

his or her designation must file a written statement with the appropriate district manager terminating his or her designation.

Section 109(d) of the Mine Act, requires each operator of a coal or other mine to file with the Secretary of Labor, the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names and addresses. Title 30, CFR Part 41 implements this requirement and provides for the mandatory use of Form 2000 7, Legal Identity Report, for notifying the MSHA of the legal identity of the mine operator. Additionally, the Form 7000-51, complements this activity by providing a convenient mechanism for obtaining a mine identification number.

Title 30 CFR 56.1000 and 57.1000, operators of metal and nonmetal mines must notify MSHA when the operation of a mine will commence or when a mine is closed.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04-20498 Filed 9-9-04; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D-11098, et al.]

Proposed Exemptions; Comerica Bank

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the

exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov*, or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete

statement of the facts and representations.

Comerica Bank, Located in Detroit, MI

[Application No. D-11098]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Proposed Exemption For Receipt of Fees

If the proposed exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the receipt of fees by Comerica Bank and its affiliates (Comerica) from the Munder Funds (the Funds), open-end investment companies registered under the Investment Company Act of 1940 (the 1940 Act), for acting as an investment adviser for the Funds, as well as for providing any other services to the Funds which are not investment advisory services ("Secondary Services" as defined in Section III(h) below) in connection with the purchase and sale of shares of the Funds by certain defined benefit and defined contribution pension plans and funded employee welfare benefit plans (Client Plans) for which Comerica serves as fiduciary with investment discretion, provided that the following conditions and the General Conditions set forth in Section II are met:

(a) No sales commissions, redemption fees, or other fees are paid by the Client Plans in connection with the purchase or sale of shares of the Funds.

(b) The price paid or received by a Client Plan for shares in a Fund is the net asset value per share, as defined in Section III (e), at the time of the transaction, and is the same price that would have been paid or received for the shares by any other investor at that time.

(c) Comerica, including any officer or director of Comerica, does not purchase or sell shares of the Funds from or to any Client Plan.

(d) Each Client Plan receives a credit, through a cash rebate of such Plan's proportionate share of all fees charged to the Funds by Comerica for investment advisory services, including

any investment advisory fees paid by Comerica to third-party subadvisers. Cash rebates for investment advisory services provided to the Client Funds are received by a Plan on or before the date Comerica charges the Client Plan for plan-level investment management services. Comerica management fees and Munder advisory fees are paid in arrears for services provided to the Client Plans and the Funds, respectively. The crediting of all such fees is audited by Comerica through a system of internal controls to verify the proper crediting of the fees to each Client Plan.

(e) Comerica will supply, annually and upon request, to the second fiduciary acting for a Client Plan, who is independent of and unrelated to Comerica (the Second Fiduciary), all information reasonably necessary for such fiduciary to verify that the fee credit calculation is correct and any additional information that the Second Fiduciary may require to determine that the conditions of this exemption are being met by Comerica.

(f) For each Client Plan, the combined total of all fees received by Comerica for the provision of services to a Client Plan, and in connection with the provision of services to the Funds in which the Client Plan may invest, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of ERISA.

(g) Comerica does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions.

(h) The Client Plans are not employee benefit plans sponsored or maintained by Comerica.

(i) The Second Fiduciary receives, in advance of any initial investment by the Client Plan in a Fund, full and detailed written disclosure of information concerning the Fund, including, but not limited to:

(1) A current prospectus for each Fund in which a Client Plan is considering investing;

(2) A statement describing the fees for investment advisory or similar services and any Secondary Services as defined in Section III (h), and all other fees to be charged to or paid by the Client Plan and by the Funds, including the nature and extent of any differential between the rates of such fees;

(3) The reasons why Comerica may consider such investment to be appropriate for the Client Plan;

(4) A statement describing whether there are any limitations applicable to Comerica with respect to which assets of a Client Plan may be invested in the

Funds, and if so, the nature of such limitations; and

(5) Upon the request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption, if granted, once such documents is published in the **Federal Register**.

(j) After consideration of the information described in paragraph (i) above, the Second Fiduciary authorizes in writing the investment of assets of the Client Plan in each particular Fund, the fees to be paid by such Fund to Comerica, and the cash rebate to the Client Plan of fees received by Comerica from the Funds for investment advisory services.

(k) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to Comerica are subject to an annual reauthorization wherein any such prior authorization referred to in paragraph (j) above shall be terminable at will by the Client Plan, without penalty to the Plan, upon receipt by Comerica of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (j) above (the Termination Form) with instructions on the use of the form must be supplied to the Second Fiduciary no less than annually. However, if the Termination Form has been provided to the Second Fiduciary pursuant to paragraph (m) below, then the Termination Form need not be provided again for an annual reauthorization pursuant to this paragraph unless at least six months have elapsed since the form was provided in connection with the additional service or fee increase. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Client Plans, upon receipt by Comerica of written notice from the Second Fiduciary; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Client Plan will result in continued authorization of Comerica to engage in the transactions described in paragraph (j) above on behalf of the Client Plan.

(3) A copy of the Termination Form will be sent to the Second Fiduciary for the Client Plan upon request.

(l) The Second Fiduciary receives full written disclosure, prior to the effective date, in a Fund prospectus or otherwise, of any increases in the rates of fees charged by Comerica to the Funds for investment advisory services even though such fees will be rebated as required by paragraph (d) above.

(m) In the event that Comerica provides an additional Secondary Service to a Fund for which a fee is charged or there is an increase in the rate of any fee paid by the Funds to Comerica for any Secondary Services that results from either an increase in the rate of such fee or a decrease in the number or kind of services performed by Comerica for such fees in connection with a previously authorized Secondary Service, Comerica will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide written notice (that is separate from the prospectus of the Fund) to the Second Fiduciary explaining the nature and the amount of the additional services or of the effective increase in fees of the affected Fund. Such notice shall be accompanied by the Termination Form.

(n) On an annual basis, Comerica provides the Second Fiduciary of a Client Plan investing in the Funds with:

(1) A copy of the current prospectus for the Funds and, upon such Second Fiduciary's request, a copy of the Statement of Additional Information for such Funds that contains a description of all fees paid by the Funds to Comerica (including fees for investment advisory services);

(2) A copy of the annual financial disclosure report of the Funds in which such Client Plan is invested, which includes information about the Fund portfolios; and

(3) Oral or written responses to inquiries of the Second Fiduciary as they arise.

(o) All dealings between the Client Plans and the Funds are on a basis no less favorable to the Client Plans than dealings with other shareholders of the Funds.

Section II—General Conditions

(a) Comerica maintains for a period of six years the records necessary to enable the persons described in paragraph (b) of Section II to determine whether the conditions of this exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Comerica, the records are lost or destroyed prior to the end of the six-year period, and

(2) No party in interest other than Comerica shall be subject to the civil penalty that may be assessed under section 502(i) of ERISA or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or not available for examination as required by paragraph (b) below.

(b) Except as provided in paragraph (b)(2) below and notwithstanding any provisions of section 504(a)(2) and (b) of ERISA, the records referred to in paragraph (a) of Section II are unconditionally available at their customary location for examination during normal business hours by: (i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; (ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of shares of the Funds owned by the Client Plan, or any duly authorized employee or representative of such fiduciary; and (iii) Any participant or beneficiary of a Client Plan or duly authorized employee or representative of such participant or beneficiary.

(1) None of the persons described in subparagraph (b)(1)(ii) and (iii) above shall be authorized to examine trade secrets of Comerica, or commercial or financial information, which is privileged or confidential.

Section III—Definitions

For purposes of this exemption:

(a) “Comerica” means Comerica Bank, a Michigan banking corporation, and any affiliate thereof (as affiliate is defined below in paragraph (b) of this section).

(b) An “affiliate” of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) “Control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term “Fund” or “Funds” shall include the Munder Funds, each series thereof, or any other diversified open-end investment company registered under the 1940 Act for which Comerica serves as an investment adviser and may also serve as a Fund accountant, transfer agent or provide some other Secondary Service (as defined below in paragraph (h) of Section III) which has been approved by such Funds.

(e) “Net asset value” means the amount for purposes of pricing all purchases and sales, calculated by dividing the value of all securities, determined by a method as set forth in a Fund’s prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each

such portfolio or Fund, by the number of outstanding shares.

(f) “Relative” means a “relative” as that term is defined in section 3(15) of ERISA (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) “Second Fiduciary” means a fiduciary of a Client Plan who is independent of and unrelated to Comerica. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Comerica if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Comerica;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary is an officer, director, partner, or employee of Comerica (or is a relative of such persons); or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this proposed exemption:

If an officer, director, partner, or employee of Comerica (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan’s investment adviser, (ii) the approval of any such purchase or sale between the Client Plan and the Funds, and (iii) the approval of any change in fees charged to or paid by the Client Plan in connection with any of the transactions described in Section I and Section II above, then subparagraph (g)(2) of Section III shall not apply.

(h) “Secondary Service” means a service other than an investment management, investment advisory, or similar service which is provided by Comerica to the Funds including (but not limited to) custodian services, transfer and dividend disbursing agent services, administrator or sub-administrator services, accounting services, and shareholder servicing agent services.

However, for purposes of this exemption, the term “Secondary Service” will not include any brokerage services provided to the Funds by Comerica for the execution of securities transactions engaged in by the Funds.

(i) “Termination Form” means the form supplied to the Second Fiduciary that expressly provides an election to the Second Fiduciary to terminate on behalf of a Client Plan the authorization described in paragraph (j) of Section I above. Such Termination Form may be

used at will by the Second Fiduciary to terminate an authorization without penalty to the Plan and to notify Comerica in writing to effect a termination by selling the shares of the Funds held by the Client Plan requesting such termination within one business day following receipt by Comerica of the form; provided that if, due to circumstances beyond the control of Comerica, the sale cannot be executed within one business day, Comerica shall have one additional business day to complete such sale.

Effective Date: The proposed exemption, if granted, will be effective as of the date the final exemption is published in the **Federal Register**.

Summary of Facts and Representations

1. Comerica represents that it acts as trustee with investment discretion for approximately 62 Client Plans that are subject to ERISA. The Client Plans include defined benefit and defined contribution pension plans, and funded employee welfare benefit plans. Comerica Bank is a banking corporation chartered under the laws of the State of Michigan. It is a wholly owned subsidiary of Comerica Incorporated which is a bank holding company regulated by and registered under the Bank Holding Company Act of 1956 as amended.

2. Comerica represents that it has been granted trust powers by the Office of Financial and Insurance Services of the State of Michigan, which regulates Comerica Bank pursuant to Michigan law. As to fiduciary matters, the Office of Financial and Insurance Services generally requires Michigan chartered banks to comply with the regulations promulgated by the United States Comptroller of Currency as well as Michigan law. Comerica Bank is also regulated by the Federal Reserve Board. As of March 31, 2004, Comerica Bank had approximately \$26.8 billion under trust management.

3. Comerica represents that Munder Capital Management (Munder) is the investment advisor to several open-end investment companies registered under the 1940 Act (Munder Funds). Munder is a Delaware general partnership with three partners, two of which, WAM Holdings, Inc. and WAM Holdings II, Inc. own a 95.5% interest in Munder, and are wholly owned subsidiaries of Comerica Investment Services, Inc. which itself is a wholly owned subsidiary of Comerica Incorporated. Munder is, consequently, an affiliate of Comerica Bank as defined at 29 CFR 2510.3-21(e).

4. The Munder Funds are Massachusetts business trusts. The

Munder Funds involved in the exemption transactions are: Munder Bond Fund B Class Y, Munder Fram Emerging Mkts B Y, Munder Fram Healthcare FD-Y, Munder Framlington Intl GRW, Munder Fund of Funds, Munder Future Technology CL Y, Munder Index 500 Fund B CL K, Munder Index 500 Fund B CL Y, Munder Inst S&P Midcap 400, Munder Instl S&P Smallcap 600, Munder Instl S&P 500 Idx Equ Fd, Munder Instl S&P 600 Fd CL K, Munder Intermed Bd Fd (K Shs), Munder Intermediate Bd-Y, Munder International Eq-Y, Munder Intl Bond Fund-CL Y, Munder Intl Equity Fund (K Shs), Munder Intl Net Net CL Y, Munder Large Cap Growth Fd CL Y, Munder Large Cap Value Fund CL Y, Munder Micro Cap Equity B Y, Munder Midcap Select Fund CL Y, Munder Multi-Seas Gwth Fd (CL K), Munder Multi-Season Growth B Y, Munder Net Net Fund CL Y, Munder Power Plus Fund CL Y, Munder Real Estate Eq Inv-Y, Munder Small Cap Value Fd-Y, Munder Small Co GRY Shrs, Munder U.S. GVT Income FD (K SHS), Munder U.S. Govt Income FD-Y (the Funds). Comerica anticipates that other Munder Funds may be established in the future, and it intends to offer appropriate Munder Funds to its Client Plans as they are organized.

5. Comerica represents that it uses its fiduciary authority to invest Client Plan assets in the Funds and that all investments in the Funds on behalf of the Client Plans are made by Comerica pursuant to initial written authorizations and annual reauthorizations of the investments by an independent fiduciary of each of the Client Plans after receipt by that fiduciary of the current prospectus for the relevant Munder Funds and written disclosure of the investment advisory fees charged to the Client Plan and the Munder Funds.

6. The Applicant believes that the advantages of permitting Comerica to invest the assets of Client Plans in the Funds include the fact that the Funds are valued daily, and their market values are quoted in daily publications of mass circulation. This permits the independent fiduciaries of the Client Plans to monitor their plans' investment performance on a daily basis without the need to communicate with Comerica Bank, unlike the case with Comerica's collective investment funds. The Funds also have the advantage of permitting investment and redemption on a daily basis, so that funds may be immediately invested in the desired medium, whereas some investments, such as some of Comerica's collective funds, are

only available for investment and redemption monthly.

7. The Applicant states that all investments of Client Plan assets in the Funds occur either through the direct purchase of shares of the Funds for a Client Plan by Comerica Bank, the liquidation of shares owned by a Client Plan in one Munder Fund and the simultaneous purchase of shares in another Munder Fund at the direction of Comerica, or an automated sweep of uninvested cash of a Client Plan by Comerica Bank into one or more Funds previously designated by the Client Plan for that purpose. Comerica states that the terms and conditions of these transactions are at least as favorable to the Client Plans as offered to other customers of Comerica Bank. The Client Plans pay no sales commissions or redemption fees in connection with transactions in the Fund shares executed at Comerica Bank's instruction. Comerica represents that it does not and will not receive fees payable pursuant to Rule 12b-1 in connection with transactions for Client Plans involving shares of the Funds.

8. Comerica states that it charges management fees to its Client Plans in accordance with written fee agreements. These agreements are individually negotiated between the independent fiduciaries of the Client Plans and Comerica Bank. The fee agreements establish base management fees calculated as a percentage of assets under management and per-transaction fees for Secondary Services. Comerica represents that the fees charged to Client Plans for services performed are exempt from the prohibited transaction provisions of ERISA by Section 408(b)(2) and the regulations under that Section at 29 CFR 2550.408b-2.¹

9. The Applicant represents that Munder is compensated for acting as investment advisor to each of the Munder Funds. Munder charges a uniform fee for acting as investment advisor to each of the Munder Funds equal to 0.75% of average net daily assets of each of the respective Munder Funds. The fee agreements between Munder and the Funds are approved by the Board of Directors of the Munder Funds in accordance with the applicable provisions of the 1940 Act. As described in detail below, Comerica states that it regularly rebates to Client Plans their proportional shares of Munder's investment advisory fee, so that Client Plans do not pay duplicative

¹ The Department notes that no relief is being proposed herein for prohibited transactions under the Act that arise in connection with the provision of services directly to the Client Plans that are not otherwise covered by section 408(b)(2) of the Act.

fees for investment advisory services to both Munder and Comerica Bank.

10. The Applicant represents that all investments of Client Plans in the Funds occur through direct purchases of Fund shares from the Funds' distributor, Funds Distributors, Inc., which is not an affiliate of Comerica Bank. The Applicant represents that Client Plans pay no commissions or redemption fees in connection with purchases or sales of Fund shares, but Funds Distributors, Inc. is compensated by the Funds under a distribution plan adopted by the Funds pursuant to Rule 12b-1 under the 1940 Act equal to an annual rate of 0.25% of the Funds' average daily net assets. The distribution fee is calculated daily and paid monthly.²

11. The Applicant states that Comerica Bank provides shareholder services to the Funds. Comerica Bank further notes that it receives shareholder servicing fees from the Funds of 0.25% of the average daily net asset value of Class K shares of equity and bond Munder Funds, and .15% of the average daily net asset value of Class K shares of money market Munder Funds under the Munder Funds' shareholder servicing plans. These services are not investment advisory services to the Funds, and consequently do not duplicate the fees for asset management charged by Comerica Bank to the Client Plans. Moreover, the Applicant represents that the shareholder services that Comerica Bank provides to the Funds are not duplicative of secondary trustee services for which Comerica Bank is compensated by the Client Plans or their sponsors either as part of the base management fee or from per-transaction fees. These secondary trustee services include processing distributions, maintaining participant accounts, executing investment directions, valuing plan assets, filing required reports, and compiling participant and plan sponsor reports. These trustee services are necessary whether or not a Client Plan's assets are invested in a Fund and may involve maintenance of Client Plan accounts reflecting ownership of Fund shares, whereas Comerica Bank's services to the Funds relate to securities owned by the

² With respect to any fees paid by the Funds to parties unrelated to Comerica and its affiliates, the Department notes that Comerica, as a trustee or investment manager for a Client Plan's assets that are invested in the Funds, has a fiduciary duty to ensure that the fees indirectly paid by a plan to third parties are reasonable. The Department notes further that Comerica should ensure that services performed by Comerica or an affiliate for a fund are not duplicative of any similar services performed by third parties.

Funds and procedures necessary for servicing the Funds' shareholders.³

12. Comerica represents that it does not and will not provide securities brokerage services to either the Funds or the Client Plans, so that Comerica Bank will not generate brokerage fees with respect to securities transactions for the Client Plans.

13. Comerica Bank represents that it uses automatic data systems to manage its fee arrangements with Client Plans. The automatic data systems create cash rebates of the appropriate amounts of Munder fees rather than crediting the Munder fees against Comerica Bank's management fees. It is solely for this reason that Comerica Bank cannot rely upon Prohibited Transaction Class Exemption 77-4⁴ for the transactions described herein.

14. With respect to transactions that occurred prior to the effective date of this proposed exemption, Comerica notes the following: "Comerica Bank's ERISA compliance officer was not aware until recently that the Department intended that PTE 77-4 be followed literally in crediting fund investment management fees rather than in rebating them. When the compliance officer was made aware of the distinction by published commentary, an assessment of the operation of Comerica Bank's trust fee systems was instituted and it was discovered that the computer system maintained by Comerica Bank generated rebates, not credits. The compliance officer then caused the Comerica exemption application to be prepared and filed. Comerica continues to rebate fund level investment management fees. Because the Department has issued other individual exemptions permitting the rebate of

investment management fees and because the Client Plans reap financial advantages from Comerica Bank's rebating procedures, it was decided that the current procedures will be continued and be adjusted, if necessary, to secure the Department's approval of the individual exemption." Comerica further notes that: "Correction of the exemption transactions would require the Client Plans to refund the investment returns received by virtue of receiving fee rebates earlier than fee credits would have been received under the requirements of PTE 77-4. Comerica Bank believes that the correction of the transactions is inappropriate under the circumstances."⁵

15. Comerica represents that it either charges a Client Plan directly for management fees or it invoices the Client Plan's plan sponsor for management fees. In some cases, a portion of a Client Plan's management fees are charged directly and a portion invoiced to the plan sponsor. Comerica states that it utilizes an automated system for Client Plans to which all management fees are charged directly. The automated system calculates the appropriate Munder fee rebate for each month on the last day of that month. The transfer of funds by Comerica Bank to Client Plans to rebate the Munder fees takes place on the 15th of the next month or the next business day if the fifteenth is not a business day.

Depending on the management agreement between Comerica Bank and the Client Plan, the charge to Client Plans for Comerica Bank management fees or other fees occurs monthly, quarterly, semi-annually or annually, as appropriate, on the 15th day of the month (or the next business day, if later) after the fee calculation period and concurrently with the Munder fee rebate for the prior month. The Applicant states that the phrase "after the fee calculation period" means the Comerica management fees are paid in arrears.

Comerica represents that for Client Plans for which some or all of the management fees are invoiced to the plan sponsor, Comerica has and continues to utilize an automated billing system. The automated fee calculation system calculates the Munder fee rebate for each such Client Plan on the last day of each month and transfers the rebate to each Client Plan on 15th day of the next month (or the next business day, if

later). The automated billing system invoices Comerica management fees to the plan sponsor no later than the third to the last business day of the month after the end of the monthly, quarterly, semi-annual or annual fee calculation period. If a portion of the Comerica Bank management fees are charged directly to the Client Plan, the charge is made on the third to the last day of the month after the fee calculation period, and in no event before the posting of the Munder fee rebate for the prior month. The Applicant provides the following example. If Comerica charges its trust management fee monthly, then it earns its fee for January and is paid on February 15. The automated system calculates the appropriate cash rebate for Munder fees for January on January 31 and pays it to the trust account no later than February 15. If the trust account pays its management fee quarterly, then it would pay Comerica's management fees for January through March on April 15. The rebates of the Munder fees nevertheless proceed monthly on February 15, March 15 and April 15.

16. Comerica Bank prefers the method it uses for rebating Munder fees because it permits the Client Plans to confirm that the fees paid to Comerica Bank are in accordance with its fee agreement, and Comerica Bank desires to avoid the expense of changing its data processing systems to calculate a credit of the Munder fees against the Comerica Bank management fees. Comerica represents that the Client Plans in many cases receive an advantage by the rebating method because they receive their rebates in advance of paying the Comerica Bank management fee, but in no case does a Client Plan receive its appropriate rebate later than the time at which it pays Comerica Bank's management fees. Moreover, Client Plans whose sponsors pay the management fees are in a better position under Comerica Bank's rebate program, since the Client Plans receive a greater return on their investments in Munder Funds.⁶

17. Comerica represents that it has established a system of internal controls to ensure the proper rebating of Munder investment management fees to clients. The calculation of asset management fees and rebate of Munder fees is an automated function of the computer program that controls the rebates and is accomplished with minimal human

³ Paragraph (f) of Section I provides that the combined total of all fees received by Comerica directly and indirectly from the Client Plans for the provision of services to the Client Plans and/or to the Funds may not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

⁴ PTE 77-4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that, among other things, the plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. Section II(c) of PTE 77-4 states that this condition does not preclude the payment of investment advisory fees by the investment company under the terms of an investment advisory agreement adopted in accordance with section 15 of the 1940 Act. Section II(c) states further that this condition does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company.

⁵ The Department expresses no opinion herein on whether the previous receipt of fees by Comerica from the Funds violated any of the provisions of Part 4 of Title I of the Act. The Department is providing no retroactive exemptive relief herein with respect to Comerica's previous receipt of fees from the Funds.

⁶ To the extent that the Department of the Treasury determines that this arrangement should be deemed a contribution by an employer to a Client Plan of the rebated fees, the transaction must be examined under the applicable provisions of the Code, including sections 401(a)(4), 404 and 415.

intervention. The asset management fee and Munder rebate calculation logic is coded into the computer program. Thus, once the calculation logic is confirmed as producing the intended rebates, the opportunity for error in the rebate calculation method is nil. Access to the computer application files in which the computer program is maintained is strictly controlled, and any changes must be reviewed by authorized personnel in both the Trust Systems Department and the Information Systems Department. In addition, Comerica states that its Information Technology audit group performs periodic internal audits of the controls over all mainframe computer system changes, including changes to the program that controls the Munder fee rebates. The Comerica Bank Trust Operations group maintains a computer spreadsheet of the investment management fee rates applicable to each trust asset. Each month a review is conducted to ensure the system rate and the spreadsheet rate are the same. Munder's fees charged to the Munder Funds are extracted from the Funds' published prospectuses, and once entered into the computer files are also protected from unauthorized access. All data changes are reviewed and approved by appropriate personnel in the Trust Operations Department. Comerica Bank Trust Operations handles the actual transfer of cash used for fee rebates from a Munder account to a Comerica account. It performs a monthly reconciliation between cash received from Munder and rebates calculated by the computer system. Comerica Bank Trust Operations performs a quarterly review of Munder fees/rebates and Munder reviews the results of this self-audit. Additionally, Comerica Bank Institutional Trust and Private Banking management receive reports of the results and conduct an independent review.

Comerica Bank's internal audit department performs annual reviews of fee income reconciliation including Munder fee rebates. In the event an error is made in the rebating of fees to the Client Plans, Comerica asserts that it will correct the error and conduct further audits to determine whether the error occurred with respect to other Client Accounts. With respect to any shortfall in rebated fees to a Client Plan, Comerica Bank will make a cash payment to the Client Plan equal to the amount of the error with interest computed on the same yield as that paid by the Client Plan's money market fund or the Federal Funds rate if no money market fund is used for the period

involved. Any excess rebates made to a Client Plan will be corrected, to the extent possible, by an appropriate reduction of cash rebate to the Client Plan during the next payment period.

18. Comerica Bank represents that the independent fiduciary of each Client Plan who approves the investment of assets in the Munder Funds receives full and detailed disclosure of information concerning the fees paid by the Funds, including the investment advisory fees of Munder Capital Management and fees paid for shareholder services to Comerica Bank both before the authorization of the investments by the independent fiduciary and at least 30 days before any increase in the fees.⁷ In the event that Comerica Bank provides an additional service to a Fund for which a fee is charged or there is an increase in the amount of fees paid by the Funds to Comerica Bank for any services resulting from a decrease in the number or kinds of services performed by Comerica Bank, it will provide thirty day's advance written notice of the such additional services or fee increase, provide written notice to the independent fiduciaries explaining the nature and the amount of the additional services for which a fee will be charged or the nature and the amount of the increase in fees from the affected Munder Fund. Such notice will be made separate from the Munder Fund prospectuses and will be accompanied by a Termination Form. The independent fiduciary will also receive full written disclosure in a Munder Fund prospectus of any increase in the rate of fees charged by Munder Capital Management for investment advisory services even though such fees will be rebated to the Client Plans.

19. Any authorizations by an independent fiduciary regarding the investment of a Client Plan's assets in a Fund and the fees to be paid to Munder and Comerica Bank, including any future increases in rates of fees for Secondary Services, are or will be

⁷ With respect to increases in fees, the Department notes that an increase in the amount of a fee for an existing Secondary Service (other than through an increase in the value of the underlying assets in the Funds) or the imposition of a fee for a newly established Secondary Service shall be considered an increase in the rate of such fees. However, in the event a Secondary Service fee has already been described in writing to the Second Fiduciary and the Second Fiduciary has provided authorization for the fee, and such fee was temporarily waived, no further action by Comerica would be required in order for Comerica to receive such fee at a later time. Thus, for example, no further disclosure would be necessary if Comerica had received authorization for a fee for custodial services from Plan investors and subsequently determined to waive the fee for a period of time in order to attract new investors but later charged the fee.

terminable at will by the independent fiduciary, without penalty to the Client Plan, upon receipt by Comerica Bank of written notice of termination. Comerica states that a termination form expressly providing an election to terminate the authorization will be supplied to the independent fiduciary upon initial authorization. Instructions on the use of the Termination Form will be supplied to the independent fiduciary no less than annually. The instructions for the termination form include the following information:

(a) The authorization is terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by Comerica Bank of written notice from the independent fiduciary; and

(b) Failure to return the form will result in continued authorization of Comerica Bank to engage in the subject transactions on behalf of the Client Plan.

(c) Additional Termination Forms are available at any time from Comerica Bank upon request.

The Termination Form may be used to notify Comerica Bank in writing to effect a termination by selling the shares of the Funds held by the Client Plan requesting such termination within one business day following receipt by Comerica Bank of the form. Comerica states that if, due to circumstances beyond its control, the sale cannot be executed within one business day, it will complete the sale within the next business day.

20. Comerica represents that any disclosure of information regarding a proposed increase in the rate of any fees for Secondary Services will be accompanied by an additional Termination Form with instructions on the use of the form as described above. Therefore, the independent fiduciary will have prior notice of the proposed increase and an opportunity to withdraw from the Funds in advance of the date the increase becomes effective. Although the independent fiduciary will also have notice of any increase in the rates of fees charged by Munder to the Funds for investment advisory services, through an updated prospectus or otherwise, such notice will not be accompanied by a Termination Form since all increases in investment advisory fees will be rebated by Comerica Bank to the Client Plans and will be subject to an annual reauthorization as described above.

21. Comerica states that the independent fiduciary always receives a current prospectus for each Munder Fund and a written statement giving full disclosure of the fee structure prior to any investment in the Funds. The disclosure statement explains why

Comerica believes that the investment of assets of the Client Plan in the Fund is appropriate. The disclosure statement also describes any limitations on Comerica with respect to which Client Plan assets may be invested in shares of the Munder Funds and the nature of such limitations.⁸ Comerica provides further that the independent fiduciary receives an updated prospectus for each Fund at least annually and annual financial reports for each Fund. Comerica Bank also provides monthly reports to the independent fiduciary of all transactions engaged in by the Client Plan, including purchases and sales of Fund shares.

22. In summary, Comerica represents that the transactions described above satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) The Funds provide the Client Plans with a more effective investment vehicle than collective investment funds maintained by Comerica Bank without any increase in investment management, advisory or similar fees paid to Comerica; (b) Comerica Bank's automated system of fee rebates and its controls and auditing procedures for protecting the system and periodically verifying the accuracy of rebates to Client Plans will insure that the proper rebates are credited to the Client Plans; (c) with respect to any investments in a Fund by the Client Plans and the payment of any fees by the Fund to Comerica Bank for services, an independent fiduciary receives full written disclosure of information concerning the Fund, including a current prospectus and a statement describing the fee structure, and authorizes in writing the investment of the Client Plan's assets in the Munder Fund and the fees paid by the Fund to Comerica Bank; (d) any authorizations made by a Client Plan regarding investments in a Fund and fees paid to Munder, or any increases in the rates of fees for secondary services which are retained by Comerica Bank, are or will be terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by Comerica Bank of written notice of termination from the independent fiduciary; (e) no commissions or redemption fees are paid by the Client Plan in connection

⁸ See section II(d) of PTE 77-4 requires, in pertinent part, that an independent plan fiduciary receive a current prospectus issued by the investment company and a full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including a discussion of whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

with either the acquisition or sale of Fund shares; (f) Comerica Bank does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with transactions in Fund shares for Client Plans; and (g) all dealing between the Client Plans, the Funds and Comerica Bank, are on a basis which is at least as favorable to the Client Plans as such dealings are with other shareholders of the Munder Funds.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all Second Fiduciaries of Client Plans that are currently invested in the Funds, as of the date the notice of the proposed exemption is published in the **Federal Register**, where Comerica Bank provides services to the Funds and receives fees that would be covered by the exemption, if granted. Notice to interested persons shall be provided by first class mail within fifteen (15) days following publication of the proposed exemption in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs all interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within forty-five (45) days following publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy McColough of the Department, telephone (202) 693-8561. This is not a toll-free number.

Linda Ann Smith, M.D. Profit Sharing Plan and Trust (the Plan), Located in Albuquerque, NM

[Application No. D-11223]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990).⁹ If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply

⁹ For purposes of this proposed exemption, references to specific provisions of the Title I of Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

to the proposed exchange of an unimproved tract of land located in Nathrop, Colorado (Lot 154), which is owned by the Plan and allocated to the individually-directed account (the Account) in the Plan of Linda Ann Smith, M.D., for one unimproved tract of land (Lot 85) located in San Pedro Creek Estates, New Mexico, which is owned jointly by Dr. Smith, and her spouse, Mr. Harold G. Field (the Applicants).

This proposed exemption is subject to the following conditions:

(a) The exchange of Lot 154 by the Account for Lot 85 owned by the Applicants is a one-time transaction.

(b) The fair market value of Lot 154 and Lot 85 is determined by qualified, independent appraisers, who will update their appraisal reports at the time the exchange is consummated.

(c) For purposes of the exchange, Lot 85 has a fair market value that is more than the fair market value of Lot 154.

(d) The terms and conditions of the exchange are at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party.

(e) The exchange does not involve more than 25 percent of the Account's assets.

(f) Dr. Smith is the only participant in the Plan whose Account is affected by the exchange and she desires that the transaction be consummated.

(g) The Account does not pay any real estate fees or commissions in conjunction with the exchange.

Summary of Facts and Representations

1. Dr. Smith, a surgeon, is the sole practitioner in the Linda Ann Smith, M.D., LLC (the Employer). Her medical practice, which employs three full-time employees and four part-time employees, is located in Albuquerque, New Mexico.

2. The Plan is a profit sharing plan that was established by the Employer, effective February 1, 1993, for the benefit of Dr. Smith's employees. As of December 31, 2003, which is the date the most recent financial information is available, the Plan had 3 participants and assets having an aggregate fair market value of \$946,888. Of this total, the Account had total assets of approximately of \$847,393.

3. The trustee of the Plan (the Trustee) is Harold G. Field, the husband of Dr. Smith. Mr. Field does not have an individually-directed account in the Plan. Pursuant to provisions of the Plan, each participant has the right to direct investments under the Plan for his or her own respective account. In such instances, the investments are

earmarked for the accounts of the participants directing such investments.

4. Among the assets in Dr. Smith's Account in the Plan is Lot 154. Lot 154 is an unimproved parcel of land located at 3 Mesa Antero Subdivision Nathrop, Colorado. Lot 154, which consists of approximately 3.7 acres, was acquired by the Account in 1996 for investment purposes from an unrelated third party. The Account paid \$29,007.90 for Lot 154. The consideration was paid in cash. Lot 154 is also located in close proximity to another property, which is jointly owned by the Applicants. Since the time of acquisition, the only expenses associated with the Account's ownership of Lot 154 have been real estate taxes, totaling \$6,682.58. These expenses have been paid by the Applicants.

5. Lot 154 has been appraised by Ms. Judee Nuechter, CRA, a qualified, independent appraiser. Ms. Nuechter is affiliated with the real estate appraisal firm of Mountain Appraisal Associates, Inc. of Salida, Colorado. In an appraisal report dated November 5, 2003, Ms. Nuechter placed the fair market value of a fee simple interest in Lot 154 at \$160,000 as of November 24, 2003 on an "as is" basis. In valuing Lot 154, Ms. Nuechter utilized the Sales Comparison Approach because she believed this method would yield the most reliable indication of fair market value since other valuation methods were not applicable to the unimproved vacant lots in the subject neighborhood.

6. In addition, on June 9, 2004, Ms. Nuechter assessed the unique value of Lot 154 since the Applicants own a lot adjacent to the subject lot. According to Ms. Nuechter, the value of each lot is separate from any other lot because each lot is considered a single family residential site. Ownership of an individual lot or parcel is considered a separate unit, which is unable to be combined for building purposes, and neither lot impacts the value of the other, regardless of lot ownership of record. Ms. Nuechter explained that each lot located within vicinity of Lot 154 is valued as a single parcel that offers the same amenities and potential for development only as a single family residential site. Therefore, Ms. Nuechter concludes that ownership of an adjacent parcel would have no impact on the valuation of other parcels within Lot 154's vicinity. On the basis of Ms. Nuechter's appraisal, Lot 154 currently represents approximately 19% of the Account's assets.

7. Lot 85 is presently owned jointly by the Applicants. This unimproved parcel of land is located in San Pedro Creek Estates, New Mexico, approximately 25

miles northeast of Albuquerque in the foothills of the Sandia Mountains. Lot 85, which consists of about 10 acres of land, was acquired in March 27, 1997 by the Applicants for investment purposes. The seller was the Campbell Farming Corporation, an unrelated third party and the original developer of the subdivision. The Applicants paid \$98,268 in cash for Lot 85. Since 1997, all expenses associated with Lot 85 have been paid by the Applicants. These costs have included \$450 for a septic tank, \$1,200 for a transformer, and \$4,456.19 in real estate taxes.

8. Lot 85 has been appraised by Mr. Darrell Ratchner, SRA, a qualified, independent appraiser, who is affiliated with the appraisal firm of Darrell Ratchner & Associate of Salida, Colorado. In an appraisal report dated August 23, 2003, Mr. Ratchner placed the fair market value of a fee simple interest in Lot 85 at \$175,000 also as of August 23, 2003. In valuing Lot 85, Mr. Ratchner utilized the Sales Comparison Approach. Mr. Ratchner noted that sales of vacant sites in the subject subdivision where Lot 85 is located have continued at a steady pace, with modest price increases over the past several years. According to Mr. Ratchner, Lot 85's good access, topography, location and vegetation all support a market estimate near the mid to upper end of the range.

9. Because the Applicants own a parcel of real property adjacent to Lot 154, they wish to avoid engaging in a future prohibited transaction by inadvertently using Lot 154. Therefore, the Applicant's legal representative has suggested that the Applicant's exchange the aforementioned unimproved real estate property (*i.e.*, Lot 154) for Lot 85, which is owned by the Account in a like-kind exchange under section 1031 of the Code.¹⁰ Thus, the Applicants have requested an administrative exemption from the Department to exchange Lot 85 for Lot 154. Following the exchange, Lot 154 will represent

¹⁰Section 1031 of the Code, which covers like-kind exchanges (*i.e.*, 1031 Exchanges), refers to the exchange of business or investment property solely for business or investment property of a like-kind. No gain or loss is recognized under section 1031 of the Code. If, as part of a 1031 Exchange, one also receives other property or money, gain is recognized to the extent of the other property and money received, but a loss is not recognized. Section 1031 of the Code does not apply to exchanges of inventory, stocks, bonds, notes, other securities or evidence of indebtedness, or certain other assets. Properties eligible for a 1031 Exchange are of the same nature or character, even if they differ in grade or quality. Personal property of a like-class are permissible for the purpose of a 1031 Exchange. The terms concerning the subject 1031 Exchange are listed in the exchange agreement.

approximately 21% of the Account's assets.

10. The exchange will be a one-time transaction between the Applicants and the Account. For purposes of the exchange, the fair market value of Lot 154 and Lot 85 will be updated on the date of the transaction by the independent appraisers who previously valued the properties. Moreover, the Account will not be required to pay any real estate fees or commissions in connection with the transaction.

11. In summary, it is represented that the proposed transaction will satisfy the statutory requirement for an exemption under section 408(a) of the Act because:

(a) The exchange of Lot 154 by the Account for Lot 85 owned by the Applicants will be a one-time transaction.

(b) The fair market value of Lot 154 and Lot 85 will be determined by qualified, independent appraisers who will update their appraisal reports at the time the exchange is consummated.

(c) For purposes of the exchange, Lot 85 will have a fair market value that will be more than the fair market value of Lot 154.

(d) The terms and conditions of the exchange will be at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party.

(e) The exchange will not involve more than 25 percent of the Account's assets.

(f) Dr. Smith is the only participant in the Plan whose Account will be affected by the exchange and she desires that the transaction be consummated.

(g) The Account will not pay any real estate fees or commissions in conjunction with the exchange.

Notice To Interested Persons

Because Dr. Smith is the only participant in the Plan whose Account will be affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, comments and requests for a hearing are due 30 days after publication of the notice of pendency in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Arjumand A. Ansari of the Department at (202) 693-8566. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve

a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 7th day of September, 2004.

Ivan Strasfeld,

*Director of Exemption Determinations,
Employee Benefits Security Administration,
U.S. Department of Labor.*

[FR Doc. 04-20537 Filed 9-9-04; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2004-13; Exemption Application No. D-11213 et al.]

Grant of Individual Exemptions; The Prudential Insurance Company of America

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

The Prudential Insurance Company of America, Located in Newark, NJ

[Prohibited Transaction Exemption 2004-13; Exemption Application No. D-11213]

Exemption

The Prudential Insurance Company of America and its current and future affiliates (collectively, Prudential) shall not be precluded, as of November 21, 2003, from functioning as a "qualified professional asset manager" (QPAM), pursuant to Prohibited Transaction Class Exemption 84-14 (PTCE 84-14), 49 FR 9494 (March 13, 1984), solely because of a failure to satisfy Section I(g) of PTCE 84-14, as a result of Prudential's affiliation with an entity convicted of violating a dual-penalty law of Korea, Japan or Taiwan.

This exemption is subject to the following conditions:

(a) The affiliate convicted under a dual-penalty law does not provide fiduciary or QPAM services to employee benefit plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) or otherwise exercise discretionary control over ERISA assets.

(b) ERISA-covered assets are not involved in the misconduct that is the subject of the affiliate's conviction(s).

(c) Prudential imposes its internal procedures, controls, and protocols on the affiliate to reduce the likelihood of any recurrence of misconduct to the extent permitted by local law.

(d) This exemption is not applicable if Prudential, or any affiliate (other than affiliates convicted of violating a dual-penalty law of Korea, Japan or Taiwan) is convicted of any of the crimes described in Section I(g) of PTCE 84-14.

(e) Prudential maintains records that demonstrate that the conditions of the exemption have been and continue to be met for at least six years following the conviction of an affiliate under the dual-penalty laws of Korea, Japan or Taiwan.

(f) The criminal acts in question are neither authorized nor condoned by Prudential.

(g) Prudential complies with the other conditions of PTCE 84-14, combined with the procedures it adopts to afford ample protection of the interests of participants and beneficiaries of employee benefit plans.

Effective Date: This exemption is effective as of November 21, 2003.