

to the extent necessary to permit the deduction of the Surrender Charge on surrender, partial surrender, face amount reduction or lapse of a Policy.

8. Although Section 2(a)(32) does not specifically contemplate the imposition of a charge at the time of redemption, Applicants assert that such charges are not necessarily inconsistent with the definition of "redeemable security."

9. Applicants submit that although the deferred imposition of the Surrender Charge (upon surrender or lapse) may not fall within the historical pattern of all the provisions described in this Application, that does not change the charge's essential nature. Moreover, the proposed amendments to Rule 6e-2 would permit a sales charge to be imposed on a contingent deferred basis. Contingent deferred charges are also authorized by Rule 6e-3(T) for policies able to rely on that rule. Therefore, Applicants submit that the Surrender Charge is consistent with the principles and policies underlying the limitations in Section 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rules 6e-2(b)(12) and 22c-1 thereunder.

#### *Class Exemption for Future Underwriters*

10. Applicants seek to have the relief they request extend to underwriters that may, in the future, act as principal underwriters of the Policies ("Future Underwriters"). Future Underwriters will be members of the NASD.

11. Applicants represent that the terms of the relief requested with respect to any Future Underwriters are consistent with the standards set forth in Section 6(c) of the Act. Further, Applicants state that, without the requested class relief, exemptive relief for any Future Underwriter would have to be requested and obtained separately. Applicants assert that such additional requests for exemptive relief would present no issues under the Act not already addressed herein. Applicants submit that their request for class exemptions is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act, and that an order of the Commission including such class relief, should, therefore, be granted.

#### **Conclusion**

For the reasons summarized above, Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

[Rel. No. IC-22854; File No. 812-10288]

#### **The Prudential Insurance Company of America, et al.**

October 10, 1997.

**AGENCY:** The Securities and Exchange Commission (the "Commission").

**ACTION:** Notice of application for an order under section 11(a) of the Investment Company Act of 1940 (the "1940 Act") permitting certain exchange offers between certain unit investment trusts and certain open-end management investment companies.

**SUMMARY OF APPLICATION:** Applicants seek an order amending a previous order<sup>1</sup> (the "Prior Order"), which approved the terms of certain offers of exchange from interests in certain unit investment trusts to certain open-end management investment companies. Applicants seek an amended order: (1) To extend relief to open-end management investment companies that have succeeded to the assets of those open-end management investment companies granted relief in the Prior Order; (2) to permit exchanges both ways between the unit investment trusts and the successor management investment companies; and (3) to permit exchanges between the unit investment trusts and certain other similar current and future funds.

**APPLICANTS:** The Prudential Insurance Company of America ("Prudential"), Prudential Dryden Fund ("Dryden Fund," formerly The Prudential Institutional Fund ("PIF")), The Prudential Variable Contract Account-10 ("VCA-10"), The Prudential Variable Contract Account-11 ("VCA-11"), The Prudential Variable Contract Account-24 ("VCA-24," collectively with VCA-10 and VCA-11, the "Medley separate accounts"), Prudential Investment Management Services LLC ("PIMS"), Prudential Jennison Series Fund, Inc. ("Jennison Fund"), Prudential Allocation Fund ("Allocation Fund"), Prudential World Fund, Inc. ("World Fund"), Prudential Government Income

Fund, Inc. ("Government Income Fund"), Prudential MoneyMart Assets, Inc. ("MoneyMart Fund"), and Prudential Securities Incorporated ("PSI").

**FILING DATES:** The application was filed on June 20, 1996 and was amended and restated on July 8, 1997 and September 17, 1997.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 4, 1997, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W. Washington, D.C. 20549. Applicants, c/o Christopher E. Palmer, Shea & Gardner, 1800 Massachusetts Ave., N.W., Washington, D.C. 20036.

**FOR FURTHER INFORMATION CONTACT:** Ethan D. Corey, Attorney, or Kevin M. Kirchoff, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application; the complete application is available for a fee from the Commission's Public Reference Branch, 450 5th Street, N.W., Washington, D.C. 20549 (tel. (202) 942-8090).

#### **Applicants' Representations**

1. Prudential is a mutual life insurance company organized under New Jersey Law.

2. The Dryden Fund, formerly PIF, is an open-end, no-load, registered management investment company. Prior to the reorganization described below, PIF was a series mutual fund with the following seven series, each of which is referred to as a "PIF Fund": PIF Growth Stock Fund, PIF Balanced Fund, PIF International Stock Fund, PIF Income Fund, PIF Money Market Fund, PIF Active Balanced Fund, and PIF Stock Index Fund. PIF was generally available only as an investment vehicle to certain retirement programs and other institutional investors.

3. The Jennison Fund, the World Fund, the Government Income Fund,

<sup>1</sup> Prudential Insurance Company of America, File No. 812-8536, Rel. No. IC-19826 (Nov. 8, 1993) (Notice), Rel. No. IC-19918 (Dec. 2, 1993) (Order).

and the MoneyMart Fund are organized as Maryland corporations and each is registered under the 1940 Act as a diversified open-end management investment company. The Jennison Fund consists of two series: The Jennison Growth Stock Fund and the Jennison Growth and Income Fund. Currently, the World Fund consist of two series: the International Stock Series and the Global Series. The Allocation Fund is organized as a Massachusetts business trust and is registered under the Act as a diversified open-end management investment company. The Allocation Fund consists of two series: the Balanced Portfolio and the Strategy Portfolio. The Jennison Growth Stock Fund of the Jennison Fund, the International Stock Series of the World Fund, the Government Income Fund, the MoneyMart Fund, and the Balanced Portfolio of the Allocation Fund are referred to individually as a "PMF Fund" and collectively as the "PMF Funds." Each PMF Fund offers Class Z shares to certain institutional investors and other investors meeting specified criteria without a sales charge or a Rule 12b-1 fee.

4. VCA-10 and VCA-11 are separate accounts of Prudential that are registered as open-end management investment companies under the 1940 Act. Prudential is the investment manager of VCA-10 and VCA-11. VCA-24 is a separate account of Prudential that is registered as a unit investment trust under the 1940 Act. VCA-24 has seven separate subaccounts, each of which invests exclusively in a single corresponding portfolio of The Prudential Series Fund, Inc. (the "Series Fund"), an open-end management investment company.

5. PIMS is a direct wholly-owned subsidiary of Prudential and is registered as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act"). It is the principal underwriter of the group variable annuity contracts funded through the Medley separate accounts.

6. The Medley program consists of Prudential group annuity contracts issued to employers ("Contractholders") who make contributions under them on behalf of their employees ("Participants"). The contracts are offered for use in connection with retirement arrangements that qualify for federal tax benefits under Sections 401, 403(b), 408 or 457 of the Internal Revenue Code of 1986, as amended, and with certain non-qualified annuity arrangements. Under the Medley program, a Contractholder may hold a fixed-dollar group annuity contract (the

"Companion Contract") and up to three group variable annuity contracts, funded by VCA-10, VCA-11 and VCA-24, respectively. Typically, a Participant may choose to have contributions invested in any one or more of the Companion Contract, VCA-10, VCA-11 and the subaccounts of VCA-24. Subject to certain limitations, Participants may transfer amounts credited to their accumulation accounts during the accumulation period.

7. The Prior Order approved an exchange program referred to as "Medley Plus" under which Participants could transfer amounts from any of the Medley separate accounts to PIF. No fee of any kind was imposed at the time of the exchange and PIF shares acquired in an exchange were not subject to any deferred sales load or redemption fee. Although these exchanges were effected at relative net asset value, the Prior Order was obtained because of the involvement of VCA-24, which is a unit investment trust. Section 11(c) of the 1940 Act requires the Commission's approval of exchange offers involving registered unit investment trusts unless the exchange can be effected pursuant to an exemptive rule.

8. The PMF Funds (Jennison Growth Stock Fund, Balanced Portfolio of the Allocation Fund, International Stock Series of World Fund, Government Income Fund and MoneyMart Fund) have acquired all or substantially all of the assets of five of the seven PIF Funds (PIF Growth Stock Fund, PIF Balanced Fund, PIF International Stock Fund, PIF Income Fund and PIF Money Market Fund, respectively) in exchange for Class Z shares of the relevant PMF Fund, and have distributed such Class Z shares to the shareholders of the PIF Funds (the "Reorganization"). The two remaining PIF Funds did not merge into a different fund, but entered into new investment advisory and distribution contracts with Prudential Mutual Fund Management LLC ("PMF") and related entities, and thereby became part of the same "group of investment companies" as the PMF Funds, as that term is defined in Rule 11a-3 under the 1940 Act. PIF's name was changed to "Prudential Dryden Fund," and its two remaining series (the Prudential Active Balanced Fund and the Prudential Stock Index Fund) now each issue Class Z shares with no sales load or Rule 12b-1 fees. The five PMF Funds and the two Dryden Funds are referred to together as the "PMF/Dryden Funds."

9. PSI is an indirect, wholly-owned subsidiary of Prudential and is registered as a broker-dealer under the

1934 Act. PSI distributes the shares of each class of the PMF/Dryden Funds.

10. Applicants request that the Commission amend the Prior Order to allow Participants to exchange any or all of their units of the Medley separate accounts for Class Z shares of any or all of the PMF/Dryden Funds, the successor funds to PIF (the "Medley-to-PMF/Dryden Exchange"). Any Medley-to-PMF/Dryden Exchange will be effected at the relative net asset values of the securities exchanged, and will be priced in accordance with Rule 22c-1 under the 1940 Act. No sales load, administrative fee, redemption fee, or other transaction charge will be imposed at the time of a Medley-to-PMF/Dryden Exchange. Moreover, all PMF/Dryden Fund Class Z shares, including those acquired in a Medley-to-PMF/Dryden Exchange, are not subject to any deferred sales load upon their subsequent redemption because Class Z shares are completely no-load.

11. Applicants also request that the Commission amend the Prior Order to permit holders of Class Z shares of any PMF/Dryden Fund to exchange any or all such shares for units of any or all of the Medley separate accounts (the "PMF/Dryden-to-Medley Exchanges"). Any PMF/Dryden-to-Medley Exchange will be effected at the relative net asset values of the securities to be exchanged, and will be priced in accordance with Rule 22c-1 under the 1940 Act. No sales load, administrative fee, redemption fee, or other transaction charge will be imposed at the time of a PMF/Dryden-to-Medley Exchange. No sales load will be imposed on the subsequent surrender of any interests in the Medley separate accounts acquired in a PMF/Dryden-to-Medley Exchange.

12. With respect to both Medley-to-PMF/Dryden Exchanges and PMF/Dryden-to-Medley Exchanges, Prudential will, in its sole discretion, determine to whom an exchange offer will be made, the time period during which the exchange offer will be in effect, and when an exchange offer is terminated. Prudential may, for example, establish fixed periods of time for exchanges under a particular contract (a "window") of at least 60 days in length. No open-ended exchange offer will be terminated or its terms amended materially without prominent notice to any Contractholder subject to that offer of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment; provided, however, that no such notice will be required if, under extraordinary circumstances, either: (a) There is a suspension in redemption of the

exchanged security under Section 22(e) of the 1940 Act or rules thereunder; or (b) the offering company temporarily delays or ceases the sale of the security because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions.

13. Applicants represent that at the commencement of the exchange offer, and at all times thereafter, the Medley prospectus will: (a) Disclose that no administrative or redemption fee will be imposed in connection with the exchange program; (b) disclose that the exchange offer is subject to termination and that its terms are subject to change; and (c) describe the tax implications of the exchanges including, if appropriate, a description of any adverse tax consequences of an exchange. Applicants anticipate that the exchange offers will be extended only to persons that have been provided a copy of the current Medley prospectus. As long as that is the case and the disclosure about the exchange offer is in the Medley prospectus, no additional disclosure about the exchange offers will be included in the PMF/Dryden prospectuses because those funds are offered to a significant number of persons who will not be given the exchange offer. Applicants represent that if the exchange offer is extended to persons that have not been provided copies of the current Medley prospectus, the PMF/Dryden prospectuses also will: (a) Disclose that no administrative or redemption fee will be imposed in connection with the exchange program; (b) disclose that the exchange offer is subject to termination and its terms are subject to change; and (c) describe the tax implications of the exchanges including, where appropriate, a description of any adverse tax consequences of an exchange.

14. Applicants request that the Commission amend the Prior Order to allow exchanges not only with the PMF/Dryden Funds, but also with all other current and future classes of registered open-end management investment companies for which Prudential or an affiliate serves as investment adviser or principal underwriter for which there is no front-end sales charge, no Rule 12b-1 fee, and no contingent deferred sales charge (each a "Prudential Class Z Fund"). Specifically, Applicants request that the Commission amend the Prior Order to allow Participants to exchange any or all of their units in the Medley separate accounts for shares of any or all of the Prudential Class Z Funds (the "Medley-to-Prudential Class Z

Exchanges"). In addition, Applicants request that the Commission amend the Prior Order to permit holders of Prudential Class Z Fund shares to exchange any or all such shares for units of any or all of the Medley separate accounts (the "Prudential Class Z-to-Medley Exchanges"). Applicants represent that all Medley-to-Prudential Class Z Exchanges will be subject to the same conditions as those set forth in the application that is the subject of this notice (the "Application") as applicable to the Medley-to-PMF/Dryden Exchanges. Applicants further represent that all Prudential Class Z-to-Medley Exchanges will be subject to the same conditions as those set forth in the Application as applicable to the PMF/Dryden-to-Medley Exchanges.

#### Applicants' Legal Analysis

1. Section 11(a) of the 1940 Act provides, in pertinent part, that it shall be unlawful for any registered open-end company or any principal underwriter for such a company to make or cause to be made an offer to the holder of a security of such company, or of any other open-end investment company, to exchange his or her security for a security in the same or another such company on any basis other than the relative net asset values of the respective securities to be exchanged, unless the terms of the offer have first been submitted to and approved by the Commission. Section 11(c) of the 1940 Act provides that, irrespective of the basis of exchange, Commission approval is required for any offer of exchange of any security of a registered open-end company for a security of a registered unit investment trust, or any offer of exchange of any security of a registered unit investment trust for the securities of any other investment company. Accordingly, although Applicants believe that the proposed exchanges will be at net asset value, Commission approval is required for the proposed exchanges because of the involvement of VCA-24, a registered unit investment trust. Applicants state that they cannot rely on existing exemptive rules because neither Rule 11a-2 nor Rule 11a-3 permits exchanges between a unit investment trust separate account and an open-end investment company that is not a separate account.

2. The legislative history of Section 11 of the 1940 Act indicates that its purpose is to provide the Commission with an opportunity to review the terms of certain offers of exchange to ensure that a proposed offer is not being made "solely for the purpose of exacting additional selling charges." H. Rep. No.

2639, 76th Cong., 2d Sess. 8 (1940). One of the practices Congress sought to prevent through Section 11 was the practice of inducing investors to switch securities so that the promoter could charge investors another sales load. Applicants assert that the proposed offers of exchange involve no possibility of such abuse. On a Medley-to-PMF/Dryden Exchange, there is no sales load or transaction fee, and the acquired PMF/Dryden shares are completely no-load. On a PMF/Dryden-to-Medley Exchange, there is not sales load or transaction fee, and so sales load will be imposed on the subsequent surrender of any interests in the Medley separate accounts acquired in such an exchange.

3. Applicants submit that providing class relief is appropriate. Applicants request that the order extend to all Prudential Class Z Funds which, like the PMF/Dryden Funds, offer shares that are subject to no front-end sales charge, no Rule 12b-1 fee, and no contingent deferred sales charge. Those exchanges would be on the same terms as the exchanges with the PMF/Dryden Funds, and therefore there would be no possibility of the abuses Congress sought to prevent through Section 11. Furthermore, without such exemptive relief, before Medley Participants could be given any additional exchange options, Applicants would have to apply for and obtain additional approval orders. Applicants believe that such additional applications would present no new issues under the 1940 Act not already addressed in the Application.

4. Applicants submit that the proposed offers of exchange meet all the requirements of Section 11, and provide a benefit to Contractholders and Participants by providing new investment options and an attractive way to exchange existing securities for interests in those options.

#### Conclusion

For the reasons summarized above, Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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