State of Utah
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES

Michael O. Leavitt
Governor
Douglas C. Borba
Executive Director
Mark J. Griffin
Director

160 East 300 South
P.O. Box 45808
Salt Lake City, Utah 84145-0808
(801) 530-6600 • FAX (801) 530-6980

November 21, 1995

Ms. Jacqueline A. May
Fulbright & Jaworski
666 Fifth Avenue
New York, NY 10103-3198

Re: Prudential Securities Incorporated Section 401(k) Plan
File # 005-0345-35/A48619-35
Request for Interpretive Opinion

Dear Ms. May:

This letter is in response to your letters dated September 11, 1995 and October 4, 1995, wherein you requested an interpretive opinion from the Utah Division of Securities ("Division"). You ask the Division to opine whether the Prudential Securities Incorporated Section 401(k) Plan ("Plan") qualifies as a "pension or profit-sharing trust" for purposes of the institutional buyer exemption found in § 61-1-14(2)(h) of the Utah Uniform Securities Act ("Act"). The Division understands the relevant facts to be as follows:

> The Plan is a self-directed cash and deferral arrangement qualified under § 401(k) of the Internal Revenue Code ("IRC") and has assets in excess of $5 million. The Plan was established for the benefit of employees of Prudential Securities Incorporated ("PSI") and employees of PSI's affiliates. PSI is licensed as a broker-dealer in the State of Utah. Employees who participate in the Plan elect to have a portion of their salary contributed to the Plan by means of payroll deductions.
>
> The Plan is administered by a committee (the "Committee") consisting of PSI officers and employees. The Committee selects the investment companies whose shares will be available for investment under the Plan. Shares in investment companies for which PSI acts as distributor are the only investment options provided under the Plan. Purchases are made by the Committee only by the employees instructing the Committee how to invest his or her contributions to the Plan. Participating employees have no direct ownership interest in securities held by the Plan, but each employee directs the investment of his or her account.
>
> PSI proposes to act as distributor of a new class of shares to be offered and sold exclusively to the Plan which will be issued by the Prudential Equity Fund (the "Fund"). The Fund is a

registered investment company under the Investment Company Act of 1940. The outstanding shares of the Fund are registered under federal law and currently qualify for exemption from registration under Utah law. The new class of shares will be registered under federal law and will qualify for exemption from registration under Utah law by amending the Fund's notice of issuance.

On the basis of the foregoing facts and for the reasons stated below, it is the opinion of the Division that the Plan qualifies as a "pension or profit-sharing trust" for purposes of the institutional buyer exemption found in § 61-1-14(2)(h) of the Act. Consequently, any offer or sale of securities to the Plan, including the offer or sale of securities of the Fund, is exempted from the registration requirements found in §§ 61-1-7 and 61-1-15 of the Act.

Section 61-1-14(2)(h) of the Act provides a transactional exemption for "any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity."

To qualify under § 401 of the IRC, the Plan must, among other requirements, 1) be a trust created or organized in the United States, and 2) form part of a stock bonus, pension, or profit-sharing plan. Therefore, on the basis that the Plan is qualified pursuant to § 401(k) of the IRC, it would appear to be considered a "pension or profit-sharing trust." However, merely naming the Plan a "pension or profit-sharing trust" or qualifying it under § 401 of the IRC does not mean the Plan was meant to be covered by the exemption.

The exemption in question was meant to cover institutional buyers. Institutional buyers are commonly considered to have a heightened amount of knowledge and experience related to the purchase of securities and are deemed more sophisticated in financial matters and are therefore less in need of the protection of the Act. The language of § 61-1-14(2)(h) includes a list of the types of investors covered, including a bank, savings institution, trust company, insurance company, investment company and pension or profit-sharing trust, followed by the language "or other financial institution or institutional buyer[.]" The words "pension or profit-sharing trust" are modified by the ensuing words, implying that a pension or profit-sharing trust must be the type which would also qualify as a financial institution or institutional buyer.

A trust would not qualify for the exemption merely by virtue of a group of people who have joined together for an investment and named it a pension or profit-sharing trust. To qualify for the exemption, the trust would need to evidence the same degree of investment sophistication as a bank, savings institution, trust company, insurance company, or investment company. Furthermore, in making this determination, the focus should be on the person or group of persons making the ultimate investment decision. Finally, the trust could not be established with the purpose or plan of evading the securities laws.

Under most circumstances, a pension plan which is self-directed would not be able to demonstrate the requisite sophistication, as the focus would be on the person with the authority to direct the investments. Furthermore, the person that actually has that authority would need to qualify as an institutional buyer for the exemption to apply.

The Plan is a self-directed cash and deferral arrangement established under § 401(k) of the IRC. The ultimate investment decision is directed by the individual employee which has a portion of their salary deducted and invested in the Plan. Furthermore, PSI has not demonstrated, and it is unlikely, that the individual employees would have the sophistication of an institutional buyer. Therefore, at first glance, it appears that the exemption would not apply. However, although the Plan is self-directed, the degree of self direction is limited.

The Plan is administered by a Committee. The Committee will act on behalf of all participants and select the products which will be available for investment by the Plan. The employees will not invest directly in the securities held by the Plan, but they will invest in the Plan. The only decision the employees will make will be how they want their share of the Plan invested among the products chosen by the Committee.

It appears to the Division that the Committee and Plan, without reference to the employees, would be considered an institutional buyer. The Committee is comprised of individuals experienced in business matters, and as a group has the requisite experience and sophistication of an institutional buyer. Furthermore, the Committee is charged with administering a very large trust, which has assets in excess of $5 million. Although the Plan is self-directed, the facts and circumstances indicate that the Plan is not in need of the enhanced protection of the Act, thus warranting the status as an institutional buyer and exemption from registration.

Please note that this opinion relates only to the offering discussed and shall have no value for future similar offerings. It should be further noted that any different facts or conditions of a material nature might require a different conclusion.

Very truly yours,

UTAH DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES

S. Anthony Taggart
Director of Corporate Finance

cc: Mark J. Griffin, Director
Utah Division of Securities