PRUDENTIAL’S PLAN TO DEMUTUALIZE

A Guide to Issues for Group Contract Holders and Policyholders
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I. Introduction

ABOUT PRUDENTIAL AND THIS GUIDE.

With more than $375 billion in total assets under management, Prudential is one of the nation’s largest financial services companies. Prudential is a leading provider of individual and group insurance, retirement plan services, securities brokerage, mutual funds and real estate services.

This “Guide to Issues for Group Contract Holders and Policyholders” (the “Group Guide” or “Guide”) is prepared for holders of Prudential group annuity contracts (“contract holders”) and group insurance policies (“policyholders”) who will receive stock or other compensation as part of Prudential’s demutualization. (In the Guide, we use the term “policyholder” to refer to both contract holders and policyholders.) The purpose of the Guide is to help you identify the issues that might apply to your receipt of compensation in the demutualization. In order to make the information more accessible, we are placing this Guide on our website at www.prudential.com.

The Guide should be read in conjunction with Prudential’s Policyholder Information Booklet and Prudential’s Plan of Reorganization (a copy of which is attached to the Policyholder Information Booklet). These two documents are the primary source of information concerning Prudential’s demutualization.

WHY GROUP POLICYHOLDERS SHOULD READ THIS GUIDE.

Group policyholders have special responsibilities not faced by most individual policyholders. Many group policyholders represent others covered under the group policies, including individual certificate holders, participants in employee benefit plans or employers. The actions you take on behalf of others with respect to the demutualization compensation may be subject to specific duties under the federal Employee Retirement Income Security Act of 1974, as amended, (“ERISA”) and the Internal Revenue Code of 1986, as amended, (“Code”), as well as state laws. (Similar issues may be raised where individual policies fund an employee benefit plan.)

Prudential is committed to providing you with information to assist you in carrying out your responsibilities. In keeping with this commitment, we had Groom Law Group, Chartered, one of the nation’s leading employee benefits law firms, assist us in preparing this Guide.

HOW THIS GUIDE IS ORGANIZED.

- Section II of this Guide is an Executive Summary that briefly describes Prudential’s demutualization process and identifies the key issues faced by group policyholders. The discussion of these issues in this Section is necessarily abbreviated and the issues are analyzed and more fully discussed later in the Guide.
- In Sections III, IV and V, we address the responsibilities of policyholders of policies issued in connection with ERISA-covered pension and welfare plans.
- Section VI addresses legal issues raised for policies issued in connection with programs exempt from ERISA.
- Section VII discusses the potential federal tax issues applicable to both ERISA and non-ERISA programs.
- Section VIII is an Appendix designed to provide you with a more detailed description of some of the authorities used in preparing this Guide.

THIS GUIDE PROVIDES IMPORTANT INFORMATION, BUT IT IS NOT LEGAL ADVICE. PLEASE CONSULT WITH YOUR OWN LEGAL ADVISOR.

While this Guide provides important information for group policyholders and beneficiaries of group policies, it is not intended to provide legal advice to you or any of Prudential’s policyholders. Therefore, you should not regard this Guide as creating an attorney-client relationship between you and Prudential or you and Groom Law Group, Chartered.

You should note that while the New Jersey Commissioner of Banking and Insurance, the primary state insurance regulator charged with reviewing Prudential’s Plan of
Reorganization (the “Commissioner”), has reviewed the Guide, the Commissioner has not expressed any view concerning the contents of this Guide. Furthermore, neither the Commissioner, nor any of her advisors, should be construed as providing legal advice concerning the contents of the Guide.

This Guide provides general information, and your specific facts and circumstances may affect the approach you take. Moreover, the federal and state laws are subject to change at any time, and there may not be one correct approach to resolving the issues identified in this Guide. You should consult with your legal advisor concerning your specific situation.

As a final point, we should explain the use of the term “risk”. While this Guide is not intended to provide legal advice to you, the Guide indicates that some options available to group policyholders may involve more “risk” than other options. In this context, “risk” means the likelihood that a policyholder’s actions may be challenged by interested parties, and does not necessarily mean that the policyholder’s actions would conflict with the interpretation of a court or government agency.

II. Executive Summary

PRUDENTIAL’S DEMUTUALIZATION:

Prudential is currently a mutual life insurance company. As a mutual life insurance company, Prudential has no shareholders. Prudential’s policyholders are the owners of the company (having a “membership interest”), and they have the right to vote on certain corporate issues and transactions and participate in any distribution of the company’s surplus.

On December 15, 2000, Prudential’s Board of Directors unanimously adopted a Plan of Reorganization (the “Plan of Reorganization”). Under the Plan of Reorganization, Prudential proposes to change its structure from a mutual life insurance company to a stock life insurance company owned by its shareholders (a process known as “demutualization”). If the Plan of Reorganization is approved by Prudential’s policyholders and the Commissioner (and certain other conditions set forth in the Plan of Reorganization are satisfied), Prudential will be allowed to convert from a mutual life insurance company to a stock life insurance company.

Upon Prudential’s conversion to a stock life insurance company under the Plan of Reorganization, eligible policyholders of Prudential and other “deemed eligible” policyholders will receive compensation in exchange for their ownership interests in Prudential. Under the Plan of Reorganization, the compensation paid to group policyholders will, in most cases, consist of stock in Prudential Financial, Inc., a newly formed holding company. (Please note that stock issued may be registered under an abbreviated version of a policyholder’s name. In addition, some policyholders may receive cash or “policy credits” instead of stock.) Prudential Financial, Inc.’s stock will be publicly traded and is expected to be listed on the New York Stock Exchange. Importantly, Prudential’s conversion will not negatively affect existing policy provisions as to policy guarantees, benefits, account values, dividend eligibility or premiums.

Prudential’s Plan of Reorganization provides for compensation to be paid to “eligible policyholders” as defined in the Plan of Reorganization, which includes group policyholders. Group policyholders may include private employers (both for profit and not-for-profit), labor organizations, trusts, employee benefit plans, governments (federal, state, and local), schools, churches and associations.

There is one exception to the general rule that compensation is paid directly to group policyholders who satisfy the definition of “eligible policyholder” under the Plan of Reorganization. If the group policy was issued to a trust established by Prudential (other than trusts established on behalf of employee benefit plans sponsored by Prudential), and certain conditions under section 5.4 of the Plan of Reorganization are met, compensation will be paid directly to the certificate holder or other parties participating under the group policy instead of to the Prudential-created trust that is the group policyholder. The group policyholder, in these cases, still retains the right to vote. You should review the Policyholder Information Booklet and the Plan of Reorganization to determine whether this limited exception applies to you.

“Eligible policyholders” include group policyholders such as employers, labor organizations, trusts, benefit plans, governments, schools, churches and associations.
KEY DECISIONS: All group policyholders must make several key decisions that may be subject to a variety of constraints imposed by federal and state law.

Some of the key issues that group policyholders must address in connection with Prudential’s demutualization are:

- If qualified to vote, whether to vote in favor of, or against, the Plan of Reorganization;
- If given the choice, whether to elect stock in lieu of receiving cash under the Plan;
- If receiving stock, whether to hold or sell the stock;
- Whether, and how, to use or otherwise allocate the compensation among individuals or entities covered under the terms of the group policy or benefit plan;
- Determining how the compensation must be held (e.g., in a trust or other similar arrangement) and what steps must be taken to implement that decision; and
- Determining the tax implications of the receipt of compensation and related tax matters.

ERISA CONSIDERATIONS: ERISA is a comprehensive federal statute that applies to most Prudential group contracts issued to fund employee benefit plans sponsored by employers and labor unions. (ERISA may also apply to individual policies issued by Prudential, where such policies fund employee benefit plans.) Plans subject to ERISA include pension and profit sharing plans (e.g., Code section 401(k) plans) and most group life, disability and health plans.

Fiduciary responsibilities and liability. ERISA generally defines a “fiduciary” as a person who administers a plan, manages or controls plan assets, or provides investment advice for a fee. ERISA imposes strict duties on persons who are fiduciaries. Fiduciaries must act prudently and solely in the interest of the plan participants and beneficiaries. The assets of ERISA plans must be used for the exclusive purpose of paying plan benefits and reasonable plan expenses. A fiduciary who breaches one of these duties will be personally liable for any loss to the plan and civil penalties and excise taxes may be assessed. Courts may also issue injunctions and other equitable remedies.

As a group policyholder, you may be an ERISA fiduciary and you may be subject to these requirements when you make decisions on behalf of an employee benefit plan in connection with Prudential’s demutualization. However, not all decisions that relate to a benefit plan are subject to ERISA. For example, decisions to establish, terminate, or amend a plan are deemed “settlor” decisions and are not subject to ERISA’s fiduciary requirements.

Deciding who owns the demutualization compensation is a key decision. Your most important decision is deciding who owns the compensation that will be paid by Prudential under its Plan of Reorganization — the group policyholder (e.g., employer), an employee benefit plan or both.

Amounts received in connection with a pension or profit sharing plan will be deemed an asset of the plan and, as a result, must be used to pay plan benefits or expenses. You may, however, have more flexibility in using compensation paid in connection with a welfare plan. For example, an employer may be able to retain a portion of the demutualization proceeds if some or all of the premiums under the policy were paid from the employer’s general assets. You must exercise great care in making this determination and should consult with your legal advisor before deciding to retain any of the demutualization compensation. These issues are discussed in detail in Section IV.

If the compensation is a plan asset, it must be used within the ERISA plan to pay benefits or expenses. If you determine that all or a portion of the demutualization compensation is a plan asset, you must decide how to use the compensation. ERISA provides that plan assets may not inure to the benefit of the employer (the “anti-inurement” rule) and must be used solely to provide benefits to participants and beneficiaries and to pay reasonable plan expenses (the “exclusive benefit” rule). In addition, any disposition of plan assets must also be consistent with the governing plan documents. These issues are discussed in greater detail in Section V.
If you have the right to vote on Prudential’s Plan of Reorganization (and most group policyholders do), you may have a fiduciary duty under ERISA to exercise that voting right. In addition, if you receive stock, you must decide whether to hold or sell the stock. If the stock is a plan asset, the decision to hold or sell the stock is an investment decision subject to ERISA’s fiduciary rules. These issues are discussed in more detail in Section III.

ERISA’s trust requirement.

ERISA requires that all plan assets be held in trust, unless the assets are insurance contracts or are assets held by an insurance company. If the demutualization compensation is determined to be an asset of an ERISA-covered plan, ERISA’s trust requirement must be met. Prudential has obtained a special ruling from the U.S. Department of Labor (“DOL”) indicating that the DOL will not assert a violation of ERISA where no trust is established to hold demutualization compensation (cash or stock) that is a plan asset, provided that the plan fiduciary takes specific steps to safeguard that asset (“DOL Trust Policy”). We have described the requirements of the DOL Trust Policy, and several other alternatives for satisfying the trust requirement, in Section III.

PROGRAMS EXEMPT FROM ERISA.

Some Prudential group policies are issued to employee benefit plans and programs not subject to ERISA. These programs include state and local government plans, church plans, tax-deferred annuities (“TDAs”) issued to employees of public schools, certain TDAs issued to employees of charitable and tax-exempt educational institutions, individual retirement annuities and associated policies (“IRAs”) funded solely by employees, certain employee-pay-all group insurance programs, and certain “Keogh” plans.

ERISA’s rules do not apply to these programs. However, you should consider other federal and state laws when determining whether and to what extent demutualization compensation must be used for the benefit of individuals insured under the group policy. For example, some governmental and church plans are “tax qualified” pension and profit sharing plans subject to the exclusive benefit and anti-reversion requirements of the Code. The rules generally preclude sponsors of these plans from retaining demutualization compensation. For other programs exempt from ERISA, a number of state laws, including state insurance and contract law, impose requirements similar to ERISA. The laws applicable to programs exempt from ERISA are described in Section VI. In addition, the ERISA requirements described in this Guide may provide useful guidance even for policyholders exempt from ERISA.

FEDERAL INCOME TAX CONSIDERATIONS.

The federal income tax treatment of the receipt of demutualization compensation generally depends on the form of the compensation (stock, cash or policy credits) and the tax status of the recipient. For example, special rules apply to the receipt of compensation by a voluntary employees’ beneficiary association (“VEBA”) and welfare benefit funds. The general tax consequences for the receipt of stock, cash and policy credits have been confirmed by the Internal Revenue Service (the “IRS”) in rulings issued to Prudential.

Group policyholders should consult with their legal advisors on how the provisions of the Code apply to their particular circumstances. A failure to address the tax issues could result in significant adverse consequences, including jeopardizing the tax qualified status of the plan and exposure to income and excise taxes. The key tax issues are described in Section VII.
III. Overview Of ERISA Considerations

ERISA applies to holders of most Prudential group policies.

ERISA is a comprehensive federal statute that applies to most Prudential group contracts issued to fund pension and welfare plans. ERISA imposes fiduciary duties on those who administer ERISA-covered plans. These duties are enforced by the federal government through the DOL and IRS. Individual plan participants, beneficiaries, and fiduciaries also may sue under ERISA to enforce these duties. If your group policy was issued in connection with an ERISA-covered plan, you may be subject to these fiduciary duties in making the key decisions we identified in the Executive Summary provided in Section II.

Pension and welfare plans sponsored by private employers and labor unions are subject to ERISA.

ERISA applies to pension, profit-sharing and welfare plans sponsored by employers, employee organizations (labor unions) or both. Pension plans generally include plans subject to Code section 401(a) (e.g., traditional defined benefit plans, profit-sharing plans, Code section 403(a) and 403(b) plans and Code section 401(k) plans). Welfare benefit plans include plans that provide benefits, such as life, disability, health, dental and vision benefits. (Although Group IRAs and Keogh plans may be exempt from ERISA, they are subject to rules similar to ERISA’s “prohibited transaction” provisions under Code section 4975.)

Multiple employer programs, including association plans, present special issues.

Group policies under which multiple employers participate present special issues. For example, a plan sponsored by an association may or may not constitute an ERISA-covered plan. However, even if the association plan does not constitute an ERISA plan, each employer that participates in the association plan would likely be treated as having established its own ERISA-covered plan if the plan provides ERISA-covered benefits.1 Thus, if an association holds a group policy on behalf of employee benefit plans established by its members, its actions may be subject to ERISA’s fiduciary rules described below, and subject to enforcement by its members and their employees. Multiple employer programs that hold group policies should also refer to Section VI for other applicable non-ERISA considerations.

ERISA IMPOSES DUTIES ON EMPLOYERS AND TRUSTEES TO WHOM THE GROUP POLICIES ARE TYPICALLY ISSUED.

ERISA imposes duties on persons who are “fiduciaries.” Section 3(21) of ERISA provides that a fiduciary is a person that administers a plan, manages or controls plan assets or provides investment advice for a fee.

Fiduciary requirements.

ERISA’s key fiduciary requirements are as follows:

- Section 404(a) provides that fiduciaries must act prudently and solely in the interest of the plan participants and beneficiaries in discharging their plan duties, diversifying plan investments, and following the terms of the plan document unless inconsistent with ERISA;
- Sections 403(c) and 404(a)(1) provide that plan assets may not inure to the employer’s benefit and must be used for the “exclusive purpose” of paying benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan;
- Section 406 prohibits certain fiduciary conflicts of interest and prohibits fiduciaries from engaging in certain transactions with “parties in interest”; and
- Section 403 requires that all plan assets be held in trust, unless, as relevant here, the plan assets are insurance contracts or are assets held by an insurance company.

Settlor decisions.

As a holder of a group policy that provides benefits under an ERISA plan, you may be an ERISA fiduciary and you may be subject to these requirements when you make decisions on behalf of an employee benefit plan in connection with Prudential’s demutualization. However, not all decisions that relate to an ERISA plan are subject to these fiduciary requirements. Decisions by a plan sponsor to establish, terminate, design, or amend an ERISA plan (generally referred to as “settlor” decisions) are exempt from ERISA’s fiduciary requirements.2 You should consult with your legal advisor on how this doctrine may apply in your particular circumstances.
ERISA imposes significant liability and penalties for breaches of fiduciary duties. Under section 502(a), a fiduciary may be sued by a plan participant, another fiduciary, or DOL. If a fiduciary breach is established, the fiduciary will be personally liable for any loss to the plan and may be required to disgorge any profits it has made on the breach. If a fiduciary breach claim is made by DOL, section 502(l) provides that the fiduciary will be required to pay an additional penalty in the amount of 20 percent of the amount recovered by DOL in a judgment or settlement of the claim. In addition, courts may issue injunctions or other equitable relief to remedy violations of ERISA.

Additional penalties may apply to a subset of fiduciary violations called “prohibited transactions”. Section 502(i) authorizes DOL to impose penalties on parties in interest who engage in welfare plan prohibited transactions, and section 4975 of the Code imposes similar excise tax penalties for pension plan prohibited transactions.

There are a number of decisions required of you, as a group policyholder. The first is how to vote on Prudential’s Plan of Reorganization, if you have the right to vote. According to DOL, fiduciaries who manage plan assets consisting of shares of corporate stock have a duty to vote proxies on shares of stock that are held by the plan. 29 C.F.R. § 2509.94-1. DOL has stated that section 404(a)(1) of ERISA requires that, in voting proxies, the responsible fiduciary should consider those factors that may affect the value of the plan’s investment and the fiduciary may not subordinate the interests of participants and beneficiaries to the interests of the plan sponsor or other unrelated objectives.

Your right to vote, if any, on Prudential’s Plan of Reorganization is similar to a corporate shareholder’s right to vote proxies. This right to vote is derived from your membership interest in Prudential, which is similar to a shareholder’s ownership interest in a stock company.

The Prudential Board of Directors unanimously adopted the Plan of Reorganization which, if approved by both the Commissioner and policyholders (and certain other conditions set forth in the Plan of Reorganization are satisfied), will permit Prudential to become a publicly traded corporation. Prudential’s Board of Directors believes that the Plan, as constituted and in its entirety, is fair and equitable to Prudential policyholders and promotes the best interest of both Prudential and its policyholders. This endorsement is similar to a public company’s board of directors review (and endorsement of) a proxy statement proposal.

Although Prudential’s Board of Directors unanimously adopted the Plan of Reorganization, and has recommended the Plan’s adoption to policyholders, as with a typical proxy voting process, you have a fiduciary duty under ERISA to independently review these materials and to vote on Prudential’s Plan of Reorganization in a manner consistent with ERISA’s fiduciary requirements on behalf of your ERISA-covered plan. This means that you must vote solely in the interests of plan participants and beneficiaries. You should consult with your legal advisor with respect to these and other related issues.

In connection with the vote, you should carefully review the detailed information provided in the Policyholder Information Booklet. If Prudential’s policyholders approve the Plan of Reorganization, the Plan still must be approved by the Commissioner prior to its implementation. In order to approve the Plan of Reorganization, the Commissioner, among other things, must find that the Plan of Reorganization is fair and equitable to Prudential’s policyholders. The Commissioner has retained independent investment banking, actuarial, legal and accounting experts, among others, to assist in evaluating Prudential’s Plan of Reorganization.

Even though Prudential has approximately 11 million individual and group policyholders, your vote matters. Prudential’s Plan of Reorganization, and the payment of compensation to all eligible policyholders, cannot proceed unless at least one million policyholders vote on the Plan of Reorganization, and at least two-thirds of voting policyholders vote in favor of the Plan. You should consult with your legal advisor in deciding how to vote on the Plan of Reorganization.
ACQUIRING, HOLDING, AND SELLING PRUDENTIAL FINANCIAL, INC. STOCK MAY BE A FIDUCIARY DECISION.

If the Plan of Reorganization is approved, you may be required to make decisions relating to the acquisition, holding, and disposition of Prudential Financial, Inc. stock that you may receive. Under the Plan of Reorganization, most group policyholders will receive compensation distributed in the form of stock. Policyholders that are allocated 50 or fewer shares (or some lesser number established later by Prudential’s Board of Directors) will receive cash instead of stock unless they elect to receive stock. If this choice applies to you, you must decide which choice to make. If you receive stock, you must decide whether to hold or sell the stock. If the compensation is a plan asset, the decision to elect stock, if applicable, and the decision to hold or sell stock after it is acquired, are investment decisions subject to ERISA’s fiduciary rules.

DOL has issued regulations applying the fiduciary standards of section 404(a) of ERISA to investment decisions. 29 C.F.R. § 2550.404a-1. These regulations provide that a fiduciary must consider those facts and circumstances the fiduciary knows are relevant to the particular investment decision. The fiduciary should consider the role of the investment in that portion of a plan’s portfolio over which the fiduciary has investment duties. In doing so, relevant considerations include the investment’s risk and return characteristics, the liquidity of the investment relative to the plan’s expected cash flow requirements, and portfolio diversification. Because the appropriate investment analysis depends on the plan’s particular circumstances, a fiduciary’s decision to acquire, hold, or sell Prudential Financial, Inc. stock might differ depending on, for example, whether the plan is a defined benefit plan with long term obligations or a welfare plan with short term obligations funded only by insurance contracts. In addition, plan fiduciaries should consider whether the acquisition, holding or selling of Prudential Financial, Inc. stock is consistent with plan documents or any plan investment guidelines.

Please note that the Plan of Reorganization provides for a commission-free purchase and sale program under which eligible policyholders who receive 99 or fewer shares of Prudential Financial, Inc. stock will be permitted to sell all of the stock received under the Plan on a commission-free basis or purchase an additional amount of shares necessary to bring their holdings up to 100 shares. The commission-free purchase and sale program will begin no sooner than 90 days after the effective date of the Plan of Reorganization and no later than the second anniversary of the effective date of the Plan of Reorganization. For more information, please review the Policyholder Information Booklet separately provided to you.

ERISA imposes a trust requirement.

Section 403 of ERISA requires that all plan assets be held in trust, unless a specific exception applies. Among the plan assets specifically excepted from the trust requirement are insurance policies and annuity contracts issued by an insurer, and assets of a plan that are held by an insurance company.

If the demutualization compensation you receive is an asset of an ERISA-covered plan, you should take steps to ensure that ERISA’s “trust requirement” is satisfied. Therefore, you should determine how the plan will satisfy the trust requirement, or qualify for an exception, before you receive compensation. Satisfying the trust requirement (or an applicable exception) will depend in part on whether you currently maintain a trust for your plan or, if you do not, whether you wish to establish one. Many ERISA-covered welfare plans, in particular, may not have a trust because they have been funded by insurance contracts.

Some of your options to address the trust requirement are described below as follows:

- Assign the policy or demutualization compensation to an existing trust;
- Deposit the demutualization compensation into a segregated brokerage or bank account that complies with the DOL Trust Policy (described on page 9);
- Assign and hold the demutualization compensation in a new trust for pension or profit-sharing plans (either with Prudential Trust Company or a trust company unaffiliated with Prudential) or welfare plans (with an unaffiliated trust company only); or
- Assign and hold the demutualization compensation in a Prudential “custodial” account (for welfare benefit and Keogh arrangements).
Assignment of policy or distribution of compensation to an existing trustee.

Each of these options is described below.

The first alternative involves ensuring that the demutualization compensation is held by an existing trust (and trustee) of your employee benefit plan.

If your ERISA plan currently has a trustee (including our affiliate, Prudential Trust Company), and the trustee is the “policyholder” of the Prudential policy that will generate the demutualization compensation, the compensation will be distributed directly to the trustee (which should satisfy the requirements of ERISA section 403). If the trustee is not currently the policyholder, you have two alternatives. First, if your policy permits, you may request that the policy be amended so that the trustee becomes the “policyholder” and the compensation is directly distributed to it. However, while Prudential will attempt to process your request in a timely manner, if significant changes to the policy need to be made, it is possible that the assignment will not be completed prior to Prudential’s demutualization. Further, as described below, there may be other ramifications to any decision to actually assign the insurance policy or annuity contract itself to a trustee of a trust (e.g., in the welfare plan context, increasing the risk/difficulty of concluding that any portion of the demutualization compensation when distributed is not an asset of the plan). You should consult with your legal advisor on these and related issues.

Second, if you do not wish to, or are not permitted to, assign the policy to the trustee, you (as policyholder) may direct Prudential to distribute just the compensation to the plan’s trustee — an assignment of the demutualization compensation itself, rather than your policy, to the trustee. In order to accomplish this, you should execute an agreement assigning the demutualization compensation prior to the date of the distribution. Please note that, while the ERISA trust requirements would be satisfied if you assign the compensation, there may be other consequences of the assignment (e.g., the policyholder may still be subject to tax on the compensation). You should consult with your legal advisor on these and related issues.

If you would like either to assign the policy to the plan’s trustee or to assign the compensation to the trustee, please contact your Prudential account representative. If you are uncertain as to whom to call, or if you have received this material in connection with a group insurance contract now administered by Aetna/US Healthcare (and have no other insurance in force at Prudential), please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time.

In order to ensure that we handle requests on a timely basis, any request that you make to assign your policy to a new trustee must be received (in a form acceptable to Prudential) no later than June 30, 2001. This date is earlier than the other deadlines noted in the Guide. The reason for this is we may need to determine whether or not your contract must be amended (and if such amendment needs to be filed with local insurance regulators). We will then advise you whether the assignment can be implemented prior to Prudential’s demutualization.

If you wish only to assign the demutualization compensation (and not your policy), you must execute and provide us with a valid “assignment of compensation” agreement satisfactory to Prudential by no later than September 30, 2001.

For your convenience, a sample “assignment of compensation” document that you can use is attached to this Guide as Exhibit A, and additional copies may be obtained by calling the toll-free number above or by accessing Prudential’s website at www.prudential.com. You may use this form agreement or you may use your own form document. When you complete and execute the assignment, please contact the toll-free hotline number (1-877-264-1163) for instructions on where to send the completed assignment form. Please be aware that unless all of the relevant information set forth on the Prudential form document is provided to Prudential, we will be unable to update our records appropriately prior to demutualization. In all cases, please consult with your legal advisor prior to making an assignment.
If you do not have an existing trust for your pension or welfare plan, new guidance issued by the DOL to Prudential may be helpful. At Prudential’s request, DOL has stated formally that it will not assert a violation of ERISA in an enforcement action solely because you fail to establish a trust to hold demutualization compensation if specific conditions are met (the “DOL Trust Policy”). This is an important development because it allows you to avoid the expense of establishing a trust to hold cash or stock that your plan receives from Prudential. However, the following important conditions must be met if you rely on the DOL Trust Policy:

- The cash or stock must be placed in a separate interest-bearing account for cash or a custodial account for stock in the name of the plan as soon as reasonably possible. Amounts held in such accounts may not be commingled with any other assets.

- The account must be under the control of a designated plan fiduciary.

- As soon as possible (but no later than 12 months following receipt of demutualization compensation), amounts held in the account should be applied to the payment of participant premiums or plan benefit enhancements, or distributed to participants.

- You must maintain records necessary to document the holding and disposition of the cash or stock. Generally, ERISA requires that such records be maintained for no less than 6 years.

Satisfaction of the DOL Trust Policy’s requirements will likely involve fewer administrative burdens and costs than the establishment or maintenance of a new trust or custody account (discussed below). However, if you establish a bank or custody account pursuant to the DOL Trust Policy, you may have less flexibility in using demutualization compensation to pay for plan expenses or fund existing benefits. These issues are discussed in Section V.

Pension plans should exercise caution in taking advantage of the bank or custody account option offered under the DOL Trust Policy. In this regard, pension plans are separately required to hold assets in trust under section 401(a) of the Code. The Code does, however, provide an exception from its trust requirement for custodial accounts under Code section 401(f), which may be structured to meet the requirements of the custody account option under the DOL Trust Policy. The Code does not include an exception for the interest-bearing bank account option under the DOL Trust Policy. If you are acting on behalf of a pension or profit-sharing plan subject to Code section 401(a) and wish to establish an account described under the DOL Trust Policy, you should discuss these issues with your legal advisor (and the financial institution where you decide to establish such an account).

A copy of the DOL Trust Policy may be obtained on Prudential’s website at www.prudential.com.

If you do not have an existing trust for your pension or profit sharing plan and believe that it would be appropriate to establish such a trust, Prudential Trust Company, a Prudential affiliate, will offer trust services to your retirement plan. (Prudential Trust Company will not provide trust services for welfare benefit plans.)

Prudential will charge a fee for providing trust services if you elect such services. It is likely that Prudential’s fee for providing trust services will be greater than the cost of establishing an account consistent with the DOL Trust Policy or the custodial account option described below. A sample Prudential Trust Company retirement plan trust agreement (as well as a fee schedule for trust services) may be found on our website at www.prudential.com.

If you are interested in receiving more information about this option, please contact your Prudential account representative or please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time. (Copies of the form Prudential Trust Company trust agreement and fee schedule may also be obtained by calling the toll-free hotline number.) In order to ensure that we handle requests on a timely basis, you must provide us with both executed “assignment of compensation” and trust documents (in forms acceptable to Prudential) by September 30, 2001. Please contact the toll-free hotline or your Prudential representative on instructions where to send the completed assignment and trust documents.
You may, of course, establish a trust with someone other than Prudential Trust Company for either your retirement plan or your welfare benefit plan. In order to assure that your demutualization compensation is transferred to your newly established trust, an “assignment of compensation” agreement must also be executed by you and received by Prudential by September 30, 2001. As noted earlier, a sample assignment of consideration document is attached to this Guide as Exhibit A, and additional copies may be obtained by calling our toll-free number (1-877-264-1163) or by accessing Prudential’s website at www.prudential.com.

If you do not have a trust for your ERISA-covered Keogh or welfare plan, and do not wish to establish one simply to hold the demutualization compensation received by the plan or avail yourself of the DOL Trust Policy exemption, you may wish to consider another option.

As noted earlier, there are exceptions to the trust requirement. For example, insurance and annuity contracts need not be held in trust. In addition, section 403(b)(2) of ERISA also exempts from the trust requirement “assets of a plan held by an insurance company”. Similarly, while Code section 401(a) generally requires that pension plan assets be held in trust, exceptions are provided for annuity contracts under Code section 403(a), and for contracts issued by insurance companies and certain custodial accounts under Code section 401(f).

Prudential will offer an arrangement under which it will “hold” demutualization compensation, including Prudential Financial, Inc. stock and cash, on behalf of either a Keogh or welfare benefit plan. Under this custodial account arrangement, Prudential will enter into an agreement with you that requires Prudential to establish a brokerage account with Prudential Securities Incorporated in Prudential’s name, for the benefit of your particular Keogh or welfare benefit plan, where you may deposit the Prudential Financial, Inc. stock or cash received as a result of Prudential’s demutualization. Prudential, at all times, will follow your directions with respect to the continued holding or liquidation of the stock, the investment of the cash, the disposition of the account balance and the termination of the arrangement. Any dividends on the stock (and earnings on the cash) will be deposited in the account and will be subject to your direction. (Note that these custodial account arrangements do not change the fact that you, and not Prudential, have the right to vote on Prudential’s Plan of Reorganization. This arrangement only assigns your demutualization compensation).

We believe that, under this arrangement, the compensation should be viewed as a plan asset “held” by an insurance company (that is, Prudential) and thus exempt from the trust requirement under section 403(b)(2) of ERISA.5 (For Keoughs, the arrangement should constitute a contract with an insurance company within the meaning of Code section 401(f).) However, this is a judgment that you must make independently, and you should consult with your legal advisor in doing so. Depending on the circumstances, amounts held by Prudential under the arrangement in connection with a welfare plan may constitute a “welfare benefit fund” subject to the various requirements of the Code. You should consult with your legal advisors for the application of these tax rules to your particular circumstances. In addition, consult the “Federal Tax Consequences” section of this Guide for further information on the appropriate tax treatment of the assets held in this account.

You should also note that Prudential will charge a fee for providing custody services if you elect to receive such services and this fee may be greater than the cost of establishing an account pursuant to the DOL Trust Policy. A sample custodial contract authorizing Prudential to hold demutualization compensation as described above, as well as the fee schedule for these custodial services, may be found on our website at www.prudential.com.

If you are interested in receiving more information about this option, please contact your Prudential account representative. If you are uncertain as to whom to call, or if you have received this material in connection with a group insurance contract now administered by Aetna/US Healthcare (and have no other insurance in force at Prudential, please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time. (Copies of the form Prudential custodial contract and fee schedule may also be obtained by calling the toll-free hotline...
FORM 5500 REPORTING.

Prudential is not required to file any reports with DOL regarding the compensation paid in the demutualization. Since demutualization compensation generally is not a component of a Prudential insurance policy or annuity contract, Prudential generally will not include the value of your demutualization compensation in any Schedule A information that we provide. (One exception is that Prudential will include the value of any “policy credit” distributed to an ERISA-covered plan where Schedule A is required.) Prudential will report policyholder payments to the IRS as required by law. Most ERISA plans are required to file with DOL an Annual Report (Form 5500). If the compensation you receive is viewed as an asset of an ERISA plan, the plan’s receipt of the compensation should be reflected on the plan’s financial statements, if any, and on the plan’s Form 5500.

Schedule H (for plans with 100 participants or more) and Schedule I (for plans with less than 100 participants) of the “new” Form 5500 (effective 1999) are designed to report the Plan’s assets and liabilities, and income and expenses. The plan’s receipt of the compensation might be reported as, for example, “other income” on Line 2c or as “net gain on the sale of an asset” on Line 2b(4) of Schedule H, or “other income” on Line 2c of Schedule I (if appropriate).

If you determine that compensation is an asset of the plan, and report the receipt of the compensation as income or a gain, you would report the investment and disposition of this asset as any other plan asset. Thus, if the compensation were not disposed of prior to year-end, it would be included in Schedule H, Part I (Assets and Liabilities), or Line 1a of Schedule I (if appropriate) as of the end of the year with the plan’s other assets. You should consult with your legal advisor on how to report demutualization compensation on your Form 5500.

Welfare benefit plans that provide benefits exclusively through insurance contracts (i.e., “insured welfare plans”) are exempt from certain reporting requirements. Such plans are exempt from reporting financial information on Schedule H (or Schedule I, if appropriate) of the Form 5500 and furnishing participants with the summary annual report (SAR) required under section 104(b)(3) of ERISA. In addition, such plans are typically exempt from having to engage an independent qualified public accountant to examine the plan’s financial statements and audit the plan’s Form 5500. If you determine that demutualization compensation is a plan asset, and plan assets are held outside of the insurance contract, your plan may no longer meet the 5500. If you determine that demutualization compensation is a plan asset, and plan regulations at 29 C.F.R. § 2520.104-46(b)(2).

In addition, the DOL Trust Policy provides special relief from the reporting and audit requirements where you hold plan assets in a bank or custodial account and use the assets for certain plan purposes. (See discussion at page 8) In this circumstance, even though assets are held outside the insurance contract, the DOL indicates that the plan will still be treated as insured and will not be subject to the annual audit requirement. You should consult with your legal advisor with respect to these issues.

Additional reporting and accounting issues for insured welfare plans.

Your most important decision may be how to use or allocate the compensation paid by Prudential when the Plan of Reorganization becomes effective. The following two-step analysis may be helpful in this regard. First, you should determine whether some or all of the compensation paid by Prudential is an asset of a particular ERISA plan. Second, after the “plan asset” portion of the compensation has been identified (and it may be the entire payment), you should determine how to use that plan asset within the ERISA plan.

Section IV below provides you with additional information concerning the first step of identifying ERISA plan assets. Section V discusses issues regarding how ERISA plan assets might be allocated in pension and welfare plans — the second step.
### IV. ERISA Plans: The First Step Is Identifying ERISA Plan Assets

**Determining Whether the Compensation Is an “Asset” of a Plan May Be Your Most Important Decision Under ERISA.**

Since ERISA restricts a policyholder’s use of plan assets, the first step in allocating demutualization compensation is to determine whether some or all of the compensation constitutes a “plan asset” of an ERISA plan. **This may be your most important decision in connection with Prudential’s demutualization. You should consult with your legal advisor in making this determination.**

| **Pension and Profit Sharing Plans.** | In determining whether an asset is an asset of a plan, the DOL has stated that “ordinary notions of property rights” will apply.\(^7\) The DOL Trust Policy issued to Prudential applies these principles to demutualization compensation and concludes that, in the case of pension and profit sharing plans, demutualization compensation will be an asset of the plan.\(^8\) The Code also requires that tax qualified pension and profit sharing plans hold assets for the exclusive benefit of the plan and prohibits the reversion of plan assets. These rules also effectively require that all demutualization compensation attributable to Prudential’s group annuity contracts be used for plan purposes.\(^9\) |
| **Welfare Plans.** | The DOL Trust Policy also applies “ordinary notions of property rights” to determine whether demutualization compensation will be deemed an asset of a welfare plan. **According to DOL, all of the demutualization compensation will be an asset of a welfare plan where:**

- the policy is issued to the welfare plan or a trustee of the plan; or
- policy premiums are paid from trust assets.\(^10\) If the policy is issued directly to the employer, you may have some flexibility. Under the DOL Trust Policy, it appears that if premiums under a policy were paid entirely from the employer’s general assets, the demutualization compensation attributable to that policy would not be plan assets.\(^11\) However, if the policy was 100 percent funded by participant contributions, all of the demutualization compensation would be deemed plan assets. If the policy was funded with both participant contributions and employer payments, the DOL Trust Policy indicates that the compensation should be allocated between the employer and the plan.\(^12\) In this situation, when determining the proportion of demutualization compensation that is attributable to participant contributions, the DOL Trust Policy indicates that the plan fiduciary must consider all of the relevant facts, including plan documents and instruments and the proportion of total participant contributions to the total premiums paid over an appropriate time period. The DOL Trust Policy is not the first time that DOL has taken into account participant contributions when determining whether insurance company payments in connection with a policy are plan assets. DOL adopted a similar approach in an internal memorandum addressing the “plan asset” status of dividends paid under life insurance policies to which both employees and employers contribute (the “DOL Dividend Analysis”).\(^13\) The DOL Dividend Analysis provides similar, but somewhat more detailed, guidance than the DOL Trust Policy. In particular, in the DOL Dividend Analysis, DOL found a distinction based on whether the employee’s contribution obligation is expressed in the governing plan documents and participant communications as a percentage of total premium or as a flat dollar amount. For example, if the employee is required to contribute 20 percent of the cost of insurance coverage, 20 percent of the premium refund would be deemed plan assets. However, if the employee was required to contribute a flat dollar amount, e.g., $100 per year, towards coverage with the employer contributing the balance from its general assets, the refund would be viewed as a reduction in the employer’s obligation and not a plan asset. In an important caveat, DOL specifically noted that, because an employer should not obtain a financial benefit through administration of a plan, the employer should, in no event, receive dividends in excess of its original premium payments. Notably, in the more recent DOL Trust Policy, DOL did not distinguish between participant contributions that are a flat dollar amount and those that are a stated...
percentage of the total premium. Thus, it is not clear if DOL would apply the DOL Dividend Analysis to the receipt of demutualization compensation. (A copy of the DOL Dividend Analysis may be found on our website at www.prudential.com.)

We understand that a number of DOL’s regional offices have adopted an approach similar to the DOL Trust Policy and DOL Dividend Analysis, where the policy is not issued to a plan or trust, when investigating the use of demutualization compensation by sponsors of welfare plans.14

In addition to these DOL authorities, there are two court decisions that may provide useful guidance if you consider adopting the premium-focused approach. Neither court decision, however, adopts DOL’s reasoning, which was developed after these decisions.

In Corley v. The Hecht Co., a district court found that an employer did not violate ERISA by retaining dividends paid in connection with a group life insurance policy that was funded by a combination of employee and employer premiums. 530 F. Supp. 1155 (D.D.C. 1982). In Corley, employee contributions were the primary source of premium payments under the group policy. However, the employer voluntarily paid premiums to make up for periodic shortfalls in employee paid premiums and some of the employer paid premiums were substantial. When dividends were periodically paid under the policy, the employer reimbursed itself for its premium payments from the dividends. Over a period of years, the dividends retained by the employer did not exceed the employer’s voluntary premium payments. In its decision, the court allowed the employer to retain the dividends. However, the court found that the manner in which the employer obtained and handled the dividends violated ERISA’s fiduciary requirements. The court also found that the employer failed to provide participants with an adequate summary plan description (“SPD”) as required by section 102 of ERISA because the SPD did not describe the employer’s procedure for recovering the voluntary contributions.

In the only reported ERISA case addressing the disposition of demutualization compensation, a federal appeals court found that an employer did violate ERISA by retaining a demutualization distribution paid in connection with a group long term disability insurance policy. Ruocco v. Bateman, Eichler, Hill, Richards, Inc., 903 F.2d 1232 (9th Cir. 1990). In Ruocco, the court found that the employer was not entitled to retain any of the demutualization proceeds where nearly all of the insurance premiums had been paid by plan participants.

If you think you might allocate assets between a welfare plan and an employer, you should keep in mind the following points:

- As described above, DOL does not believe that this approach is appropriate if the policyholder is a trust or the plan. In addition, if the trust is a VEBA, there is a risk under the Code that the VEBA could lose its tax-exempt status as a consequence of any such decision.

- While the DOL Trust Policy reflects DOL’s interpretive position, it is not binding on the courts or binding on plan participants or plan fiduciaries, who have independent standing to enforce ERISA. Thus, a court might later decline to follow the DOL Trust Policy in regards to the disposition of demutualization compensation.

- If a court ultimately determines that the compensation retained by an employer was in fact a plan asset, the plan fiduciary (usually the employer) may be liable for the plan’s losses (including the demutualization compensation) and other penalties under ERISA and the Code (described above).
V. ERISA Plans: The Second Step Is Allocating Plan Assets

If any portion of the demutualization compensation is considered a plan asset, you must decide how to use that plan asset within, and under the terms of, the ERISA plan to which it belongs. ERISA's fiduciary provisions will apply to this decision. The DOL has made clear that under section 404(a)(1)(A), plan fiduciaries must act solely in the interest of plan participants and beneficiaries in determining how demutualization compensation is allocated (provided the decision is a fiduciary decision, and is not a “settlor” decision exempt from ERISA's fiduciary requirements). In addition, ERISA sections 403 and 404 provide that plan assets may not inure to the benefit of the employer and must be used solely to provide benefits to participants and beneficiaries and to pay reasonable plan expenses. Under section 404(a)(1)(D) of ERISA, any disposition of plan assets must also be consistent with the governing plan documents.

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<tr>
<th>SPECIAL ISSUES FOR BANK OR CUSTODY ACCOUNTS UNDER THE DOL TRUST POLICY.</th>
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<tr>
<td>If you establish an interest-bearing bank or custody account consistent with the requirements of the DOL Trust Policy, your options to use the demutualization compensation may be limited. The DOL Trust Policy provides that demutualization compensation should be used to pay participant premiums, enhance participant benefits, or distribute amounts directly to plan participants. The DOL Trust Policy does not expressly authorize the use of demutualization compensation to pay plan expenses, fund current benefits, or pay employer premium obligations. Each of these additional uses of demutualization compensation is discussed in the options below and may be a permissible use of plan assets if you hold demutualization compensation in a trust or in a Prudential custody arrangement (see discussion of trust and trust alternatives at pages 7-11.) Thus, you may wish to consider the convenience and low cost of establishing a bank or custody account pursuant to the DOL Trust Policy together with the potential loss of flexibility of using demutualization compensation held in such accounts.</td>
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<th>SPECIAL ISSUES RELATING TO FORMER AND FUTURE PARTICIPANTS.</th>
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<td>Former employees or active employees no longer covered under a plan might claim they are entitled to a share of the demutualization compensation paid with respect to a policy funding an ERISA plan. Similarly, employees who later become covered under a plan (and a policy) might also claim entitlement to some portion of the compensation because the demutualization compensation can be viewed as attributable, at least in part, to future experience under the plan.</td>
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There are a number of possible approaches to this issue. For example, you might take the view that an employee or former employee is entitled only to the benefits described in the plan and does not have an individual right to any particular asset of the plan, including the demutualization compensation. Under this approach, the only obligation would be to ensure that the compensation is used for a proper plan purpose. However, if you wanted to use the compensation to benefit the employees who may have contributed to it, you might consider amending the plan to provide new benefits to former and future, as well as current, employees. (Demutualization compensation can be viewed as a relative share of a surplus accumulated over many years, both past and future.) You should discuss possible approaches to this issue with your legal advisor.

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<th>FOCUS: PENSION AND PROFIT SHARING PLAN ALLOCATION ISSUES.</th>
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<td>If you decide that some or all of the demutualization compensation payable under a Prudential group annuity contract is an asset of a pension plan covered by ERISA, your handling of that compensation will be subject to the fiduciary responsibility and prohibited transaction provisions of ERISA and the Code.</td>
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As discussed in Section IV, ERISA requires that plan assets be used to provide benefits and defray the costs of administering the particular plan. There are significant risks of a challenge if you use compensation that is deemed a plan asset for your own, non-plan purposes. Any use for non-plan purposes could constitute a prohibited transaction and a reversion to the employer, resulting in personal fiduciary liability, possible disqualification of the plan (if applicable), and serious income and/or excise tax consequences.
Paying plan expenses. If you decide to use the compensation to pay plan expenses, you should ensure that the expenses are appropriate expenses of administering the plan and that the payment of the expenses with plan assets is permitted by the governing plan documents. Appropriate plan expenses might include trustee fees, third party administration fees, plan accounting and legal fees, and the cost of preparing “plan communications” (such as summary plan descriptions or summary annual reports) and plan filings (Form 5500). In addition, a plan may not pay expenses associated with “settlor” decisions, such as the costs associated with establishing, terminating, designing or amending the plan.17 If you are the plan fiduciary, reimbursement of your expenses might also be limited under ERISA’s “direct expenses” rule. See ERISA § 408(c)(2); 29 C.F.R. §§ 2550.408b-2(e), 408c-2(a).

As noted above, if you establish a bank or custody account consistent with the requirements of the DOL Trust Policy, your ability to use demutualization compensation to pay plan expenses or fund current benefits may be limited. You should consult with your legal advisor in determining whether a particular expense is properly payable from the plan.

MULTIPLE PLANS COVERED UNDER ONE POLICY. If your group annuity contract funds more than one pension or profit sharing plan, you may be required to allocate demutualization compensation received under the single policy among those plans. It will be important to ensure that the demutualization compensation is used for the benefit of the plan to which it is allocable. Use of compensation due to one plan for the benefit of another raises issues under ERISA’s exclusive benefit and prohibited transaction rules.18 Prudential will, upon request, be able to provide you with a percentage estimate of the amount of “variable” demutualization compensation attributable to each pension and profit-sharing plan funded under a single policy. Such amounts would be determined according to each plan’s contribution to Prudential’s surplus consistent with the actuarial contribution methodology described in the Plan of Reorganization. The availability of such estimates depends upon how complete Prudential’s records are. Further, Prudential will undertake to implement such an allocation among plans funded under a single group policy only at your express direction.

The DOL has concluded that Prudential will not act as an ERISA fiduciary solely because of its provision of such administrative services to your plan.19 If you have any questions regarding this issue, please call your Prudential account representative. If you are uncertain as to whom to call, or if you have received this material in connection with a group insurance contract now administered by Aetna/US HealthCare (and have no other group insurance in force with Prudential), please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time.

ALLOCATION ISSUES FOR DEFINED BENEFIT PENSION PLANS. In most situations, demutualization compensation received by your defined benefit plan could be treated as any other asset of the plan. That is, the compensation could be used to fund current or additional plan benefits or to pay current or future plan expenses. (Unless your defined benefit plan is among the few that maintain individual participant accounts, such as a floor-offset plan, you will not be required to allocate the compensation among participant accounts.) It is possible that employees could challenge a decision not to increase benefits under the plan, particularly if the plan is or has been a contributory plan. However, the Supreme Court’s decision in Hughes Aircraft Co. v. Jacobson, may support the view that demutualization compensation can be used to fund current benefits or expenses and need not be used to fund new benefits.20 Please consult with your legal advisor in making these determinations.

Most defined benefit plans will receive Prudential Financial, Inc. stock rather than cash. If your plan receives stock, you will be required to decide whether to hold the stock as a plan investment or sell it and use the compensation to invest in something else or to pay plan benefits or expenses. As discussed in Section III, your decision to hold or sell the stock will likely be viewed as an investment decision subject to ERISA’s fiduciary provisions.
Finally, if you have established a bank or custody account to hold demutualization compensation attributable to your defined benefit plan consistent with the DOL Trust Policy, your ability to use demutualization compensation to pay plan expenses or fund current benefits may be limited. Please consult with your legal advisor in making these determinations.

**Allocation Issues for Defined Contribution Pension Plans.** Unlike defined benefit plans, defined contribution plans may have specific allocation obligations. If you receive demutualization compensation on behalf of a defined contribution plan, in most cases you will be required to allocate the compensation among participant accounts to the extent the compensation is not used to pay current plan expenses.

Neither ERISA nor the Code specifies any particular method for allocating plan assets among participant accounts. Because many plan documents contain allocation procedures, you should first consult your plan documents. For example, many plans provide for the allocation of investment income based on participant account balances. Demutualization compensation might be viewed as investment income and allocated the same way. However, to the extent that the plan document permits it, you may have some flexibility in selecting an allocation method that you deem appropriate. If you exercise discretion in interpreting your plan documents when selecting an allocation method, you may be acting as a fiduciary and you should ensure that you act prudently and solely in the interest of plan participants and beneficiaries. If you, in consultation with your legal advisors, wish to adopt a special allocation method (or believe that your proposed allocation would not be permitted under the existing plan terms), you may wish to make any necessary plan amendments before the compensation is actually received.

If Prudential is the recordkeeper of your defined contribution plan, we will allocate amounts among participant accounts pursuant to the method selected by you. The two most common methods of allocating compensation are “pro rata” and “per capita.” A “pro rata” allocation involves allocating amounts based on the participant’s account balance. Thus, participants with larger account balances receive a greater portion of the demutualization compensation. A “per capita” allocation involves evenly dividing the compensation among all participants (each participant receives the same amount) as of a particular date. As described earlier, the DOL has concluded that Prudential will not act as an ERISA fiduciary solely because of its provision of allocation services to your plan.21

If you decide to use the demutualization compensation to pay plan expenses, you may not be required to allocate it among participant accounts. However, please note the possible limits on the use of plan assets to pay plan expenses if you establish a bank or custody account under the DOL Trust Policy (see discussion at page 9). And, as noted above, your allocation decisions must also take into account situations where your group annuity contract funds more than one pension or profit-sharing plan. You should review these issues with your legal advisor before selecting a particular allocation method. See Section VII below for a discussion of tax issues, including the timing of allocations and possible plan qualification issues.

**Additional Implications for Participant-Directed Defined Contribution Pension Plans.** Allocation of the compensation may be more complicated if your defined contribution plan allows participants to direct the investment of their own accounts (a “participant-directed plan”). For example, the Prudential group annuity contract held on behalf of your plan may support only one (or a subset) of the investment options under the plan. In that case, you might decide to treat the compensation payable with respect to that contract as investment income only with respect to the participant accounts invested in that investment option and allocate it as you would any other earnings from that investment option. Alternatively, if the plan document permits, you may wish to allocate the compensation to all participants in recognition of the fact that the compensation is based on many years of experience and participants may have moved in and out of the investment option(s) available under the Prudential contract during that time.

Again, if the plan document does not expressly address this type of allocation, you may have some flexibility when selecting an allocation method, so long as you act prudently and solely in the interest of plan participants. In this regard, you may not select an allocation method that benefits you as a plan participant, at the expense of
other plan participants. You should also consider the tax issues for defined contribution plans (discussed in Section VII). Lastly, you may want to consider notifying participants of the allocation method in advance. You should review these issues with your legal advisor before selecting a particular allocation method or providing any notice to plan participants.

If your participant-directed plan receives Prudential Financial, Inc. stock rather than cash, you will have to decide between allocating the stock itself to participant accounts or selling the stock and allocating the cash compensation. (You might also use the compensation to pay plan expenses.) In making this decision, you will have to consider whether it is appropriate to offer Prudential Financial, Inc. stock (or a brokerage account permitting investment in Prudential Financial, Inc. stock) as an investment option under the plan. Because this decision will likely be viewed as a fiduciary one, you will have to comply with ERISA’s fiduciary and prohibited transaction provisions. Also, keep in mind that ERISA section 404(c), which generally operates to insulate employers and fiduciaries from responsibility for participant investment decisions, probably will not insulate your decision to hold or sell stock under these circumstances.

If you choose to sell the Prudential Financial, Inc. stock and allocate cash to participant accounts, you may wish to notify participants of the allocation in advance and ask that they provide investment instructions for the allocated amounts. Alternatively, you may assume the fiduciary responsibility and invest the cash in accordance with the existing participant investment instructions or in the plan’s most conservative investment option (such as a money market account). In this event, you may wish to consider notifying participants of your decision, and permit participants to invest demutualization compensation amounts among the plan’s other investment options.

TERMINATED PENSION PLANS—SPECIAL ISSUES.

Some Prudential group contracts were issued to fund plans that were at one time subject to ERISA but are now terminated. These contracts include termination annuities. Because it is not clear under the relevant authorities how demutualization compensation attributable to a terminated plan’s annuity contract should be treated, you may incur less risk of a challenge if you treat the compensation as a “plan asset” and use it to provide enhanced benefits to the plan’s former participants whose benefits are provided under an annuity. Other uses of the compensation could involve more risk of challenge. If you conclude that the demutualization compensation need not be treated as an ERISA plan asset, the disposition of the compensation may nonetheless be subject to constraints under state law. See Section VIII below. You should consult with your legal advisor in resolving these issues.

FOCUS: WELFARE PLANS—GROUP LIFE, DISABILITY, AND HEALTH—ALLOCATION ISSUES.

If you decide that some or all of the demutualization compensation is an asset of an ERISA welfare plan, the next step is deciding how to use the assets within the ERISA plan. As with pension plans, ERISA generally requires that plan assets, including demutualization compensation, be used solely to pay plan benefits and to defray the reasonable expenses of administering the plan. However, if you establish a bank or custody account to hold demutualization compensation attributable to your welfare plan consistent with the requirements of the DOL Trust Policy, your ability to use demutualization compensation to pay plan expenses or fund existing benefits may be limited.

While you may have a number of options for using demutualization compensation in welfare plans, using the compensation for your own, non-plan purposes could constitute a violation of ERISA’s fiduciary and prohibited transaction rules, resulting in personal fiduciary liability, disqualification of any VEBA trust, and other serious penalties and tax consequences. Specific tax issues relating to welfare plans are described in Section VII.

As described above, use of demutualization compensation paid to one plan for the benefit of another could raise issues under the exclusive benefit rule of ERISA. Keep in mind that, if benefits under more than one ERISA plan are funded by one group policy, you may be required to allocate the demutualization compensation among the separate plans. Under any of the options discussed below, it will be important to ensure that the demutualization compensation is used for the benefit of the plan to which the compensation is allocable.
Prudential will, upon request, be able to provide you with a percentage estimate of the amount of compensation attributable to each plan funded under a single policy. Such amounts would be determined according to each plan’s contribution to Prudential’s surplus consistent with the actuarial contribution methodology described in the Plan of Reorganization. The availability of such estimates depends upon the completeness of Prudential’s records. Further, Prudential will undertake to implement an allocation among plans funded under a single group policy only at your express direction and only to the degree Prudential ordinarily provides such recordkeeping services. The DOL has concluded that Prudential will not act as an ERISAfiduciary solely because of its provision of such administrative services to your plan.26

If you have any questions regarding this issue, please call your Prudential account representative. If you are uncertain as to whom to call, or if you have received this material in connection with a group insurance contract now administered by Aetna/US HealthCare (and have no other group insurance in force with Prudential), please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time.

You may want to consider one or more of the following options for using demutualization compensation within your ERISA welfare plan(s).

PROVIDING NEW OR INCREASED BENEFITS UNDER A WELFARE PLAN.

One option for using a plan’s demutualization compensation is to provide new or increased benefits. New benefits could be funded either through the payment of increased insurance premiums or through the direct payment of benefits by a self-insured plan. If you decide to provide additional benefits with the demutualization compensation, you should amend the plan to reflect the new benefits, and any communications with employees describing the benefits should clearly indicate if the new benefits are temporary. You will also need to determine how to pay for any new benefits (e.g., use proceeds from the sale of Prudential Financial, Inc. stock). This approach is consistent with the requirements for bank and custody accounts under the DOL Trust Policy.

Instead of providing new or increased welfare benefits, you may wish to distribute the compensation directly to employees. (In the only reported case addressing the allocation of demutualization compensation due a plan, a court awarded the compensation directly to current and former employees who had paid premiums under the policy. See Ruocco, 903 F.2d 1232.) This approach is consistent with the requirements for bank and custody accounts under the DOL Trust Policy. If you decide to distribute the compensation to employees, you may wish to consider amending your welfare plan to specifically describe the distribution as a new plan benefit. See Section VII for an overview of federal tax issues raised by various uses of demutualization compensation by welfare plans.

FUNDING EXISTING WELFARE PLAN BENEFITS OR PREMIUM OBLIGATIONS.

Your welfare plan probably has ongoing premium obligations (insured plans) or benefit payment obligations (self-insured plans). Because ERISA states that plan assets may be used to provide benefits and defray plan expenses, it may be permissible to use the demutualization compensation to pay the plan’s current premium obligations or to fund the plan’s current benefit payments. Thus, if your plan requires employee contributions, you could institute an “employee contribution holiday” for a period of time and use the demutualization compensation to make the premium payments or to fund benefits generally paid by employees.27 If you choose a contribution holiday, you may want to emphasize the temporary nature of the holiday in communications with employees. This approach is consistent with the requirements for bank and custody accounts under the DOL Trust Policy.

You might also be able to use demutualization compensation to pay benefits or premiums that you, as employer, might otherwise pay. For example, if the premium obligations under your plan are typically shared by you and your employees, the demutualization compensation might be used to pay both employer and employee premiums. If your plan is self-insured, the compensation could be used to directly pay plan benefits, effectively reducing the amount that you might have to contribute to the plan’s benefit costs. To support this approach, you should consider amending the plan, if necessary, to clarify that the employer is required to fund the plan or make premium payments only to the extent that plan assets are insufficient to do so.
Using demutualization compensation to pay premiums or benefits that you, as employer, would otherwise pay is not one of the expressly permitted uses of demutualization compensation held in bank or custody accounts established under the DOL Trust Policy. Even if you hold demutualization compensation in trust, and therefore do not rely on the approach set forth in the DOL Trust Policy, you should be aware that using demutualization compensation in a manner that may benefit you as employer involves more risk of challenge than using the compensation to provide a contribution holiday for employees. The use of plan assets in a way that benefits the employer might be challenged as, among other things, an “inurement” to the employer in violation of the exclusive benefit rule of section 403 of ERISA. It is possible that the DOL might take this position in an enforcement action. However, in the pension plan context at least, the Supreme Court’s decision in Hughes recognized that the use of plan assets to pay benefits does not violate the anti-inurement rule of ERISA sections 403(c) (or otherwise violate ERISA) even though the use might incidentally benefit the employer. You should consult with your legal advisor if you are considering using the demutualization compensation to fund existing obligations.

**PAYING WELFARE PLAN EXPENSES.**

Because ERISA specifically authorizes a fiduciary to utilize plan assets to pay the reasonable expenses of administering the plan, you might consider using the demutualization compensation to pay the plan’s expenses. As noted above, however, paying plan expenses from demutualization compensation is not one of the expressly permitted uses of demutualization compensation held in bank or custody accounts established under the DOL Trust Policy.

Paying plan expenses is more fully reviewed in the pension and profit sharing plan discussion earlier in this Section. As with the payment of any plan expense, the plan fiduciary should review the applicable plan and ERISA provisions and consult with a legal advisor to ensure that payment of the expense is permissible.

**FUNDING FUTURE WELFARE PLAN BENEFITS.**

You might consider prefunding future plan obligations with the demutualization compensation. For example, depending upon the type of policy, the applicable tax rules, the amount involved and other factors, you may be able to hold some or all of the demutualization compensation:

- in a premium or contract stabilization reserve (“CSR”) maintained under an insurance policy providing benefits under the plan. CSRs are designed to smooth out premium fluctuations from year to year, by requiring the insurer to credit the reserve when experience is favorable and to draw upon the reserve to minimize premium increases when experience is unfavorable.
- in an Advance Premium Account (“APA”). APAs are established to hold amounts with interest until withdrawn to pay premiums due.
- to pre-fund retiree benefit obligations, such as post-retirement life insurance, in an Insurance Continuance Fund (“ICF”).

You should note, however, that your existing group insurance policy may not have a CSR, APA, ICF or other funding account currently associated with it. Even if your policy does have such an account, these accounts are not designed to hold stock of any type — Prudential Financial, Inc. or otherwise. Therefore, you will need to take certain steps to contribute the compensation to such an account (e.g., transferring the proceeds from the sale of Prudential Financial, Inc. stock to the funding account).

If you are considering using demutualization compensation to fund future benefits in these or other ways, you will need to pay particular attention to whether the use is permissible under the exclusive benefit rule of ERISA as well as the tax rules governing welfare benefit funds (discussed in Section VII).

**CAFETERIA PLANS—SPECIAL ISSUES.**

Many employers fund plans through “cafeteria” or “flexible benefit” plan arrangements. These arrangements offer participants the option to apply employer credits and their own before or after tax contributions toward the purchase of a variety of benefits (including health, life, and disability) provided under one or more ERISA plans. Significantly, a single cafeteria plan may fund more than one ERISA welfare plan and may also offer benefits not subject to ERISA regulation (e.g., dependent care accounts).
If you have a cafeteria plan, you can still use the same two-step analysis for allocating demutualization compensation. You will first be required to determine if the demutualization compensation constitutes a plan asset (see Section IV). If multiple policies are involved, this might first require identifying the policy or policies funding each plan. If you identify plan assets taking into account who paid premiums, you will then have to identify the contributions paid by employers and employees, respectively, under each policy and plan. You can then allocate the demutualization compensation among the various plans funded through the cafeteria plan. As noted in Section VII, the tax rules applicable to cafeteria plans may affect the available allocation options.

After you allocate assets to the appropriate plans, it will be important to ensure that those plan assets allocable to a particular welfare plan are used for the benefit of that plan, and no other. Possible options for using compensation attributable to welfare plans and former welfare plan participants are discussed earlier in this Section.

**VI. Programs Exempt From ERISA**

The balance of Prudential’s group policyholders hold policies that are not subject to ERISA. However, in making the voting and allocation decisions described above, these group policyholders may be subject to other federal and state laws that impose duties similar to those imposed by ERISA.

Most of our group policyholders hold their policies on behalf of ERISA-covered employee benefit plans. However, an important segment of Prudential group policies are issued to employee benefit plans and programs not subject to ERISA. While ERISA’s rules do not apply to these programs, the ERISA fiduciary requirements described above may provide a useful guide for analyzing the use of demutualization compensation. This is because state laws may impose many of the same fiduciary requirements upon group policyholders as ERISA. Importantly, ERISA, in many respects, codifies the best practices and requirements of federal and state law.

If you conclude that demutualization compensation should be allocated among participants in your non-ERISA program, it may be useful to look at the ERISA and Code guidance described above and below. In particular, the ERISA and Code authorities with respect to allocating “plan assets” among plan participants may be helpful.

In addition, group policyholders under non-ERISA programs must consider the particular state and federal laws that apply to their programs, as well as the terms of their programs. While no single statute applies to all non-ERISA programs, the Code and certain types of state laws may be applicable. We describe these laws and their possible application to use of the demutualization compensation below (as well as in the “State Law” section of the Appendix). These authorities are illustrative, are not meant to be exhaustive, and are subject to change. This material illustrates, however, that even if your group policy is not subject to ERISA, other requirements and constraints may apply. You should carefully review with your legal advisor the obligations that apply to you, as the owner of the group policy, to determine whether and to what extent you must consider the interests of persons covered under the policy in voting on the Plan of Reorganization and allocating any demutualization compensation.

**PROGRAMS EXEMPT FROM ERISA.**

<table>
<thead>
<tr>
<th>Prudential has issued group policies on behalf of the following types of programs that are or may be exempt from ERISA:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Governmental plans.</strong> State and local government pension and welfare plans are exempt under ERISA section 4(b)(1).</td>
</tr>
<tr>
<td><strong>Church plans.</strong> Church pension and welfare plans are exempt under ERISA section 4(b)(2) (unless the sponsor elects otherwise).</td>
</tr>
<tr>
<td><strong>TDAs issued to public schools.</strong> Group “tax sheltered annuities” or “tax deferred annuities” qualifying under Code section 403(b) (“TDAs”) issued to public schools are exempt from ERISA by virtue of the governmental plan exemption provided under ERISA section 4(b)(1).</td>
</tr>
</tbody>
</table>
**Employee-funded TDAs.**

- TDAs issued to charitable and tax-exempt educational institutions may also be exempt from ERISA under a “safe harbor” provided in DOL regulations. See 29 C.F.R. § 2510.3-2(f). Generally, the safe harbor limits employer involvement in the operation of the program such that the program is deemed not to be “sponsored” by the employer for ERISA purposes.

**Employee-funded “group” or “group type” insurance.**

- Certain “group” or “group type” insurance programs, typically group life insurance, may be exempt from ERISA under DOL regulations similar to the “safe harbor” regulations applying to group TDAs described above. See 29 C.F.R. § 2510.3-1(j). Generally, this regulatory safe harbor prohibits employer contributions and limits employer involvement in the operation of the program. Under the regulations, employers may receive no compensation in connection with these programs and, thus, may not qualify for the safe harbor if they retain the demutualization compensation.

**Group or individual IRAs.**

- Another regulatory “safe harbor” under ERISA applies to both individual IRAs and “group” IRAs (IRAs sold under a group annuity contract). See 29 C.F.R. § 2510.3-1(j). This regulation prohibits employer contributions, employer involvement in the operation of the program, or the receipt by the employer of any compensation in connection with the IRA program.

**Keoghs and other “owner” plans.**

- Longstanding DOL regulations generally provide that benefit plans or programs that cover only the owners of a business are not maintained by an employer and, thus, are not subject to ERISA. See 29 C.F.R. § 2510.3-3(b). This regulation commonly applies to “Keogh” pension plans for businesses that have no common law employees as well as plans that cover only a sole shareholder and his or her spouse. (Note, however, that IRS-qualified plans still must hold all plan assets in trust and/or insurance and annuity contracts.)

**Excess benefit plans.**

- Unfunded “excess benefit” plans, as defined under ERISA section 3(36), are exempt under section 4(b)(5) of ERISA. These programs provide benefits in excess of the benefit limitations under Code section 415.

**‘Top-hat’ plans.**

- Section 401(a)(1) of ERISA exempts from ERISA’s fiduciary provisions unfunded deferred compensation plans that provide benefits to highly compensated employees (so-called “top hat” plans).

**SPECIAL ISSUES FOR TDAS, IRAS AND EMPLOYEE-FUNDED “GROUP” ARRANGEMENTS.**

- TDAs, employee-funded group or group type insurance policies and IRAs are exempt from ERISA either under the statute or under DOL regulations.

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You should note the following information regarding these arrangements. Prudential has received an advisory opinion from the DOL concluding that the exemption under the DOL “safe harbor” regulations for employee-funded TDAs, employee-funded “group” or “group type” insurance, and Group IRAs is not affected if the employer votes on the Plan of Reorganization and/or takes action to allocate demutualization compensation. DOL concluded that such actions in the context of Prudential’s demutualization would not constitute impermissible employer involvement so as to limit the availability of the safe harbor.

A group policyholder that relies on the “group” or “group type” safe harbor may violate the terms of the safe harbor if it retains demutualization compensation (cash or stock) for its own use. 29 C.F.R. § 2510.3-1(j). While the same potential issue exists for TDAs and Group IRAs under their respective “safe harbors,” under the Plan of Reorganization all such arrangements will receive (for tax reasons) “policy credits.” These forms of compensation generally may only be used to provide benefits to participants under the TDAs or Group IRAs offered by Prudential.

A copy of the DOL advisory opinion may be found on our website at www.prudential.com.
REQUIREMENTS UNDER THE INTERNAL REVENUE CODE.

Various provisions of the Code (some of which predate ERISA) duplicate many of ERISA’s substantive requirements. In Section IV, we noted that IRAs not subject to ERISA are subject to the prohibited transaction excise tax penalties under Code section 4975 that generally mirror ERISA’s prohibited transaction provisions. The Code also contains some substantive legal requirements that apply to retirement plans regardless of whether the plans are covered by ERISA.

The Code includes exclusive benefit rules.

Many state and local governments have established tax-favored retirement plans that are subject to the requirements of the Code even if the program is otherwise exempt from ERISA’s requirements. Like ERISA-covered pension and profit sharing plans, compensation paid to tax-qualified governmental plans will be deemed assets of the plan and should be used to pay plan benefits and reasonable expenses. For example:

- State and local governments frequently establish defined benefit plans and defined contribution plans subject to sections 401(a) or 403(a) of the Code. For such plans to receive favorable tax treatment, all plan assets generally must be held for the exclusive benefit of participants and beneficiaries and generally may not revert to the employer.
- Code section 457 sets forth tax rules for certain deferred compensation arrangements established by state and local governments. Section 457(g)(1) requires that all assets and income of such plans be held in trust and/or annuity contracts for the exclusive benefit of participants and their beneficiaries.

You should consult with your legal advisor as to the application of these and other tax rules that may apply to your retirement programs.

GOVERNMENTAL PENSION PLANS MAY BE GOVERNED BY FIDUCIARY REQUIREMENTS SIMILAR TO ERISA’s FIDUCIARY REQUIREMENTS.

“Governmental” pension and welfare benefit plans (that is, benefit plans sponsored by federal, state, or local governments or instrumentalities) are exempt from ERISA’s requirements. However, these arrangements are subject to other laws that impose standards similar to those imposed by ERISA on group policyholders holding policies on behalf of governmental plans.30

With respect to governmental pension plans in particular:

- State laws applicable to governmental pension plans generally include the exclusive benefit rule, requiring all plan assets to be held for the exclusive benefit of participants and beneficiaries. Many states have adopted this requirement even for governmental plans that are not subject to the “exclusive benefit” language of Code section 401(a)(2).
- State laws applicable to governmental pension plans also may require that all assets of the plan be used for the exclusive purpose of paying benefits and administrative costs.
- Many states have statutory or constitutional provisions requiring members of boards appointed to supervise retirement programs to be deemed “fiduciaries” of such programs who must act generally in accordance with state law fiduciary principles that are similar to those imposed by ERISA.
- State laws may require assets of governmental plans to be held in trust, subjecting plan fiduciaries to a full range of state law trust duties, including the “duty of loyalty”. The duty of loyalty requires a fiduciary to carry out its duties solely in the interests of the trust beneficiaries, without regard to the fiduciary’s own interests.
- In addition to the specific statutory constraints placed upon governmental pension plan sponsors and fiduciaries, governmental plan group policyholders should evaluate (with the assistance of their legal advisor) other restrictions that may be imposed on the use of demutualization compensation. In particular, the use of demutualization compensation may be subject to negotiation under governmental and other types of
pension and welfare benefit plans that are collectively bargained. A collective bargaining agreement may affect the ability of a governmental employer to unilaterally decide or make compensation-related decisions. There may be additional constraints—both statutory and contractual—that may apply in your particular circumstances. You should discuss these issues with your legal advisor.

Governmental plans that hold group policies must consider whether demutualization compensation paid pursuant to the group policies is a plan asset. As discussed above, under analogous ERISA provisions, it is likely that compensation paid by Prudential in connection with group annuity contracts will be treated as an asset of the plan funded by the contract.

While it may be possible for a policyholder to conclude that demutualization compensation does not constitute a plan asset of a governmental plan, you should consult with your legal advisor before using the demutualization compensation for purposes other than paying plan benefits or expenses.

Other Types of State Laws May Apply to Non-ERISA Group Policies.

Certain types of state laws may impose requirements or give rise to potential issues concerning demutualization compensation and its appropriate use. We generally describe these types of state laws below. As noted earlier, the descriptions below and in our Appendix are intended to be illustrative, not exhaustive. You should consult with your legal advisor to determine whether and how these types of authorities might apply in your particular situation.

State insurance law governing payment of dividends on group policies provides a guide for the use of demutualization compensation.

State insurance law may impose affirmative obligations on holders of group policies that you should consider before making any decisions on the appropriate use of demutualization compensation. Significantly, many states require group life, health and disability policyholders to use dividends and premium refunds, to the extent they exceed the policyholder’s expenditures under the policy, solely for the benefit of the insured or their beneficiaries, similar to the exclusive benefit and exclusive purpose rules of ERISA. A court or regulatory agency might be guided by these statutory provisions in reviewing particular uses of demutualization compensation, even though the compensation is not expressly covered in these statutory provisions. Further, courts have enforced claims by insured employees for premium refunds or dividends paid to the policyholder under circumstances where the employees have paid a portion of policy premiums.

Demutualization compensation could be viewed as analogous to dividends and premium refunds because the compensation is distributed to you and other policyholders on account of your ownership of the policy. Membership interests are valuable, though intangible, rights associated with your policy. The conversion of these rights to compensation and the distribution of this compensation to our policyholders resembles dividend and refund concepts under state insurance law. However, the exchange of your membership interest for compensation may be characterized differently under other applicable law (federal income tax law, for example).

You should carefully review with your legal advisor the state insurance law applicable to your group policy to determine whether you are subject to these or similar requirements in determining the proper distribution of demutualization compensation.

State trust law and trust-type remedies may control the use of demutualization compensation.

If your non-ERISA group policy is held by a trust, you also must consider state law requirements in determining the proper distribution of demutualization compensation. As noted above, ERISA’s fiduciary provisions are derived in large part from state trust law. A group policy held pursuant to a trust under state law, like a group policy held under ERISA, is subject to the duty of loyalty. The duty of loyalty prohibits a trustee from benefiting itself through the use of trust assets, and a trustee who breaches this duty is liable for any amount improperly gained. You should consider whether the duty of loyalty or specific trust requirements prohibit you from using the demutualization compensation for any purpose other than for the benefit of the individuals covered under the group policy.

Demutualization compensation may be subject to a resulting trust under state law.

Even if your group policy is not held pursuant to an express trust, many states recognize a “resulting trust” that may offer the same protections. Courts have found a “resulting trust” where one party pays the purchase price for property titled in the name of another and the circumstances indicate that the purchaser did not intend the
property to be a gift.\textsuperscript{35} Individuals covered under a group policy “titled” in the name of the group policyholder who have paid all or a portion of the policy premiums might argue that they did not intend the payment of premiums to be a gift to the group policyholder and therefore they are entitled to a share of the “property” (the demutualization compensation) in proportion to their premium payments. Such individuals might bring a court action to impose a resulting trust on the demutualization compensation, even though the compensation is distributed to the policyholder. You should carefully consider with your legal advisor whether your proposed use of demutualization compensation will subject you to the risk of this type of lawsuit.

In addition, under state law a court may impose a “constructive trust” on property to compel a person who unfairly obtains an interest in the property to hold it for the benefit of the person who, in equity or good conscience, is the rightful owner.\textsuperscript{36} Unlike a resulting trust, establishment of a constructive trust does not require one party to have paid for the property at issue. Instead, imposition of a constructive trust generally requires a showing that the party who obtained title to the property, often as a result of a fiduciary or other confidential-type relationship with the claimant, would be unjustly enriched at the expense of the claimant if he or she kept the property. This remedy has been used in connection with the merger of insurance companies to preserve assets sought in a lawsuit by policyholders.\textsuperscript{37} As a general matter, a lawsuit seeking to impose a constructive trust similarly could be used by individuals covered under a group policy who claim a share of compensation distributed to the policyholder pursuant to the demutualization.

Under state contract law, group insurance policies often are construed as contracts between the policyholder and the insurer intended for the benefit of the insured employees or individuals.\textsuperscript{38} In addition, documents describing your group program, including formal plan documents as well as booklets or other written explanations, descriptions or communications that you have provided to the program’s participants, may be viewed as establishing a “contract” intended to benefit the individuals covered under the program. Most states recognize the right of a third party intended to benefit under a contract — a “third party beneficiary” — to enforce his or her rights under the contract.\textsuperscript{39}

Many of our group insurance policies or annuity contracts contain specific language to protect the rights of individual participants and certificate holders covered under group arrangements. These provisions could give rise to contract claims under state law by insured individuals as third party beneficiaries. For example, many of our TDA contracts issued to non-ERISA programs and group policies issued under association and multiple employer arrangements are held on behalf of the employer or association, but do not provide for contributions by the employer or association. Generally, our TDA contracts, in particular, specify that the rights of individual certificate holders with respect to any contributions and earnings generated under the contract are “nonforfeitable”. The TDA contracts also specify that any portion of Prudential’s divisible surplus paid under the contract will be credited to participant accounts, not to the employer or group contract holder. In addition, consistent with state insurance law protections governing the crediting of dividends, our group insurance policies issued to non-ERISA group policyholders generally provide that any dividends paid under the contract in excess of the contract holder’s costs shall be applied for the “sole benefit” of insured persons. As discussed earlier, demutualization compensation is not technically a “dividend” or “earnings”. However, we believe that the language in our contracts describing these types of distributions may be relevant to group contract holders in interpreting their responsibilities under the contracts.

In addition to the language contained in the group policy, documentation describing your non-ERISA group program may include provisions similar to those found under ERISA, such as the exclusive benefit rule. This language may provide specific guidance on the appropriate use of demutualization compensation, as well as contractually enforceable rights for participants in your programs. As under an ERISA-covered program, you and your legal advisor should review all of the documents governing your group programs to determine your contractual responsibilities and whether individuals covered under the group policy could claim that they are third party beneficiaries entitled to all or part of the demutualization compensation.
## VII. Federal Tax Considerations

### A NUMBER OF IMPORTANT TAX ISSUES ARE RAISED FOR PENSION AND WELFARE PLANS.

This section reviews the federal tax treatment of group policyholders with respect to the receipt of demutualization compensation. The information provided in this Guide supplements the information provided in the Policyholder Information Booklet. Although it is possible to provide some general principles, the tax treatment of benefit plans in demutualization transactions has been the subject of very little IRS guidance. As with the ERISA issues, the analysis often varies based on the structure of the recipient plan and the precise use or allocation of the compensation. This material does not address any state income tax matters. Accordingly, you should consult with your legal advisor regarding your particular tax situation and the consequences of available options.

In general, the discussion of tax-favored retirement plans is intended to cover group policyholders of plans and arrangements described in Code sections 401(a), 403(a), 403(b), 408, 408A, and 457. Exceptions are noted as appropriate.

### FORM OF COMPENSATION:

The federal income tax treatment of the receipt of demutualization compensation generally depends on the form of compensation (stock, cash or policy credits) and the tax status of the recipient. The key principles are summarized below, along with some important exceptions. The tax results described below for stock, cash or policy credits have been confirmed by the IRS in rulings issued to Prudential.

#### Stock.

The receipt of Prudential Financial, Inc. stock in the demutualization process is not subject to federal income tax at the time of its receipt. If the stock is received by a tax-exempt policyholder (e.g., trustee of a tax-favored retirement trust), any later sale or other disposition of the stock also should not result in federal income taxation to the policyholder. (Welfare benefit funds involve special considerations, discussed below.) On the other hand, if a taxable policyholder later sells or disposes of the stock, the full sales price is subject to tax under the IRS position that the stock has a “zero” cost basis. The sales price generally will be treated as either long-term or short-term capital gain, depending on the holding period of the stock, which includes the period the policyholder held the policy before the demutualization. A one-year holding period is currently required for long-term capital gain treatment.

#### Cash.

The receipt of cash by a group policyholder generally is not taxable if the policyholder is a tax-exempt entity (e.g., trustee of a tax-favored retirement trust). The cash generally will be taxable if distributed directly to an otherwise taxable policyholder. In this case, the cash will be taxed as long-term or short-term capital gain, depending on whether the policyholder owned the policy for more than one year at the time the cash is received. (Again, welfare benefit funds involve special considerations, discussed below.)

#### Policy Credits.

Policy credits (i.e., policy or contract enhancements) are granted to policyholders who hold policies under IRA and TDA arrangements, and to persons who hold individual policies issued under or distributed from plans described in Code section 401(a) or 403(a). The receipt of policy credits does not result in current federal income tax, excise tax, or penalties, or adversely affect the tax-favored status of these plans. When ultimately paid under the policy, contract, or certificate, these amounts will be taxed under rules that generally govern the distribution of benefits from the particular type of retirement plan. (Policy credits are discussed in more detail in the Policyholder Information Booklet and in section 8.2 of the Plan of Reorganization.)

### DISTRIBUTION TO RETIREMENT PLAN PARTICIPANTS.

If the policy is held under a tax-favored retirement plan, and the compensation received in the demutualization is paid by the group policyholder in a lump sum to individual participants, it will be treated as ordinary income and taxed to each recipient the same as would any other nonperiodic distribution from that type of plan. Regardless of the form of compensation (stock, cash, or policy credits), the current distribution by the group policyholder of such amounts under most types of tax-favored retirement plans (including tax-qualified pension plans, and Code sections 401(k), 403(b), and 457 plans) could adversely affect the tax status of the plan, the participant or both. Most tax-favored plans are not able to make any plan...
distributions prior to a “triggering event” — hardship, termination of employment, attainment of age 59 1/2, death, or disability — and distributions generally must be in accordance with the specific terms of the plan. Even if distributions are permitted, an additional 10 percent income tax generally applies to withdrawals before age 59 1/2 from most forms of tax-favored retirement plans, and direct rollover requirements may be applicable. For qualified pension plans and ERISA-covered 403(b) plans, spousal consent generally is required for any distribution that is not in the form of a qualified joint and survivor annuity.

**IRS Qualification Rules May Affect the Use or Allocation of Compensation.**

For pension and savings plans qualified under Code sections 401(a) or 403(a), the exclusive benefit/non-reversion requirements of Code section 401(a)(2) for trusted plans, and the analogous requirements imposed by Code section 404(a)(2) on nontrusted plans, effectively require that demutualization compensation be held by the plan and used for plan purposes. The receipt of compensation by a tax-favored retirement plan generally will not have current federal tax consequences because it is neither a contribution to, nor distribution from, a plan, but merely a return on the plan’s investment for tax purposes. Sponsors of defined benefit plans should consider the possible impact on the minimum funding requirements of section 412 of the Code and/or the maximum deduction limits of section 404 of the Code (if employer contributions are being made). Also, the rules for “annual additions” under defined contribution plans, and for allocations of earnings under defined contribution plans subject to IRS nondiscrimination rules, warrant some discussion (see below). If a special allocation method is to be used, the policyholder may want to consider making any necessary plan amendments before the compensation is actually received and allocated.

The IRS generally requires that a tax-qualified defined contribution plan allocate all plan assets to participant accounts at least once a year. Your plan document may provide for more frequent allocations.) There is reasonable flexibility under the Code on when amounts received by a plan may be allocated to participant accounts. For example, contributions and other amounts received by a plan after the end of a plan year may be taken into account for the immediately preceding year if the amount is allocated to participant accounts as of a date within such prior plan year. In general, the requirement to allocate an amount to the account of a participant as of a particular date means the participant must have a right to the allocation as of that date, without a requirement to continue to perform services or any other condition. These principles may be particularly relevant where the distribution of demutualization compensation occurs near the end of a plan year. The following example illustrates how a plan sponsor might comply with the IRS’ requirement that amounts be allocated by the end of a plan year if demutualization compensation is paid near the end of the year. You should, however, consult with your legal advisors on these and related allocation issues.

Example — Assume that Prudential’s demutualization becomes effective November 1, 2001, and that a calendar-year defined contribution plan receives its distribution of compensation on December 27, 2001. The plan sponsor reviews various possible methods for allocating the compensation and determining which participants are entitled to an allocation. Based on its review, on March 31, 2002, the employer decides to allocate the stock on a per capita basis to each active participant in the plan as of December 27, 2001 (the date the plan received the compensation) or December 31, 2001 (the last day of the plan year) — whether or not the person was still employed or covered by the plan on March 31, 2002 — and amends the plan on or before such date to provide for this allocation retroactive to November 1, 2001.

Sponsors of tax-favored retirement plans that are subject to IRS nondiscrimination rules (e.g., non-governmental 401(a), 403(a), and certain 403(b) plans) should determine whether the method of allocating the compensation is consistent with the terms of the plan, and does not discriminate in favor of highly compensated employees (as defined in Code section 414(q)). Defined contribution plans subject to Code section 415(c) (including qualified plans described in Code sections 401(a) and 403(a), and Code section 403(b) plans) are also subject to limits on the amount of “annual additions” (the sum of employer contributions, employee contributions, and forfeitures) that may be allocated in any
year to a participant’s account. “Annual additions” are limited to the lesser of 25 percent of the participant’s compensation from the employer or $35,000. In general, allocations of demutualization compensation to participant accounts may be treated as investment earnings and not “annual additions”, as long as the method of allocation is consistent with traditional methods of allocating earnings under defined contribution plans. However, the IRS has not provided any published guidance on the issue of demutualization compensation.44

**RULES AFFECTING VEBAS AND WELFARE PLAN PARTICIPANTS.**

Special and complex rules apply to tax-exempt VEBAs described in Code section 501(c)(9) and to other welfare benefit funds described in Code section 419(e). Although there is limited IRS guidance in the area, premium stabilization reserves and certain experience-rated group insurance arrangements may fall under these welfare benefit fund rules in some circumstances. A retired life reserve arrangement normally would be a “welfare benefit fund”, although such a reserve may not itself hold stock.45

**VEBAS AND OTHER WELFARE BENEFIT FUNDS.**

In general, a tax-exempt Veba is nevertheless taxable on “unrelated business income”, defined as the lesser of its investment income or the amount of its assets in excess of its Code section 419/419A account limit for the year.46 Different account limits apply to different welfare benefits, such as active and retiree life insurance, short and long-term disability benefits, and active and retiree medical benefits. If a Veba received cash compensation, it would be taxable on that compensation to the extent its assets exceeded its account limit. If a Veba’s assets did not exceed its account limit, it would not be taxable on the cash compensation.

If a Veba received stock compensation, it would not be a taxable event. However, the stock received could increase the value of the total assets held by the Veba, so that its assets might exceed its account limit. This could effectively subject to income tax other investment income of the Veba, which would have been exempt if the Veba’s assets were within its account limit. If the stock is subsequently sold, the compensation would be subject to tax at the Veba level in the year of sale to the extent that Veba assets exceeded its applicable account limit for the year.

The above rules do not apply to collectively bargained VEBAs, VEBAs maintained by tax-exempt organizations (or a group of such organizations), and certain employee-pay-all VEBAs. For these VEBAs, the receipt of stock or cash compensation generally would not have any tax consequences.

A non-exempt welfare benefit fund, such as a taxable trust, would be subject to tax on the compensation received in a demutualization, generally in the same manner as any other non-exempt taxpayer. Thus, if it received cash, the cash normally would be taxable; if it received stock, it would not be currently taxable.

An employer’s deduction for contributions to a Veba or other welfare benefit fund is reduced by the fund’s after-tax income. Thus, to the extent the demutualization compensation is income of the fund, it may have the effect of reducing the employer’s deductible contribution for the year.47

Section 4976 of the Code imposes a 100 percent excise tax on “disqualified benefits”, including reversions, under welfare benefit funds. For example, an employer’s improper use of compensation that belongs to a Veba could be subject to this tax.

**CUSTODIAL AND OTHER ACCOUNTS—TAX TREATMENT.**

The principal tax issue raised by the use of insurance company custodial account agreements (like those discussed earlier in the ERISA trust requirement section) to hold the compensation for welfare plans is whether they might be considered “welfare benefit funds” within the meaning of section 419(e) of the Code. If they are, then, because the accounts themselves would not be tax-exempt, the “deemed unrelated business income” rule of section 419A(g) would apply. That rule, in effect, requires computation of the unrelated business income the fund would have had if it were exempt (like a Veba) and the imputation of that amount of income to the employer.
Although there are arguments that the accounts are funds, arguments can be made that they are not. First, the accounts would not fall within any one of the three insurance company arrangements that the IRS said it would treat as “funds” in its most recent pronouncement in this area (Announcement 86-45). Second, the accounts do not fall within the general scope of arrangements that the welfare benefit fund rules were designed to address (involving deductible employer contributions, tax-free growth, and exclusion from income when the benefit is paid).

In particular, to the extent that they hold amounts attributable to employee contributions, the accounts should not be “funds”. Employee after-tax contributions do not raise the deduction issues associated with employer contributions. By analogy to an exception for employee-pay-all VEBAs found in Code section 419A(f)(5), amounts held in the accounts (including earnings) solely for employees should not be subject to tax, and should not raise the “deemed unrelated business income” issue. In any case, where the employer has no right to use the funds for its own benefit, any earnings on accounts attributable to employee contributions should not be taxable to the employer.

We note that IRS Announcement 86-45 indicates that ICFs (often referred to as “retired lives reserves”, as in the Announcement) are “welfare benefit funds”. The status of CSRs and APAs under the Announcement is less clear, but the above arguments that custodial accounts should not be treated as “welfare benefit funds” also should be applicable to such contractual arrangements.

Instead of establishing an account with an insurance company, an employer could, consistent with the DOL Trust Policy, place the compensation in the name of the plan in an interest-bearing account. Under the current regulations under Code section 419(e)(3), relating to the treatment of any “account held [to provide welfare benefits] for an employer by any person”, such an account would not be a welfare benefit fund. As discussed above, if you hold demutualization compensation in an account described in the DOL Trust Policy, your ability to use the compensation to pay plan expenses or fund existing benefits may be limited. You should consult with your legal advisor on the appropriate approach to take in your particular circumstances.

The distribution of demutualization compensation directly to participants covered by a welfare plan normally would be taxable to them. It is unclear whether such a distribution would be subject to employment and withholding taxes, and whether participants have a “tax basis” in such a distribution (i.e., to the extent insurance premiums were paid by employees on an after-tax basis). It is possible that the full amount of the distribution may be subject to withholding and employment taxes as taxable income. However, there is some support for the position that pro rata distributions to members based on premiums paid may be treated as nontaxable premium rebates (as long as no tax deduction was taken for the premiums), and other tax positions may be supportable.

The use of demutualization compensation (i.e., cash or stock) to provide additional welfare benefits, or as a premium holiday for employees, also may have tax implications at the employee level. For example, if the compensation is used to increase the amount of group-term life insurance provided to employees, then the participants’ imputed income under Code section 79 may increase. Similarly, if the compensation is used to pay premiums for disability insurance normally paid by participants, then the taxability of disability benefit payments could be affected.

The use of compensation to provide additional benefits, or to subsidize amounts normally paid by employees for their benefits, raises complex issues under cafeteria or flexible benefit plans governed by section 125 of the Code. In such cases, you should consider, among other things, the effect on employee elections, including IRS restrictions on mid-year changes. One possible approach is to use the compensation to provide an additional “flex” credit, and to make the credit available at the beginning of the next plan year so participants can take it into account in making their elections under the plan for such year.

Finally, any use of compensation to provide additional welfare benefits should be checked against the nondiscrimination rules that apply to the particular benefit (e.g., group-term life insurance) or to any benefit provided through a Veba.
IRS REPORTING.

Earlier, we described the ERISA plan-level reporting (e.g., Form 5500) approach for compensation received from Prudential’s demutualization. There is, however, another level of reporting required by the IRS when an employer receives compensation that is determined to be a plan asset and distributes it to plan participants. These IRS reporting and withholding rules are not clear. One approach would be to include the amount in Box 1 (“Wages”) of Form W-2 and withhold tax accordingly. An approach that involves some risk would be to include the amount in Box 14 (“Other”) on Form W-2; this recognizes that the employer is making the payment on behalf of the plan, but the payment is not wages. A third approach, which may involve greater risk of being challenged by IRS, is to report on Form 1099-MISC each payment of $600 or more with no withholding. Still other reporting approaches are possible. The failure to withhold tax and/or properly report distributions may result in various tax liabilities and penalties under the tax law. **You should consult with your legal advisor on this and other tax issues to determine the best approach in your particular circumstances.**

Prudential will report and withhold on cash payments as required by law.

VIII. Conclusion

As we noted at the beginning of the Guide, we intend to provide you, our group policyholders, with as much information as possible about a variety of legal obligations under ERISA and other laws that may apply to your particular program or plan. We hope that you and your legal advisor find this Guide provides helpful information. **As we have stated earlier, neither Prudential nor the Groom Law Group, Chartered should be viewed as providing you with legal advice regarding any of the issues addressed in this Guide. You should consult with your legal advisor regarding the application of this information to you and your group policy.**

If you have any questions regarding this material, or need additional copies, please call your Prudential account representative or access our website at [www.prudential.com](http://www.prudential.com). If you are uncertain as to whom to call, or if you have received this material in connection with a group insurance contract now administered by Aetna/US HealthCare (and have no other group insurance in force with Prudential), please call our toll-free hotline at 1-877-264-1163, 8 a.m. to 9 p.m., Monday through Friday, Eastern Time.
ERISA Authority

1 DOL has issued a number of opinions addressing whether an association plan is an ERISA plan. See, e.g., DOL Adv. Op. 86-08 (Feb. 3, 1986). DOL and the courts have recognized that when an association plan does not qualify as an ERISA plan, employers participating in the association will be deemed to have established their own ERISA plans. DOL Adv. Op. 86-08; Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982).


3 See LTR 200011063 (Dec. 20, 1999).


5 See generally DOL Trust Policy at 3.

6 DOL Trust Policy at 3-4.


9 See IRC § 404(a)(2) (nontrusteed plans); IRC § 401(a)(2) (trusteed plans).

10 DOL Trust Policy at 2.

11 Id. This reflects DOL’s traditional view that an employer’s premium payments are not plan assets. See DOL Adv. Op. 77-92 (May 26, 1977).

12 DOL Trust Policy at 2.

13 See Memorandum from R. Sandler to C. Lerner, DOL Legal Analysis of Premium Refunds, Credits or Dividends on Experience Rated Contracts (Apr. 25, 1994) (“DOL Dividend Analysis”). A copy of the DOL Dividend Analysis may be obtained at Prudential’s website at www.prudential.com.

14 See Letter from Mabel Capolongo, Regional Director, Philadelphia Region, Pension and Welfare Benefits Administration, Department of Labor (Feb. 24, 1998) (investigating group policyholders handling of Trigon Healthcare Inc. demutualization compensation attributable to employee contributions). A copy of the DOL’s audit letter may be obtained on Prudential’s website at www.prudential.com.


16 In Hughes Aircraft Co. v. Jacobson, 119 S.Ct. 755 (1999), the Supreme Court rejected participants’ claim that they have an interest in the surplus attributable to employee contributions to a defined benefit pension plan.


20 See Hughes Aircraft Co. v. Jacobson, 119 S.Ct. 755 (1999). In Hughes, plan participants claimed that the employer’s use of pension plan surplus attributable, at least in part, to employee contributions violated ERISA’s “anti-inurement rule.” That rule prohibits the inurement of plan assets to the benefit of an employer. Because the employer’s obligation to fund the plan was effectively reduced by the existence of the surplus, participants alleged a violation when the employer failed to increase benefits. The Supreme Court held that the use of plan assets to provide benefits authorized under the plan could not constitute a prohibited inurement. But see Ruocco v. Bateman, Eichler, Hill, Richards, Inc., 903 F.2d 1232, 1238 (9th Cir. 1990).


23 ERISA section 404(c) and the regulations thereunder provide that if a participant exercises control over the assets in his account in accordance with the rules provided in the regulation, no fiduciary will be liable for any investment loss that results from the participant’s exercise of control. An exercise of control by a plan fiduciary, rather than the participant, is not insulated from liability. See ERISA § 404(c); 29 C.F.R. § 2550.404a-1 (discussed in Section IV).

24 If demutualization compensation is paid in connection with an insurance contract purchased with plan assets, a policyholder might conclude that the compensation is a plan asset even though the plan has been terminated. In that event, the disposition of the compensation might depend upon the terminated plan’s provisions for distribution of assets and for reversion. If, as DOL has recently suggested, compensation distributed with respect to a plan that no longer has any participants need not be treated as plan assets, ERISA will not regulate the use of those assets. E.g., 63 Fed. Reg. 69317 n.7 (MONY demutualization exemption).


27 DOL settled a fiduciary action against an employer who had retained insurance dividends attributable to employee contributions by allowing the employer to provide a premium holiday to current plan participants. See Reich v. Outboard Marine Corp., Consent Order and Judgment (No. 94 C. 6479, Aug. 17, 1995).

28 Hughes Aircraft Co. v. Jacobson, 119 S. Ct. at 762-63. In addition to Hughes, the Supreme Court’s decision in Lockheed Corp. v. Spink, 517 U.S. 882 (1996), may also be helpful. In that case, the Court rejected an employee’s claim that a plan’s enforcement of an early retirement option conditioned on the employee’s execution of a release of his employment claims against the employer violated ERISA Section 406(a)(1)(D) because the release benefited the employer. Section 406(a)(1)(D) prohibits a fiduciary from using plan assets for the benefit of a party in interest, such as a sponsoring employer. See also DOL Adv. Op. 2001-01A (favorably citing Hughes and Spink in discussing incidental benefits).


State Law Authority

Representative State Laws Applying to Governmental Plans

30 The following state authorities illustrate the types of obligations that apply to group policies held by governmental plans.

Alabama: Ala. Const. Amend. no. 472 (under the state constitution, the exclusive purpose rule applies to assets, proceeds, or income of the teachers’, employees’, state police, public and judicial retirement systems, or any successor systems thereto); Ala. Code § 36-27-25 (no board member or employee of the board may have a direct interest in the gains or profits of any investment or, directly or indirectly use the gains or profits of any investment except to make payments authorized by the board); Ala. Code § 36-27A-4 (all investments of the Public Employees Individual Retirement Account Fund are subject to the same requirements as the State Employees’ Retirement System); Ala. Code § 16-25-20 (board of trustees of the Teachers Retirement System subject to the restriction on gains or profits of investments); Ala. Code § 36-21-66 (funds of the Alabama Peace Officers’ Annuity and Benefit Fund held in trust).

Alaska: Alaska Stat. § 14.25.180 (under teachers’ retirement provisions, State Pension Investment Board is the designated fiduciary, and must act only in regard to the best financial interests of the plan and beneficiaries); Alaska Stat. § 39.35.080 (funds of the Public Employees’ Retirement System managed by the State Pension Investment Board under the same duties established in regard to the teachers’ retirement trust fund).

Arizona: Ariz. Rev. Stat. § 38-718 (investment manager of Arizona State Retirement System shall have the highest professional and fiduciary recommendations, and shall not directly or indirectly have any interest in the gains or profits from investments); Ariz. Rev. Stat. § 38-848 (all Public Safety Personnel Retirement System funds, including income from investments and from all other sources, shall be retained for exclusive benefit of members; fund manager shall not use fund assets except to make current and necessary payments).

Arkansas: Ark. Code Ann. § 24-2-205 (assets of the Public Employee Retirement Plans shall be held in trust); Ark. Code Ann. § 24-2-207 (all assets and income of any public employee retirement system shall be held for the exclusive purpose of providing benefits and paying administrative expenses); Ark. Code Ann. § 24-7-402 (assets of the Teacher Retirement System are separated into a single trust fund with its own board of trustees); Ark. Code Ann. § 24-7-403 (assets of the Teacher Retirement System shall be held for the sole purpose of paying benefits and making disbursements in accordance
with statute and no board member or employee of the board shall use fund assets, directly or indirectly, except to make current and necessary payments authorized by the board).

**California:** Cal. Const. art. 16, § 17(a)-(c) (under state constitution, exclusive purpose rule applies to public pension and retirement systems and assets of public pension and retirement systems are held in trust; retirement board members are subject to exclusive purpose rule when managing plan assets); Cal. Gov’t Code § 20151 (retirement board officers and employees subject to duty of loyalty); Cal. Gov’t Code § 21664 (long term care fund for public employees subject to exclusive benefit rule and held in trust); Cal. Gov’t Code § 22772 (fiduciary obligations applicable to retirement board also apply with respect to administration of health plan for state employees).

**Colorado:** Colo. Rev. Stat. §§ 22-64-112(2), -205(12), -206(6)(c), (d), -207(1), -208 (public school boards of education under duty of care to invest retirement funds under standards prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs and in conformity with Colorado Uniform Prudent Investor Act, as well as under exclusive purpose rule and fiduciary standard); Colo. Rev. Stat. § 24-51-207 (trustees of Public Employees’ Retirement System are under duty of care to invest retirement funds under standards prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, as well as under exclusive purpose rule); Colo. Rev. Stat. § 24-52-102(1)(d)(I), (2)(a) (Public Employees’ Deferred Compensation Plan to be administered under exclusive purpose rule); Colo. Rev. Stat. § 24-54-112 (retirement board of County, Municipal, and Special District Officers’ and Employees’ Retirement System to invest funds in accordance with Colorado Uniform Prudent Investor Act); Colo. Rev. Stat. §§ 31-30-5.212, -503, -803 (Uniform Prudent Investor Act and exclusive benefit rule apply to Fire-Police Old Hire Pension Plans); Colo. Rev. Stat. §§ 31-31-302, -602, -703 (Uniform Prudent Investor Act applies to Fire-Police New Hire Pension Plans); Colo. Rev. Stat. § 31-31-901(3) (fire and police members’ deferred compensation fund subject to exclusive purpose rule).

**Connecticut:** Conn. Gen. Stat. § 5-155a(c) (trustees of state employees retirement system’s retirement commission are fiduciaries and must act with care, skill, prudence, and diligence, as well in conformance with applicable collective bargaining agreements).

**Delaware:** Del. Code Ann. tit. 9, § 4318 (trustee of pension fund for Kent County employees shall act as prudent man and no termination or amendment may divert any part of the Fund to any purpose other than the exclusive benefit of employees or their beneficiaries).

**District of Columbia:** D.C. Code Ann. §§ 1-627.13, -741 (exclusive purpose rule and fiduciary and prudent individual standards apply to trustees of district’s retirement system).

**Florida:** Fla. Stat. ch. 121.30 (exclusive benefit and exclusive purpose rules govern retirement plans covering state and local government employees, teachers, highway patrol, justices, and judges); Fla. Stat. Ch. 112.215(10) (assets of deferred compensation plan established under Code section 457 for state and local employees must be held in trust for the exclusive benefit of participants and beneficiaries as required by Code section 457(g)).

**Georgia:** Ga. Code Ann. § 47-2-32 (no member or employee of the board of trustees of the Employees’ Retirement System of Georgia may have any personal interest in the gains or profits from investments or use gains or profits from investments, directly or indirectly, except to make payments authorized by the board of trustees in accordance with the statute).

**Hawaii:** Haw. Rev. Stat. § 88-127 (exclusive use and benefit rules apply to public officers and employees retirement system).

**Idaho:** Idaho Code § 59-1301 (fiduciaries of Public Employees Retirement System funds must discharge their duties with respect to the funds solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).

**Illinois:** 40 Ill. Comp. Stat. Ann. 5/1-101.2, 5/1-109 (public employee retirement system uses ERISA definition of fiduciary and subjects fiduciaries to requirements of ERISA section 404, including exclusive benefit rule and duty of loyalty); 40 Ill. Comp. Stat. Ann. 5/24-101, 5/24-105, 5/24-105.1; Ill. Admin. Code tit. 80, § 2700.660 (assets of a deferred compensation plan established under Code section 457 for public employees must be held for the exclusive benefit of participants and beneficiaries as required by Code section 457(g)).

**Indiana:** Ind. Code § 2-3.5-3-2(2) (Legislators’ Retirement System subject to exclusive benefit rule); Ind. Code § 5-10-5.5-2.5(b)(2) (Excise Police and Conservation Enforcement Officers’ Retirement Plan subject to exclusive benefit rule); Ind. Code § 5-10.2-2-1.5(2) (public retirement funds subject to exclusive benefit rule); Ind. Code § 6-10.3-5-3 (board of Public Employees’ Retirement Fund to invest with care, skill, prudence, and diligence of a prudent person); Ind. Code §§ 10-1-2-2(c), -2.5(b)(2) (trustee of state police pension trust to invest funds with care, skill, prudence, and diligence of prudent person and for exclusive benefit of participants and beneficiaries); Ind. Code § 10-1-2-6 (exclusive benefit rule applies to state police benefit fund); Ind. Code § 33-13-8-3.5(b)(2) (judges’ retirement system subject to exclusive benefit rule); Ind. Code § 33-14-9-20(2) (Prosecuting Attorneys Retirement Fund subject to exclusive benefit rule); Ind. Code § 36-8-6-1.5(b)(2) (1925 Police Pension Fund subject to exclusive benefit rule); Ind. Code § 36-8-7-2.5(b)(2) (1937 Firefighters’
Pension Fund subject to exclusive benefit rule); Ind. Code §§ 36-8-7.5-1.5(b)(2), -11(b) (1953 Police Pension Fund subject to exclusive benefit rule); Ind. Code § 36-8-8-2.5(b)(2) (1977 Police Officers’ and Firefighters’ Pension and Disability Fund subject to exclusive benefit rule); Ind. Code § 36-8-10-12(a) (sheriff’s department pension trust subject to exclusive benefit rule); Ind. Code § 36-8-10-17(a) (sheriff’s department police benefit fund subject to exclusive benefit rule).

Iowa: Iowa Code § 97B.7 (assets of the Iowa Public Employees’ Retirement Fund are held in trust and must be used for the exclusive benefit of members and their beneficiaries); Iowa Code § 97A.7 (no member or employee of the board of trustees for the Public Safety Peace Officers’ Retirement, Accident, and Disability System may have any direct interest in the gains or profits from investments nor use the assets, directly or indirectly, except to make current and necessary payments authorized by the board of trustees).

Kansas: Kan. Stat. Ann. § 74-4921 (assets of the Kansas public employees retirement fund are held in trust and trustees shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).

Kentucky: Ky. Rev. Stat. Ann. § 61.650 (board of trustees for the Employee Retirement System and State Police Retirement System shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses); Ky. Rev. Stat. Ann. § 61.655 (no trustee shall have any interest in the gains or profits from investments, except to the extent that the trustee is a member or beneficiary of the retirement system and no trustee shall, directly or indirectly, use the funds or deposits of the retirement system except to make payments authorized by the board); Ky. Rev. Stat. Ann. § 161.420 (teachers’ retirement system assets are held for the exclusive purpose of providing benefits and defraying reasonable administrative expenses); Ky. Rev. Stat. Ann. § 161.430 (board of trustees and investment counselor for teachers’ retirement system shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).


Maine: Me. Const. art. IX, § 18 (all of the assets, proceeds, or income therefrom shall be held in trust and used for the exclusive purpose of providing benefits); Me. Rev. Stat. Ann. tit. 18-A, § 7-302 (trustees shall invest and manage the assets solely in the interest of the beneficiaries).


Michigan: Mich. Comp. Laws § 38.1539(2) (Municipal Employees Retirement Board subject to sole purpose rule and must invest with skill, prudence, and diligence of prudent person); Mich. Comp. Laws § 38.1609(1) (treasurer of State Police Retirement System is fiduciary); Mich. Comp. Laws § 38.1614a(7) (State Police Retirement System subject to sole purpose and exclusive benefit rules); Mich. Comp. Laws § 38.2604(6) (Judges Retirement System subject to sole purpose and exclusive benefit rules).

Minnesota: Minn. Stat. §§ 352.03(7), 352.96(3), 352B.03(1) (board of directors and executive director of the Minnesota State Retirement System are fiduciaries); Minn. Stat. § 352.96(2)(7) (Minnesota State Retirement System’s deferred compensation plan for correctional employees subject to exclusive benefit rule); Minn. Stat. § 352B.03(1a) (board of trustees and executive director of Teachers Retirement System are fiduciaries); Minn. Stat. § 354A.02(6) (trustees or directors of each teachers’ retirement fund are fiduciaries); Minn. Stat. § 356.001 (public plans and funds subject to sole purpose and exclusive benefit rules); Minn. Stat. §§ 356A.02, .04, .05, .06(3), (9), .08(2) (fiduciary and prudent person standards, sole purpose rule, self-interest prohibition, and prohibited transaction rules described); Minn. Stat. § 422A.05(2a) (members of Minneapolis retirement board and executive director are fiduciaries, subject to prudent person standard); Minn. Stat. § 423.805 (police pension fund of cities second class subject to fiduciary standard); Minn. Stat. § 424A.04(2) (board of trustees volunteer firefighters’ retirement system are fiduciaries); Minn. Stat. § 490.122 (judges retirement system subject to fiduciary standard); Minn. R. 7905.1700(1), .1800 (Minnesota State Retirement System subject to exclusive benefit rule).

Mississippi: Miss. Const. art. 14, § 272A (all assets, income, and proceeds of the Public Employees’ Retirement System and the Highway Safety Patrol Retirement System shall be disbursed for the exclusive purpose of paying benefits, refunds, and
administrative expenses); Miss. Code Ann. § 25-11-101 (funds of the Public Employees’ Retirement System shall be held in trust by the board of trustees as funds of the trust beneficiaries); Miss. Code Ann. § 25-11-121 (no member or employee of the board may have any interest in the income, gains, or profits from investments; board must discharge its duties solely for the interest of the system); Miss. Code Ann. § 25-13-1 (separate retirement system and disability and relief fund for the Highway Safety Patrol, for which the Public Employees’ Retirement System board of trustees acts as custodian).

**Missouri:** Mo. Rev. Stat. § 56.809(14) (trustees of Retirement System for Prosecuting and Circuit Attorneys subject to prudent person standard and sole purpose rule); Mo. Rev. Stat. § 86.248 (police relief and pension systems subject to exclusive benefit rule); Mo. Rev. Stat. § 86.590 (trustees of police and firemen’s pension systems must comply with prudent investor standard for investment fiduciaries); Mo. Rev. Stat. § 105.688 (public retirement system assets must be managed by investment fiduciary subject to prudent person standard and sole purpose rule); Mo. Rev. Stat. § 169.040(2) (board of teachers and school employee retirement systems subject to prudent person standard).

**Montana:** Mont. Code Ann. § 19-2-501 (separate trust funds set up for each retirement system — public employees’, teachers’, game wardens’ and peace officers’; and highway patrol officers’); Mont. Code Ann. §§ 19-2-503 to -505 (state board of investments acts as trustee for the funds, subject to the “unified investment program” as set forth in Mont. Code Ann. § 17-6-201; board may not use pension trust funds except to make current and necessary payments authorized by the board; assets of the retirement system may not be used for any purpose other than for the exclusive benefit of members and beneficiaries and for paying reasonable administrative expenses; no member or employee of the board may have any interest in the trust fund investments or gains or profits therefrom); Mont. Code Ann. § 17-6-201 (“unified investment program” requires board of investments to discharge their duties solely in the interest and for the benefit of the fund).

**Nebraska:** Neb. Rev. Stat. § 84-1503 (Public Employees Retirement Board administers retirement systems for the state patrol, judges, school employees, and state and county employees); Neb. Rev. Stat. § 72-1239.01 (Nebraska Investment Council manages the assets of the various systems as fiduciaries; fiduciaries shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).

**New Hampshire:** N.H. Const. pt. 1, art. 36-a (assets of the state retirement system are held “as in trust” for the exclusive purpose of providing benefits); N.H. Rev. Stat. Ann. § 100-A:15 (board of trustees for the several funds in the New Hampshire retirement system shall hold all assets, proceeds, and income in trust solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses; no member or employee of the board shall have any personal interest in the gains or profits from investments nor use gains or profits except to make current and necessary payments authorized by the board).

**New Jersey:** N.J. Rev. Stat. § 43:3C-9.1 (government plan assets must be held for the exclusive benefit of participants and beneficiaries); N.J. Rev. Stat. § 43:15A-36 (no trustee or employee of government plan shall have any interest in the investments of the retirement system); *Mount v. Trustees of the Public Employees’ Retirement Sys.*, 335 A.2d 559 (N.J. Super. Ct. App. Div. 1975) (trustees of public employee retirement system are fiduciaries and have a duty to protect the fund and the interests of all the fund’s beneficiaries).

**New Mexico:** N.M. Stat. Ann. § 10-11-133 (no member or employee of the public employees retirement board shall have any interest in the gains or profits from investments or use funds or deposits in any manner except to make current and necessary payments authorized by the retirement board); N.M. Stat. Ann. § 22-11-14 (retirement board of educational retirement fund is trustee of fund); N.M. Stat. Ann. § 22-11-14 (no member or employee of the educational retirement fund board shall have any interest in the gains or profits from investments of the educational retirement fund or use funds or deposits in any manner except to make current and necessary disbursements authorized by the board).

**New York:** N.Y. Retire. & Soc. Sec. Law § 13 (no person employed by a state or local pension system (excluding teachers’ plans) may have an interest in any investment of a governmental plan and managers of the state retirement system are fiduciaries of the system); N.Y. Educ. Law §§ 502, 508 (New York Teachers’ Retirement System subject to exclusive benefit and exclusive purpose rules and no employee of the board may have an interest in an investment made by the board); N.Y. Comp. Codes R. & Regs. tit. 11, §§ 136.2, 136.6 (trustees that administer New York retirement systems for state employees, state police and firefighters, state teachers and New York City employees are fiduciaries subject to the duty of loyalty); N.Y. Comp. Codes R. & Regs. tit. 9, § 9002.1 (assets of deferred compensation plan established under Code section 457 for state employees must be held in trust for the exclusive benefit of participants and beneficiaries as required by Code section 457(g)).

**North Carolina:** N.C. Gen. Stat. § 135-91(d) (Department of State Treasurer, the Board of Trustees of the Teachers’ and State Employees’ Retirement System, and the Board of Trustees of the Local Governmental Employees’ Retirement System are

**North Dakota:** N.D. Cent. Code § 54-52-14.1 (investment of public employees’ retirement fund is under the supervision of the state investment board); N.D. Cent. Code § 54-52-14.3 (all moneys from any source paid into the retirement system must be used and invested only for the exclusive benefit of the members, retirees, and beneficiaries of the system); N.D. Cent. Code § 21-10-06 (state investment board is charged with investment of the Teachers’ fund for retirement and the public employees retirement system, among others); N.D. Cent. Code § 21-10-07 (investment board must invest retirement funds exclusively for the benefit of their members).

**Ohio:** Ohio Rev. Code Ann. § 145.11(A), (B) (members of Public Employees Retirement Board are fiduciaries subject to the exclusive purpose rule and prudent person standard); Ohio Rev. Code Ann. §§ 145.112, .113 (Public Employees Retirement System prohibited transactions and investments); Ohio Rev. Code Ann. § 148.04(A) (Public Employees Deferred Compensation Programs subject to exclusive benefit rule); Ohio Rev. Code Ann. § 742.111(A), (B) (trustees of the Ohio Police and Fire Pension Fund are fiduciaries subject to the exclusive purpose rule and prudent person standard); Ohio Rev. Code Ann. §§ 742.111, .112 (Ohio Police and Fire Pension Fund prohibited transactions and investments); Ohio Rev. Code Ann. § 3307.15(A), (B) (trustees of the State Teachers Retirement Board are fiduciaries subject to the exclusive purpose rule and prudent person standard); Ohio Rev. Code Ann. §§ 3307.151, .181 (State Teachers Retirement Systems prohibited transactions and investments); Ohio Rev. Code Ann. § 3309.15(A), (B) (trustees of School Employees Retirement Board are fiduciaries subject to exclusive purpose rule and prudent person standard); Ohio Rev. Code Ann. §§ 3309.155, .156 (School Employees Retirement System prohibited transactions and investments); Ohio Rev. Code Ann. § 5505.06(A), (B) (trustees of the State Highway Patrol Retirement Board are fiduciaries subject to the exclusive purpose rule and prudent person standard); Ohio Rev. Code Ann. §§ 5505.061, .08 (State Highway Patrol Retirement System prohibited transactions and investments); Ohio Admin. Code § 145:1-1-01(C)(6), (12), (13) (assets of Ohio Public Employees Deferred Compensation Program to be held in trust for exclusive benefit of eligible employees and their beneficiaries and for the exclusive purpose of providing those benefits; trustees of the Program are fiduciaries).

**Oklahoma:** Okla. Const. art. XXIII, § 12 (all assets, income, and proceeds of any public retirement system shall be held in trust for the exclusive purpose of providing benefits, refunds, and paying expenses of the retirement system); Okla. Stat. tit. 74, § 909.1 (board of trustees for the Oklahoma Public Employees Retirement System shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses; prior to satisfying all liabilities, no part of the corpus or income of the fund may be used for any purpose other than the exclusive benefit of members and beneficiaries); Okla. Stat. tit. 70, § 17-106.1 (board of trustees for the Teachers’ Retirement System shall discharge their duties solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).

**Oregon:** Or. Rev. Stat. § 238.660 (Public Employees Retirement Fund is a separate trust fund for no use other than those set forth in relevant provisions; neither the state nor other public employers have any proprietary interest in the fund); Or. Rev. Stat. § 293.726 (Oregon Investment Council and investment officer must conform to the fundamental fiduciary duties of loyalty and impartiality in investing Fund assets).

**Pennsylvania:** 16 Pa. Cons. Stat. § 4706(a), (b), (e) (trustees of the Employees’ Retirement System are fiduciaries subject to the prudent person standard; absent breach of fiduciary duty, lack of good faith or self-dealing, trustee action or inaction is presumed to be in best interest of system); 16 Pa. Cons. Stat. § 11659 (trustees of county pension funds are fiduciaries); 24 Pa. Cons. Stat. § 8502(c) (expenditures made by The Public School Employees’ Retirement System Administrative Board shall be made for exclusive benefit of system and members); 24 Pa. Cons. Stat. § 8521(a), (e), (h), (i) (trustees of The Public School Employees’ Retirement System are fiduciaries subject to the prudent person standard and exclusive benefit rule); 53 Pa. Cons. Stat. § 30557 (trustees of the retirement system for employees of cities of the second class A municipal and quasi-municipal corporations are fiduciaries); 71 Pa. Cons. Stat. § 5931(a), (e), (h), (i) (trustees of the State Employees’ Retirement Funds and Accounts are fiduciaries subject to the prudent person standard and exclusive benefit rule); 72 Pa. Cons. Stat. § 4521.2(b)(1) (assets and income of deferred compensation plans to be held in trust for exclusive benefit of plans’ participants and their beneficiaries); 16 Pa. Code § 81.9(a) (trustees of Municipal Retirement Board are fiduciaries subject to sole purpose and exclusive benefit rules).

**Rhode Island:** R.I. Gen. Laws § 36-8-15 (all monies of the state retirement system are held in trust and invested in accordance with state investment commission rules; prior to satisfaction of all liabilities, no corpus or income of the trust may be used for any purpose other than the payment of retirement benefits except as otherwise permitted by statute); R.I. Gen. Laws § 35-10-6 (state investment commission must act solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses); R.I. Gen. Laws § 36-8-17 (no member or employee of the retirement board may have any interest in the gains or profits from investments or directly or indirectly use gains or profits in any manner except to make current and necessary payments authorized by the retirement board).

**South Carolina:** S.C. Const. art. X, § 16 (assets and funds of the public retirement systems are for the purpose of paying benefits and shall not be diverted or used for any other purpose); S.C. Code Ann. § 9-16-20 (all assets of a retirement system...
are held in trust); S.C. Code Ann. § 9-16-40 (a trustee or fiduciary of a retirement system must act solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses); S.C. Code Ann. § 9-1-1340 (no member or employee of the trustee board may have any direct interest in the gains or profits from investments or use gains or profits, directly or indirectly, except to make current and necessary payments authorized by the board).

**South Dakota:** S.D. Codified Laws § 3-12-46 (judicial, teachers, municipal, law enforcement, and public employees retirement systems are consolidated into the South Dakota retirement system); S.D. Codified Laws § 3-12-54 (the system is managed by the board of trustees, which is held to a fiduciary standard and must act solely in the interest of the members and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses).

**Tennessee:** Tenn. Code Ann. § 8-34-202 (all assets of the Tennessee Consolidated Retirement System are held in trust); Tenn. Code Ann. § 8-37-107 (no member or employee of the board of trustees of the retirement system may have any personal interest in the gains or profits from investments or use gains or profits, directly or indirectly, except to make current and necessary payments authorized by the board).

**Texas:** Tex. Const. art. 16, § 67 (legislature may establish retirement systems whose assets must be held in trust for the benefit of participants and may not be diverted to other purpose; trustees of a retirement system that covers public employees who are not in a statewide public retirement system are subject to exclusive purpose rule); Tex. Gov’t Code Ann. §§ 801.203, 815.307, 836.006, 845.301, 855.303 (governing bodies of the Employees Retirement System of Texas, Judicial Retirement System of Texas, Texas County and District Retirement System, and Texas Municipal Retirement System are subject to exclusive benefit rule); Tex. Gov’t Code Ann. § 609.009 (assets of deferred compensation plan established under Code section 457 for public employees must be held in trust for the exclusive benefit of participants and beneficiaries as required by Code section 457(g)).

**Utah:** Utah Code Ann. § 49-1-303 (trustee must invest and manage assets solely in the interest of beneficiaries as set forth in Utah Code Ann. § 75-7-302).

**Vermont:** Vt. Stat. Ann. tit. 3, § 472 (retirement board is trustee of the Vermont Employees Retirement System; trustees shall invest and manage assets solely in the interest of trust beneficiaries in accordance with the Uniform Prudent Investor Act, Vt. Stat. Ann. tit. 9, §§ 4651 to 4662; no member or employee of the board may have any direct interest in the gains or profits from investments or use gains or profits, directly or indirectly, except to make current and necessary payments authorized by the board); Vt. Stat. Ann. tit. 16, § 1943 (retirement board is trustee of the State Teachers’ Retirement System and is subject to the same duties as in regard to the Employees Retirement System).

**Virginia:** Va. Code Ann. § 51.1-124.30(C) (Virginia Retirement System Board subject to prudent person standard); Va. Code Ann. § 51.1-803 (governing body of local retirement systems subject to prudent person standard).

**Washington:** Wash. Rev. Code § 35.39.060 (city or town employees’ pension systems subject to prudent person standard); Wash. Rev. Code § 41.34.120 (assets and income of Teachers’ Retirement System Plan 3 to be held in trust for exclusive benefit of members and beneficiaries); Wash. Admin. Code § 415-501-350 (presumption that employee retirement benefits board have acted prudently and impartially, absent contrary affirmative evidence); Wash. Admin. Code § 415-501-580 (compensation deferred under retirement system to be held in trust for exclusive benefit of participants and beneficiaries under the plan).

**West Virginia:** W. Va. Code § 5-10-39 (under the Public Employees Retirement Act, no member or employee of the board of trustees may have any interest in the gains or profits from investment of retirement system monies); W. Va. Code § 5-10-40 (monies and assets of the retirement system must be used for the sole purpose of providing benefits and other authorized payments); W. Va. Code § 12-6-11 (trustees shall discharge their duties to the plan for the exclusive purpose of providing benefits to participants and beneficiaries).

**Wyoming:** Wyo. Const. art. 19, § 11 (all monies paid into any public employee retirement system shall be used only for the benefit of members, retirees, and beneficiaries and payment of administrative costs); Wyo. Stat. Ann § 9-3-403 (assets of the Wyoming Retirement System are held in trust).

**Representative State Insurance Law Authority**

31 The following state law authorities are among those that require dividends and refunds to be used under certain circumstances for the benefit of insured individuals under group policies.

**Alaska:** Alaska Stat. § 39.30.090(a)(6) (excess of aggregate of dividends payable under group insurance policy covering state employees over governmental unit’s share of the premium shall be applied by the governmental unit for the sole benefit of the employees).

**California:** Cal. Ins. Code § 10214 (dividends and premium refunds in excess of expenditures under group life policy must be applied for the benefit of insured employees or members under the policy); Cal. Ins. Code § 10270.65 (dividends and
premium refunds in excess of expenditures under group disability policy must be applied for the benefit of insured employees or members under the policy; see Ruocco v. Bateman, Eichler, Hill, Richards, Inc., 903 F.2d 1232, 1237 (9th Cir. 1990) (consideration paid upon demutualization would be subject to section 10270.65, but was preempted); but see Keniston v. American Nat’l Ins. Co., 31 Cal. App. 3d 803, 810 (1973) (“where the master policy expressly provides that premium refunds or dividends are to be paid to the policyholder, members of the group insured under the policy have no right to receive such payments from the insurer”).

Connecticut: Conn. Gen. Stat. § 5-257(c), (e) (dividends or other refunds or rate credits on state employees group life insurance shall inure to the benefit of the state and shall be applied to the cost of such insurance); Conn. Gen. Stat. § 7-323f(b) (experience credits or dividends paid in connection with policies or contracts which premium is paid from the insurance shall inure to the benefit of the state and shall be applied to the cost of such insurance); Conn. Gen. Stat. § 3127 (dividends and rate refunds in excess of expenditures under group life insurance policy must be applied by the policyholder for the sole benefit of the insured employees or members); Del. Code Ann. tit. 18 § 3209 (dividends payable from group life insurance for state employees may be used to offset any contribution made by the State in the form of money or administrative costs); Del. Code Ann. tit. 18 § 3210 (dividends payable from group life insurance for state employees in excess of any deduction made by the State for its contributions may be used solely for the benefit of the subscribers to the group life insurance program); Del. Code Ann. tit. 18 § 3529 (dividends and rate refunds in excess of expenditures under any group health insurance policy must be applied by the policyholder for the sole benefit of the insured employees or members).

Florida: Fla. Stat. ch. 110.123(6) (refunds paid on the state employees’ group insurance program from premium dollar reserves shall be deposited in a trust fund and used for increased benefits, reduced premiums, or administration costs); Fla. Stat. ch. 627.5567(4) (dividends, premium refunds, rate reductions, commissions, or service fees received by an association under any group life insurance policy to which employees or members contribute the cost, which amount exceeds expenditures under the policy, must be applied for the sole benefit of the policy’s insured employees or members; if such amount is received by a trustee fund, the amount shall be applied by the trustees for the sole purposes of the trust); Fla. Stat. ch. 627.569 (dividends, premium refunds, rate reductions, commissions, or service fees received by an employer, labor union, or association under any group life insurance policy to which employees or members contribute the cost, which amount exceeds expenditures under the policy, must be applied for the sole benefit of the policy’s insured employees or members; if such amount is received by a trustee fund, the amount shall be applied by the trustees for the sole purposes of the trust).

Hawaii: Haw. Rev. Stat. § 431:10-215 (if dividends are paid or a rate reduction is made or continued under any group disability or life insurance policy, the excess of the aggregate dividends or rate reductions under the policy and all other group insurance policies of the policyholder over aggregate expenditure for insurance under such policies made from funds contributed by the policyholder shall be applied by the policyholder for the sole benefit of insured employees); Haw. Rev. Stat. § 431:12-111 (if dividends are paid or a rate reduction is made or continued under a mass merchandising plan, the excess of the aggregate dividends or rate reductions under the policy and all other group policies of the policyholder over aggregate expenditure for insurance under such policies made from funds contributed by the policyholder shall be applied by the policyholder for the sole benefit of insured employees).

Idaho: Idaho Code § 41-2023 (excess of the aggregate dividends or rate reductions under group life insurance policy of the policyholder and all other group insurance policies of the policyholders over the aggregate expenditure for insurance under such policies made from funds contributed by the policyholder’s funds are to be applied for the sole benefit of insured employees or members); Idaho Code § 41-2205 (excess of the aggregate dividends or rate reductions under group disability insurance policy of the policyholder and all other group insurance policies of the policyholders over the aggregate expenditure for insurance under such policies made from the policyholder’s funds are to be applied for the sole benefit of insured employees or members); Idaho Code § 67-5769(3) (premium refunds, profit sharing, experience savings, and other contract refunds received by the director of the state department of administration on account of group policies and contracts covering state employees shall be used for application upon future premiums and prepayments as equitably apportioned by the director).

Illinois: 5 Ill. Comp. Stat. 375/12(a) (any surplus resulting from favorable experience of the state employees’ group life insurance and group health insurance program must be refunded to the state of Illinois and may be applied to reduce member premiums, charges, or fees or to increase benefits, or both).

Kentucky: Ky. Rev. Stat. Ann. § 304.16-230 (excess of the aggregate dividends or rate reductions under group life insurance policy of the policyholder and all other group insurance policies of the policyholders over the aggregate expenditure for insurance under such policies made from the policyholder’s funds are to be applied for the sole benefit of insured employees or members); Ky. Rev. Stat. Ann. § 304.18-050 (excess of the aggregate dividends or rate reductions under group health insurance policy of the policyholder and all other group insurance policies of the policyholders over the aggregate expenditure for insurance under such policies made from the policyholder’s funds are to be applied for the sole benefit of insured employees or members).

Louisiana: La. Rev. Stat. Ann. § 22:215(e) (experience refund or dividend on group health or accident insurance may be used to reduce employer’s share of the cost of coverage, except that the excess of aggregate refunds or dividends under group
insurance policies issued to the policyholder over the aggregate employer contributions to the cost of coverage shall be applied for the sole benefit of the insured employees).

**Maine:** Me. Rev. Stat. Ann. tit. 24-A § 2627-A (excess of dividend, experience refund, or rate reductions over amount of premium contributed by group life insurance policyholder for the same period must be refunded to employees, members, or debtors in proportion to their premium contributions for that period, except that refund amounts less than $25 per employee, with approval of superintendent, may be used for sole benefit of employees, members, or debtors); Me. Rev. Stat. Ann. tit. 24-A § 2812-A (excess of dividend, experience refund, or rate reductions over amount of premium contributed by group health insurance policyholder for the same period must be refunded to employees, members, or debtors in proportion to their premium contributions for that period, except that refund amounts less than $25 per employee, with approval of superintendent, may be used for sole benefit of employees, members, or debtors).

**Massachusetts:** Mass. Gen. Laws ch. 32A, § 9 (excess dividend, refunds, or rate credits attributable to premium payment by insured and retired employees of the commonwealth for group life and accidental death and dismemberment and health insurance shall be invested or disbursed on behalf of these employees); Mass. Gen. Laws ch. 32A, § 12 (dividends or refunds received on group life and accidental death and dismemberment insurance for certain retired teachers shall reduce the premium, subsidiary rate, and administrative expenses associated with the insurance); Mass. Gen. Laws ch. 32A, § 15 (excess dividend, refunds, or rate credits attributable to premium payment by active and retired employees of the commonwealth for group catastrophic illness insurance shall be invested or disbursed on behalf of these employees); Mass. Gen. Laws ch. 32B, § 8A (excess dividends and refunds received on certain group insurance for insured and retired employees of local governments shall be applied to reduce their future premium costs or to provide a refund to insured members); Mass. Gen. Laws ch. 149, § 178E (dividends and rate reductions in excess of expenditures under any group insurance policy made from funds contributed by the policyholder or by an employer of insured persons or a union or association to which insured persons belong must be applied by the policyholder for the sole benefit of insured employees or members).

**Michigan:** Mich. Comp. Laws § 500.4418(1) (dividends on group life insurance issued in connection with loans on dwellings or mobile homes must be paid to the party paying the premium, or portion of the premium, on the group insurance).

**Missouri:** Mo. Rev. Stat. § 376.806(3) (where insured pays full premium directly to insurer, health services corporation, or HMO, refund of group health insurance unearned premium on notice of death shall be made directly to the decedent’s spouse, the primary insured if the decedent was not married at time of death and was covered as a dependent, or else to the decedent’s estate).

**Nevada:** Nev. Rev. Stat. § 688B.180 (excess of aggregate dividends or rate reductions under a group life insurance policy and all other group insurance policies of the policyholder over the aggregate expenditure for insurance under such policies contributed by those other than the insured employees must be applied for the sole benefit of insured employees or members); Nev. Rev. Stat. § 689B.060 (excess of aggregate dividends or rate reductions under a group health insurance policy and all other group insurance policies of the policyholder over the aggregate expenditure for insurance under such policies contributed by those other than the insured employees must be applied for the sole benefit of insured employees or members).

**New Hampshire:** N.H. Rev. Stat. Ann. § 21-I:31 (dividends on state employees’ group life and medical insurance shall be used to extend greater coverage by increasing the face value of the life insurance program).

**New Jersey:** N.J. Rev. Stat. § 17B:27-53 (dividends and premium refunds in excess of expenditures under any group insurance policy must be applied by the policyholder for the benefit of the insured employees or insured members under the policy); N.J. Rev. Stat. § 53:5A-16 (dividends and retrospective rate credits on group life insurance to provide death benefits under the state police retirement system shall be credited in an equitable manner to the funds from which the premiums for the policies are paid).

**New York:** N.Y. Ins. Law § 4216(b)(10) (dividend or rate reduction under group life policy issued to an association in excess of expenditures from association or employer fiduciaries shall be applied by policyholder for the benefit of insured individuals); N.Y. Ins. Law § 4216(h) (dividend or rate reduction under group life policy issued to certain associations, organizations, and groups may be applied to reduce the policyholder’s cost, except that the excess of the insured’s aggregate contribution over the net cost of the insurance shall be applied as a cash payment to the insured or to reduce the insured’s premium, unless the insured assigns the dividend or rate reduction to the policyholder); N.Y. Ins. Law § 4231(b)(7) (dividends and premium refunds in excess of expenditures under a participating group life, accident or health insurance policy may be applicable to reduce the employer’s cost, except that the excess of the employees’ aggregate contribution over the net cost of the insurance shall be applied by the employer for the sole benefit of the employees); N.Y. Ins. Law § 4235(c)(1)(H) (excess of the aggregate dividends or rate reductions under group accident and health policy over the aggregate expenditure for insurance under such policy made from employer’s or association’s funds shall be applied for the sole benefit of the insured individuals); N.Y. Ins. Law § 4235(c)(3) (dividend or rate reduction under group accident or health insurance policy issued to certain associations, organizations, and groups may be applied to reduce the policyholder’s cost, except that the excess of the insured’s aggregate contribution over the net cost of the insurance shall be applied as a
cash payment to the insured or to reduce the insured’s premium, unless the insured assigns the dividend or rate reduction to the policyholder); N.Y. Ins. Law § 4235(j)(3) (any refund under a plan for readjustment of premium rates based on experience under group accident or health policies and any dividend paid under the policies may be used to reduce the employer’s contribution to the group insurance for its employees and the excess over the employer’s contribution shall be applied by the employer for the sole benefit of the employees).

**North Carolina:** N.C. Gen. Stat. § 58-51-80(g) (any refund under any plan for readjustment of the rate of premium based on the experience under group accident or health policies and any dividend paid under the policies may be used to reduce the employer’s contribution to group insurance, and the excess over the contribution by the employer shall be applied for the sole benefit of the employees).

**North Dakota:** N.D. Cent. Code §§ 54-52.1-04.7, -06 (refund, rebate, dividend, experience rating allowance, discount, or other reduction of premium under a group vision and dental insurance program for eligible state employees must be used to reimburse the administrative expense of the program; any excess over administrative costs must be held in a separate fund to be used to reduce the premiums paid by employees or to provide increased coverage); N.D. Cent. Code §§ 54-52.1-04.8, -06 (refund, rebate, dividend, experience rating allowance, discount, or other reduction of premium under a group long-term care insurance program for eligible state employees must be used to reimburse the administrative expense of the program; any excess over administrative costs must be held in a separate fund to be used to reduce the premiums paid by employees or to provide increased coverage).

**Pennsylvania:** Pa. Stat. Ann. tit. 40, § 477d (dividends or rate reductions under group insurance policies and group annuity contracts may be applied to reduce the employer’s cost, except that if employees contribute under the policy or contract, dividends or rate reductions in excess of the employer’s share of the aggregate cost shall be applied by the employer for the sole benefit of the employees).

**South Carolina:** S.C. Code Ann. § 38-71-810 (refund or dividend paid under group accident, group health, or group accident and health may be used to reduce the policyholder’s contribution to group insurance for the insureds of the policyholder and the excess over the contribution of the employer must be applied by the policyholder for the sole benefit of the insureds).

**Tennessee:** Tenn. Code Ann. § 8-27-701 (refunds under supplemental retiree medical insurance program for certain state employees and teachers that exceed expenses under the program shall be used only for the program).

**Utah:** Utah Code Ann. § 31A-22-702 (excess of the aggregate dividends or rate reductions under a group disability insurance policy and all other group insurance policies of the policyholder over the aggregate expenditure for insurance under those policies made from the policyholder’s funds shall be applied by the policyholder for the sole benefit of insured employees or members unless the insured employee or member explicitly elects otherwise).

**Vermont:** Vt. Stat. Ann. tit. 8, § 3825 (excess of the aggregate dividends or rate reductions under a group life insurance policy and all other group insurance policies of the policyholder, or by an employer of insured persons, union, or association to which insured persons belong, over the aggregate expenditure for insurance under those policies made from the policyholder’s funds shall be applied by the policyholder for the sole benefit of insured employees or members).

**Washington:** Wash. Rev. Code § 48.21.120 (any experience rate refund or dividend under a group disability insurance policy may be used to reduce the employer’s share of the cost of the coverage, except that if the aggregate refunds or dividends under the group disability policy and any other group policy or contract issued to the insurer exceed the employer’s aggregate contributions toward the cost of the coverage, the excess shall be applied by the policyholder for the sole benefit of insured employees); Wash. Rev. Code § 48.24.260 (any experience rate refund or dividend under a group life insurance policy may be used to reduce the employer’s share of the cost of the coverage, except that if the aggregate refunds or dividends under the group life policy and any other group policy or contract issued to the insurer exceed the employer’s aggregate contributions toward the cost of the coverage, the excess shall be applied by the policyholder for the sole benefit of insured employees).

**West Virginia:** W. Va. Code § 33-14-21 (dividends or rate reductions may be applied to reduce the policyholder’s cost of providing group life insurance, except the excess of aggregate dividends, refunds, or credits under such policy and other group policies issued to the policyholder over the policyholder’s aggregate contributions to the cost of coverages shall be applied for the sole benefit of the insured employees and members).

**Wyoming:** Wyo. Stat. Ann. § 26-17-124 (excess of aggregate dividends or rate reductions under a group life insurance policy and all other group insurance policies of the policyholder over aggregate expenditure for insurance under the policies from funds contributed by the policyholder or by an employer or insured persons or a union or association to which the insured persons belong shall be applied for the sole benefit of insured employees or members); Wyo. Stat. Ann. § 26-19-105 (excess of aggregate dividends or rate reductions under a group disability insurance policy and all other group insurance policies of the policyholder over aggregate expenditure for insurance under the policies from funds contributed by the policyholder or by an employer or insured persons or a union or association to which the insured persons belong shall be applied for the sole benefit of insured employees or members).
See Ruocco v. Bateman, Eichler, Hill, Richards, Inc., 903 F.2d 1232, 1237 (9th Cir. 1990) (finding distribution of surplus in a demutualization constitutes a “dividend” under California state insurance law, but state insurance law was preempted with respect to ERISA-covered plan).


Representative State Trust Law Authority

The duties of a trustee generally applicable under state trust law are summarized in Restatement (Second) of Trusts § 170 (1959) and are illustrated by the following statutes and cases.


Alaska: Alaska Stat. § 13.36.070 (except as specifically provided, trustee has duty to administer a trust expeditiously for the benefit of the beneficiaries); Alaska State Employees Ass’n v. Alaska Public Employees Ass’n, 825 P.2d 451, 459 (Alaska 1991) (leave bank established under collective bargaining agreement was held in trust for benefit of employees).


Arkansas: Ark. Code Ann. § 23-51-204 (trustee shall invest and manage the trust assets solely in the interest of the beneficiaries); Dickerson v. Union Nat’l. Bank of Little Rock, 595 S.W.2d 677, 680 (Ark. 1980) (bank, as trustee, owes a duty of good faith and loyalty to all beneficiaries of the estate).

California: Cal. Probate Code § 16002 (trustee has duty to administer assets solely in the interest of the trust’s beneficiaries).


Florida: In re Wickman’s Will, 289 So. 2d 788, 790 (Fla. Dist. Ct. App. 2d 1974) (under duty of loyalty, trustees are accountable to beneficiaries for failure to distribute to beneficiaries the value they are entitled to receive under will).

Georgia: Ga. Code Ann. § 53-12-190 (statutory duties are in addition to and not in limitation of the common law duties of a trustee); Hanson v. First State Bank and Trust Co., 385 S.E.2d 266, 268 (Ga. 1989) (bank trustee that dealt with trust assets for own account violated duty); Dowdy v. Jordan, 196 S.E.2d 160, 164-65 (Ga. App. 1973) (trustee violated duty of loyalty by administering trust to enhance its own account).


Idaho: Idaho Code § 68-505 (trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Edwards v. Edwards, 842 P.2d 299, 305 (Idaho App. 1992) (trustee’s agreement made in breach of duty of loyalty is voidable).


Indiana: Ind. Code Ann. § 30-4-3-7 (trustee may not buy or sell trust property for his own account); Given v. Cappas, 486 N.E. 2d 583, 589-90 (Ind. Ct. App. 1985) (recognizing duty of loyalty).

Iowa: Iowa Code § 633.155 (prohibiting self-dealing by a fiduciary); Harvey v. Leonard, 268 N.W.2d 504, 512 (Iowa 1978) (trustee violated duty of loyalty by accepting stock for personal account that caused trust to lose controlling interest in corporation).
Kansas: 2000 Kan. Sess. Laws Ch. 80, Uniform Prudent Investor Act, § 5 (fiduciary shall invest and manage the trust assets solely in the interest of the beneficiaries); Jennings v. Speaker, 571 P.2d 358, 364 (Kan. App. 1977) (individuals serving as trustees and corporate directors of corporation owned by trust are bound by duty of loyalty to trust beneficiaries).

Kentucky: Hutchings v. Louisville Trust Co., 276 S.W.2d 461, 464 (Ky. 1954) (trustee violates duty of loyalty by putting itself in a position in which its interest may conflict with beneficiary’s interests).


Maine: Me. Rev. Stat. Ann. tit. 18-A, § 7-301 (general duty of trustee to administer trust expeditiously for the benefit of the beneficiaries not altered by statute); In re Estate of Stowell, 595 A.2d 1022, 1025 (Me. 1991) (fiduciary prohibited from deriving gain from funds held in trust).


Massachusetts: Mass. Gen. Laws Ann. ch. 203C, § 6 (trustee shall invest and manage the trust assets solely in the interest of the beneficiaries); O’Brien v. Dwight, 294 N.E.2d 363, 379 (Mass. 1973) (no person holding trust funds can be allowed to derive any personal gain or advantage from the use thereof; this rule is applicable to every kind of fiduciary relation and to every mode in which such trustees may either directly or indirectly seek to derive a personal gain or advantage from the use of trust funds).


Mississippi: Holmes v. Jones, 318 So.2d 865, 869 (Miss. 1975) (trustees of public land held in trust to support public schools breached fiduciary duty of loyalty by leasing public land to government official for below market rent); Bryan v. Holzer, 589 So.2d 648, 657 (Miss. 1991) (describing duty of loyalty).

Missouri: Mo. Ann. Stat. § 456.520 (in exercising his powers, a trustee must act with due regard to his obligations as a fiduciary); Layttes’s Estate v. Scudder, 432 S.W.2d 210, 214 (Mo. 1968) (recognizing duty of loyalty).

Montana: Mont. Code Ann. § 72-34-103 (trustee has a duty to administer a trust solely in the interest of the beneficiaries); In re Estate of Clark, 772 P.2d 299, 302 (Mont. 1989) (ignorance does not excuse breach of duty by fiduciary who profits to detriment of beneficiaries).


Nevada: Riley v. Rockwell, 747 P.2d 903, 905 (Nev. 1987) (trustee should do everything in its power to avoid conflict of interest).


New Jersey: N.J. Rev. Stat. § 3B:20-11.5 (establishing duty of loyalty); Shallcross Express, Inc. v. Local 478 Trucking and Allied Industries Pension Fund, 290 A.2d 744, 751 (N.J. Super. Ct. Law. Div. 1972) (duty of loyalty requires trustees of pension plan to notify participants of eligibility to participate in plan before accepting contributions on participants’ behalf [pre-ERISA case]).


North Dakota: N.D. Cent. Code §§ 30.1-34-02, 59-02-08.5 (trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Thompson v. First Nat’l. Bank in Grand Forks, 269 N.W.2d 763, 764 (N.D. 1978) (prior agreement that tends to limit fiduciary’s duty of loyalty must be viewed with suspicion).

Ohio: Ohio Rev. Code Ann. § 2109.43 (fiduciary shall not make personal use of trust funds or property); In re Sedgewick’s Will, 59 N.E.2d 616, 624 (Ohio App. 1944) (recognizing duty of loyalty).

Oklahoma: Okla. Stat. Ann. tit. 60, § 175.65 (a trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Finley v. Exchange Trust Co., 80 P.2d 296, 303 (Okla. 1938) (trustee owes “the duty of finest loyalty”).

Oregon: Or. Rev. Stat. § 128.204 (a trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Waterbury v. Nicol, 296 P.2d 487, 492 (Or. 1956), modified, 298 P.2d 211 (Or. 1956) (duty of loyalty “is recognized by all courts, including our own.”).

Pennsylvania: Estate of McCredy, 470 A.2d 585, 597 (Pa. Sup. Ct. 1983) (duty of loyalty is inflexible and requires trustee not to place himself in a position where his interest is or may be in conflict with his duty).


South Carolina: S.C. Code Ann. § 62-7-603 (powers conferred on fiduciary as a fiduciary may not be exercised by the fiduciary in favor of himself, his estate, or his creditors); First Union Nat’l. Bank of South Carolina v. Cisa, 361 S.E.2d 615, 618 (S.C. 1987) (duty of loyalty precludes a trustee from participating in decision concerning distribution of residuary trust income and principal to trustee).

South Dakota: S.D. Codified Laws § 55-2-1 (trustee bound to act with good faith toward beneficiary); Willers v. Wettestad, 510 N.W.2d 676, 680 (S.D. 1994) (duty of loyalty requires trustee, when dealing with the beneficiary on the trustee’s own account, to communicate to beneficiary all material facts that the trustee knows or should know about the transaction).

Tennessee: Clark v. American Nat’l. Bank & Trust Co. of Chattanooga, 531 S.W.2d 563, 571 (Tenn. Ct. App. 1974) (trustee’s exchange of personal stock as well as stock held by the trust indicates that trustee believed exchange of stock would not injure stockholders and therefore did not breach duty of loyalty).


Utah: Utah Code Ann. § 75-7-302 (trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Pepper v. Zions First Nat’l. Bank, N.A., 801 P.2d 144, 152 (Utah 1990) (trustees are charged as fiduciaries with one of the highest duties of care and loyalty known in the law).


West Virginia: W. Va Code § 44-6C-5 (trustee shall invest and manage the trust assets solely in the interest of beneficiaries).


Wyoming: Wyo. Stat. § 4-9-105 (a trustee shall invest and manage the trust assets solely in the interest of beneficiaries); Kerper v. Kerper, 780 P.2d 923, 929 (Wyo. 1989) (common-law duty of loyalty is the fundamental duty from which each more specific duty is derived).

Representative “Resulting Trust” Authority

35 The circumstances that generally would give rise to a resulting trust are described in Restatement (Second) of Trusts § 440. The following statutes and cases illustrate the application of a resulting trust.

Alabama: Merchants Nat’l Bank of Mobile v. Bertolla, 18 So. 2d 378, 380 ( Ala. 1944) (when life insurance policy is purchased by partner with the money of the partnership, a trust results to the partnership, the title to the policy being taken by the partner).

Arkansas: First Nat’l Bank of Roland v. Rush, 785 S.W.2d 474, 478 (Ark. App. 1990) (clear and convincing evidence rebutted presumption that purchase of property jointly by husband and wife with wife’s funds was a gift to husband, rather than a resulting trust in wife’s favor).


California: Abbott v. Miller, 220 P.2d 570, 596 (Cal. Ct. App. 1950) (resulting trust arose in favor of claimant where claimant paid all of the consideration for the property and a half interest in the property was transferred to another).

Colorado: Mancuso v. United Bank of Pueblo, 818 P.2d 732, 739 (Colo. 1991) (“whether or not a resulting trust arises in favor of the person paying the consideration for a transfer of property to another, depends on the intention at the time of the transfer, of the person furnishing the consideration, and such intention is to be determined from all the attendant facts and circumstances”).

Connecticut: Spatola v. Spatola, 492 A.2d 518, 520 (Conn. 1985) (purchase money resulting trust in favor of one person who paid for property which was titled in another person’s name only if the payor intended the trust arise).

Delaware: Adams v. Jankouska, 452 A.2d 148, 152 (Del. 1982) (“[a]lthough most resulting trust cases involve the purchase of real property, the theory upon which they are based equally applies to acquisitions of personality”)

District of Columbia: Ciffo v. Ciffo, 44 App. D.C. 217, 225 (1915) (declining to recognize resulting trust where more than ten years passed while nominal purchaser occupied and enjoyed property).

Florida: Thompson v. Field, 54 So. 2d 520, 521 (Fla. 1951) (person who paid one-half of funds to purchase airplane titled in the name of another received one-half proceeds of the airplane insurance policy paid to the other person on the basis of a purchase money resulting trust arising first in the airplane and then in the insurance proceeds).

Georgia: Citizens & S. Nat’l Bank v. Martin, 272 S.E.2d 711, 712 (Ga. 1980) (circumstances surrounding nature of transaction and conduct of wife and husband, who received title to property, in treating property as belonging to wife, who paid for property, rebut presumption of gift to husband rather than purchase money resulting trust in favor of wife).

Hawaii: Stevens v. Oliveira, 42 Haw. 223, 224 (1957) (“[w]here property is paid for by one person and the title thereto is taken in the name of another under circumstances which rebut the intent to make a gift or an advance of funds, a trust of the property arises”).

Idaho: Gen. Motors Acceptance Corp. v. Turner Ins. Agency, Inc., 535 P.2d 664, 671 (Idaho 1975) (McFadden, J. dissenting) (resulting trust over unearned insurance premiums should be recognized in favor of financing company that paid funds to insurance agency to procure insurance coverage).

Illinois: Estate of McGee v. Osborne, 383 N.E.2d 1012, 1015 (purchase money resulting trust arises in favor of one person on proceeds of fire insurance policy on contents of dwelling where dwelling was owned by another as named insured and joint funds were used to pay insurance premium).

Indiana: Estate of Hann v. Hann, 614 N.E.2d 973, 978 (Ind. Ct. App. 1993) (recognizing resulting trust on half of savings account where intent was to establish joint account and claimant had made half of deposits to account; Ind. Code § 30-1-9-6 abolishing purchase money resulting trusts only applies to real property; a purchase money resulting trust may apply to personal property).

Iowa: Slocum v. Hammond, 346 N.W.2d 485, 492 (Iowa 1984) (no resulting trust where claimant failed to demonstrate that she had agreed to pay for property titled in another’s name).

Kansas: Hanrion v. Hanrion, 84 P. 381, (Kan. 1906) (abolition of purchase money resulting trusts by statute applies “only to transactions concerning real property, and not to transfers of personality”).

Kentucky: Bryant’s Adm’r v. Bryant, 269 S.W.2d 219, 222 (Ky. Ct. App. 1954) (noting that common law resulting trust in real estate has been abrogated and “same rule has been impliedly extended to personal property”); but cf. Aynesworth v. Haldeman, 63 Ky. 565 (Ky. 1866) (statute abolishing purchase money resulting trusts applies to realty and not to personality).

Louisiana: Haynesville Oil Co. v. Beach Drilling Co., 105 So. 790, 791 (La. 1925) (title which oil well driller obtained in his name to rig purchased using employer’s money inured to the benefit of the employer).
Maine: *Grishman v. Grishman*, 407 A.2d 9, 12 n.7 (Me. 1979) (one-half interest in property to which husband took title was impressed with a resulting trust for the benefit of the wife only if her funds were used to acquire the interest).

Maryland: *Taylor v. Mercantile-Safe Deposit and Trust Co.*, 307 A.2d 670, 675 (Md. 1973) (if the payor intended that the transferee should have a partial beneficial interest in property, a purchase money resulting trust may arise in favor of the payor only as to the balance of the beneficial interest).

Massachusetts: *Meskell v. Meskell*, 243 N.E.2d 804, 806 (Mass. 1969) (purchase money resulting trust in property arises in favor of a person only if the person paid the purchase price for the property).


Minnesota: *Freundschuh v. Freundschuh*, 559 N.W.2d 706, 709 (purchase money resulting trusts are allowed by statute).

Mississippi: *Ryals v. Douglas*, 39 So. 2d 311, 316 (Miss. 1949) (wife entitled to enforce resulting trust in her favor on property titled in husband’s name but bought and maintained with her funds).

Missouri: *Dougherty v. Duckworth*, 388 S.W.2d 870, 875 (Mo. 1965) (purchase money resulting trust arised in proportion which amount contributed bore to purchase price).

Montana: *Neset v. Fifer*, 942 P.2d 712, 715 (Mont. 1997) (purchase money resulting trust arises in favor of a person who did not receive title to the property only if the person who paid for the property did not intend to make a gift).

Nebraska: *Lewis v. Poduska*, 481 N.W.2d 898, 902 (Neb. 1992) (purchase money “resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise”).

Nevada: *Werner v. Mormon*, 462 P.2d 42 (Nev. 1969) (“[b]efore a resulting trust arises the circumstances must raise an inference that the person paying all or part of the purchase price does not intend that the person taking the property should have the beneficial interest therein”).

New Hampshire: *Hatch v. Rideout*, 65 A.2d 702, 703-704 (N.H. 1949) (a resulting trust in favor of a person on property titled to another may arise by operation of law out of payment of the purchase price by the person; the trust resulting is in proportion to the person’s payment in comparison with the total price of the property).


New Mexico: *Aragon v. Rio Costilla Coop.*, 812 P.2d 1300, 1303 (N.M. 1991) (purchase money resulting trust arises in favor of person who does not have legal title to the property but who paid for the property only if the person who does have legal title to the property was not intended also to have the beneficial interest in the property).

New York: N.Y. Est. Powers & Trusts § 7-1.3 (purchase money resulting trust abolished for both real and personal property).


North Dakota: *Zundel v. Zundel*, 278 N.W.2d 123, 128 (N.D. 1979) (“whether or not a resulting trust has been created is primarily a question of intention”).

Ohio: *Markert v. Bosley*, 207 N.E.2d 414, 419 (Ohio Prob. Ct. 1965) (where stock is paid for from child’s money and title is taken in parent’s name, presumption is that parent holds stock in purchase money resulting trust for child).

Oklahoma: *Boatright v. Perkins*, 894 P.2d 1091, 1094 (Okla. 1995) (“when legal title to real property is conveyed to one and purchase price is paid by another, a trust is presumed to result in favor of the person who pays the consideration”).

Oregon: *Fox v. Maurer*, 164 P.2d 417, 426 (Or. 1945) (“where a contribution is made to purchase price, under circumstances showing that no loan or gift is intended, the contributor is entitled to an interest in the property in the proportion that his contribution bears toward purchase price”).

Pennsylvania: *Bower v. Bower*, 611 A.2d 181, 184 (Pa. 1992) (where a transfer of property is made to one person and the purchase price is paid by another, a purchase money resulting trust arises in favor of the person by whom the purchase price is paid only if the payor intended that the trust arise).
Rhode Island: *Campanella v. Campanella*, 68 A.2d 85, 88 (R.I. 1949) (“[a] general contribution to a fund is not sufficient to cause a resulting trust to arise in favor of the contributor”).

South Carolina: *Hayne Fed. Credit Union v. Bailey*, 489 S.E.2d 472, 475-76 (S.C. 1997) (recognizing resulting trust based on clear and convincing evidence that conveyance of property was not intended by father as gift to son, but that father intended a purchase money resulting trust in the property to benefit himself).

South Dakota: *Kary v. Kary*, 318 N.W.2d 334, 337 n.3 (S.D. 1982) (“[w]hen a transfer of real property is made to one person and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made”).

Tennessee: *Rainey v. Rainey*, 795 S.W.2d 139, 146 (Tenn. Ct. App. 1990) (“[w]hen property is purchased with the money of one person but the title is taken in the name of another, a resulting or presumptive trust arises; the title holder becomes a trustee for the payor”).

Texas: *Morrison v. Farmer*, 213 S.W.2d 813, 815 (Tex. 1948) (purchase money resulting trust in property for the benefit of a person arises only if the person pays for the property).

Utah: *Estate of Hock v. Fennemore*, 655 P.2d 1111, 1115 (Utah 1982) (purchase money resulting trust arises only if “one party paid the purchase price for the property and another party was given legal title”).

Vermont: *Tokarski v. Gates*, 414 A.2d 1155, 1157 (Vt. 1980) (“no resulting trust is created when ownership is taken jointly by the payor and another party”).


Washington: *Abelsen v. Prothero*, 238 P.2d 397, 399 (Wash. 1951) (purchase money resulting trust arose in insurance proceeds received by vessel owner on behalf of crew who contributed to payment of the insurance premium).

West Virginia: *Smith v. Smith*, 376 S.E.2d 97, (W.Va. 1988) (presumption that purchase money resulting trust was not intended may be rebutted by clear evidence to the contrary).


Wyoming: *Bunn v. McAdams*, 267 P. 514, 517 (Wyo. 1928) (purchase money resulting trust arises in favor of person only if person intended trust to result).

Representative “Constructive Trust” Authority

38 Restatement of Restitution § 160 (1939). The following cases illustrate the circumstances under which a constructive trust may be imposed under the law of various states.

Alabama: *Brown v. Brown*, 604 So. 2d 365, 368 (Ala. 1992) (“a constructive trust is appropriate remedy where it would be inequitable to allow a property interest to be retained by the person who holds it”).


Arizona: *Murillo v. Hernandez*, 281 P.2d 786, 790 (Ariz. 1955) (constructive trust is appropriate where it would be unconscionable for the holder of the legal title to retain and enjoy the beneficial interest that truly belongs to another).

Arkansas: *Andres v. Andres*, 613 S.W.2d 404, 407-08 (Ark. App. 1981) (Constructive trusts are imposed in favor of persons entitled to a beneficial interest against one who secures legal title and then claims the property as his own).

California: *Weiss v. Marcus*, 51 Cal. App. 3d 590, 600 (2d Dist. 1975) (recognizing availability of constructive trust remedy where insurance company pays to one party funds that are claimed, in part, by another).


**District of Columbia:** *In re Corriea*, 719 A.2d 1234 (D.C. 1998) (purpose of constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong).

**Florida:** *In re Tolin*, 622 So. 2d 988, 990 (Fla. 1993) (to avoid unjust enrichment of one party at the expense of another, constructive trust imposed on testator’s property where testator’s attempted revocation of codicil was ineffective).

**Georgia:** *St. Paul Mercury Ins. Co. v. Meeks*, 508 S.E.2d 646, 648 (Ga. 1998) (constructive trust is a device for recovering property from person holding title to property who would be unjustly enriched if he or she were to enjoy the beneficial interest in the property).


**Idaho:** *Witt v. Jones*, 722 P.2d 474, 477 (Idaho 1986) (constructive trust is appropriate where it would be unconscionable for holder of legal title to retain beneficial interest in property).

**Illinois:** *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 745 (Ill. 1994) (imposing constructive trust for the benefit of broker’s clients on commission and fees improperly charged by commodities broker).


**Iowa:** *Loschen v. Clark*, 127 N.W.2d 600, 603 (Iowa 1964) (“constructive trust is ... a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest.”).


**Kentucky:** *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985) (imposing constructive trust for benefit of daughter who paid for automobile, even though legal title was held in another’s name).

**Louisiana:** *Assunto v. Coleman*, 104 So. 318, 319 (La. 1925) (where agent holds property interest adverse to his principal, such property is held in constructive trust for his principal).

**Maine:** *Chandler v. Dubey*, 325 A.2d 6, 8 (Me. 1974) (constructive trust may be imposed to prevent unjust enrichment when title to property is retained in violation of a fiduciary duty).


**Massachusetts:** *Sullivan v. Rooney*, 533 N.E.2d 1372, 1374 (Mass. 1989) (recognizing constructive trust); *Meskell v. Meskell*, 243 N.E. 2d 804, 807 (Mass. 1969) (constructive trust imposed to avoid unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relation).


**Minnesota:** *In re Estate of Ericksen*, 337 N.W.2d 671, 674 (Minn. 1983) (recognizing constructive trust).

**Mississippi:** *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985) (“constructive trust is a means recognized in our law whereunder one who unfairly holds a property interest may be compelled to convey that interest to another to whom it justly belongs”).


**Montana:** *Lawrence v. Clepper*, 865 P.2d 1150, 1155-56 (Mont. 1993) (constructive trust need not be limited to the person who obtained property by fraud or deception from another, but is appropriate to prevent unjust enrichment).

**Nebraska:** *Fleury v. Chrisman*, 264 N.W.2d 839, 842 (Neb. 1978) (constructive trust may arise “by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits.”).

**Nevada:** *McKissick v. McKissick*, 560 P.2d 1366, 1369 (Nev. 1977) (where divorce decree obligated divorced husband to maintain life insurance with divorced wife as beneficiary, second wife held insurance proceeds in constructive trust for first wife).


New Mexico: Matter of Estate of McKim, 807 P.2d 215, 220-21 (N.M. 1991) (constructive trust arises where person is subject to an equitable duty to convey to another to avoid unjust enrichment).

New York: *Katzman v. Aetna Life Ins. Co.*, 128 N.E.2d 307, 309 (N.Y. 1955) (recognizing court’s ability to impose constructive trust on consideration of life insurance policy to prevent unjust enrichment of individual who was substituted as beneficiary contrary to agreement between insured and original beneficiary who paid policy premiums); *Bankers Security Life Ins. Society v. Shakerdge*, 406 N.E.2d 440 (N.Y. 1980) (as an equitable doctrine, application of constructive trust is somewhat flexible, but declining to impose constructive trust on consideration of life insurance policy where there was insufficient evidence that insured intended consideration to go to anyone other than beneficiary).


Oregon: *Hanscom v. Hanscom*, 208 P.2d 330, 340 (Or. 1949) (constructive trust arose where transferee had duty to reconvey property to transferee).


Rhode Island: *Lawrence v. Andrews*, 122 A.2d 132, 139 (R.I. 1956) (constructive trust is proper remedy where the transferee procured the conveyance but violated promise to reconvey).

South Carolina: *SSI Medical Services, Inc. v. Cox*, 392 S.E.2d 789, 793-94 (S.C. 1990) (“constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot equitably withhold from another who is entitled to it.”).

South Dakota: *Olsen v. First Nat’l. Bank*, 83 N.W.2d 842, 845-46 (S.D. 1957) (constructive trust was appropriate remedy where defendant failed to convey money as promised to testator).


Texas: *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) (constructive trust requires proof of confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer).


38 E.g., Restatement (Second) of Contracts § 302, cmt. c, illus. 4 (1981).

Representative “Third Party Beneficiary” Authority

39 The Restatement (Second) of Contracts § 302 (1981) summarizes the third party beneficiary principles generally applied by states. The following statutory provisions and cases illustrate the rights of third party beneficiaries under the various state laws.

Alabama: National Union Fire Ins. Co. v. Lomax Johnson Ins. Agency, 496 So. 2d 737, 739 (Ala. 1986) (recognizing employee may be a third party beneficiary of a professional liability insurance contract between employer and insurer and that such employee would have standing to enforce the contract).

Alaska: Stewart-Smith Haidinger, Inc. v. Avi- Truck, Inc., 682 P.2d 1108, 1113 (Alaska 1984) (“[W]here the risk to the insurer is unchanged, and where a third party is within the class intended to be benefited by the parties to an insurance contract, a third-party beneficiary contract may be implied by law.”).

Arizona: Nahom v. Blue Cross & Blue Shield of Arizona, Inc., 885 P.2d 1113, 1117 (Ariz. App. 1994) (recognizing that a person who is not a party to a contract can recover under a contract if “he is a primary beneficiary under the terms of the contract.”).

Arkansas: Cook v. U.S. Fidelity & Guar. Co., 227 S.W.2d 135, 136 (Ark. 1950) (“A contract for the benefit of a third party to whom neither of the contracting parties is indebted may be enforced in Arkansas.”)

California: Murphy v. Allstate Ins. Co., 553 P.2d 584 (Cal. 1976) (recognizing the right of a third party beneficiary to enforce a contract made for his benefit). See also Cal. Civ. Code § 1559 (describing when a contract for the benefit of a third party may be enforced).

Colorado: Scott Wetzel Serv. v. Johnson, 821 P.2d 804, 810 (Colo. 1991) (employee covered under employer’s workers compensation insurance “can be viewed either as an insured or as a third party beneficiary with the right to sue on the insurance contract.”).

Connecticut: Gateway Co. v. DiNoia, 654 A.2d 342, 346 (Conn. 1995) (“A third-party beneficiary may enforce a contractual obligation without being in privity with the actual parties to the contract.”).

Delaware: Pierce v. Int’l. Ins. Co., 671 A.2d 1361, 1365 (Del. 1996) (recognizing employee may be third party beneficiary of workers’ compensation insurance contract between employer and insurer, and may assert rights directly against insurer arising out of this contract).

District of Columbia: Western Union Tel. Co. v. Massman Constr. Co., 402 A.2d 1275, 1277 (D.C. 1979) (“[o]ne who is not a party to a contract nonetheless may sue to enforce its provisions if the contracting parties intend the third party to benefit directly thereunder.”)


Georgia: Rouse v. Crum, 313 S.E.2d 140, 142 (Ga. Ct. App. 1984) (noting that named beneficiary of a life insurance policy is a third party beneficiary to the insurance contract and that such beneficiary would have the right to insist upon strict adherence to policy terms).


Idaho: Idaho Code § 29-102 (“[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”); Holscher v. James, 860 P.2d 646, 652 (Idaho 1993) (holding that a third party beneficiary is entitled to benefits provided under a contract of insurance).

Illinois: Olson v. Etheridge, 686 N.E.2d 563, 566-67 (Ill. 1997) (“well-established rule in Illinois is that if a contract is entered into for the direct benefit of a third person, the third person may sue for breach of the contract in his or her own name, even though the third person is a stranger to the contract and the consideration”).

Indiana: Mogensen v. Martz, 441 N.E.2d 34, 35 (Ind. Ct. App. 1982) (recognizing that “third party beneficiaries may directly enforce a contract in Indiana”).
New Jersey: Drewen v. Bank of the Manhattan Co., 213 N.W.2d 642, 644-45 (Iowa 1973) (“It is the rule in Iowa and in most American jurisdictions that a third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration.”).

Kansas: Fasse v. Lower Heating and Air Conditioning, 736 P.2d 930, 932 (Kan. 1987) (“[w]here a person makes a promise to another for the benefit of a third person, that person may maintain an action to enforce the contract even though he had no knowledge of the contract when it was made and paid no part of the consideration.”); NEA-Coffeyville v. Unified Sch. Dist. No. 445, 996 P.2d 821, 824 (Kan. 2000) (stating that union members would have had standing as third-party beneficiaries to claim a portion of a divisible surplus paid by an insurance company to a school district).


Louisiana: La. Civ. Code. arts. 1978-1982 (1999) (recognizing that the rights of a third party may be stipulated for by a contractor and that such third party may enforce such rights).

Massachusetts: Rae v. Air-Speed, Inc., 435 N.E.2d 628, 632-33 (Mass. 1982) (“when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.”).

Michigan: Dunn v. Detroit Fed’n. of Musicians, 256 N.W. 581, 583 (Mich. 1934) (“[w]e have always properly recognized the right of a beneficiary to bring suit on an insurance contract made by another for his benefit.”).

Minnesota: Cretex Cos. v. Constr. Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984) (recognizing that a third party may recover if there is either a duty owed to him or her or intent to benefit him or her).

Mississippi: Trammell v. Mississippi, 622 So. 2d 1257, 1260 (Miss. 1993) (“third party beneficiary may sue for a contract breach . . . when the alleged broken condition was placed in the contract for his direct benefit.”).

Missouri: Morris v. Travelers Ins. Co., 546 S.W.2d 477, 483 (Mo. Ct. App. 1976) (“Group insurance contracts are third party beneficiary contracts for the benefit of the insured employee . . . .”)

Montana: Mont. Code Ann. § 28-2-205 (“[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”); Harman v. MIA Serv. Contracts, 858 P.2d 19, 22 (Mont. 1993) (stating that an intended beneficiary may enforce a promise in a contract that creates a duty to the beneficiary).

Nevada: Properties Inv. Group v. Applied Communications, 495 N.W.2d 483, 488 (Neb. 1993) (stating that those not named as parties to a contract may recover as third-party beneficiaries only if “by express stipulation or by reasonable intention that rights and interests of such unnamed parties were contemplated and provision was made for them.”).

New Hampshire: Arlington Trust Co. v. Estate of Wood, 465 A.2d 917, 918 (N.H. 1983) (recognizing that “(third-party beneficiary doctrine is an exception to the general rule that a non-party to a contract has no remedy for breach of the contract.”).

New Jersey: Drewen v. Bank of the Manhattan Co., 155 A.2d 529, 532 (N.J. 1959) (recognizing right of administrator of wife’s estate to enforce against administrator of husband’s estate husband’s promise to provide certain distribution to children in his will); Kowalski v. Travelers Ins. Co., 280 A.2d 257, 258 (N.J. Super. Ct. 1971) (group insurance contracts generally construed as creating a contract between the employer and insurer for the benefit of insured employees, but employee not entitled to recover where terms of contract provide that coverage ceases upon termination of employment).

New Mexico: Permian Basin Inv. Corp. v. Lloyd, 312 P.2d 533, 536 (N.M. 1957) (“[s]uit may be maintained by the member of a class which is intended to be benefited by a contractual obligation.”).

New York: DeRuyter Central School District v. DeRuyter Teachers Ass’n., 403 N.Y.S.2d 818, 819 (N.Y. App. Term. 1978) (employees whose collective bargaining agreement required them to pay a percentage of premium for a group health insurance policy entered into by their employer were entitled to a percentage of dividends paid on the policy).
**North Carolina:** Vogel v. Reed Supply Co., 177 S.E.2d 273, 278 (N.C. 1970) (recognizing right of third-party beneficiaries of contracts to assert claims under such contracts).

**North Dakota:** N.D. Cent. Code § 9-02-04 (“contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.”).

**Ohio:** Grant Thornton v. Windsor House, Inc., 566 N.E.2d 1220, 1223 (Ohio 1991) (“[o]nly a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio.”).


**Oregon:** Sisters of St. Joseph of Peace, Health, and Hospital Services v. Russell, 867 P.2d 1377, 1380 (Or. 1996) (recognizing that certain third-party beneficiaries of a contractual promise may enforce such promise).


**Rhode Island:** Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990) (“[w]hen one party for valuable consideration, engages another by contract to do some act for the benefit of a third party, the latter who would enjoy the benefits, may maintain an action for breach of contract.”).

**South Carolina:** Goode v. St. Stephens United Methodist Church, 494 S.E.2d 827, 833 (S.C. Ct. App. 1997) (“when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.”).

**South Dakota:** S.D. Codified Laws § 53-2-6 (“contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”); Matter of Gosmire’s Estate, 331 N.W.2d 562, 567 (S.D. 1983) (“person may enter into a contract to devise property or make a will which is enforceable in equity by a third-party beneficiary.”).

**Tennessee:** Parks v. Prudential Ins. Co., 103 F. Supp. 493, 496 (E.D. Tenn. 1951), aff’d, 195 F.2d 302 (6th Cir. 1952) (“[O]ne holding a beneficial certificate under a group policy, for which he has paid all or a portion of the premium, has a definite contractual relation with the insurance company.”).

**Texas:** Key Life Ins. Co. v. Taylor, 456 S.W.2d 707, 709 (Tex. Civ. App. 1970) (recognizing right of employee under group accident policy between employer and insurance company to enforce policy as third party beneficiary notwithstanding release signed by policyholder/employer).

**Utah:** Kelly v. Richards, 83 P.2d 731, 736 (Utah 1938) (recognizing right of third-party creditor beneficiaries of a contract to maintain an action under such contract).


**Virginia:** Levine v. Selective Ins. Co. of Am., 462 S.E.2d 81, 83 (Va. 1995) (“[i]t is well established in this Commonwealth that under certain circumstances, a party may sue to enforce the terms of a contract even though he is not a party to the contract.”); Cobert v. Home Owners Warranty Corp., 391 S.E.2d 263, 266 (Va. 1990) (recognizing that a party claiming a benefit, upon showing that the party is an intended third-party beneficiary of a contract, may maintain an action on such contract).

**Washington:** Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1141 (Wash. 1986) (recognizing that an intended third party beneficiary to an insurance contract can sue to enforce the obligation due him).

**West Virginia:** W. Va. Code § 55-8-12 (“[i]f a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise”).

**Wisconsin:** Dorr v. Sacred Heart Hosp., 597 N.W.2d 462, 475 (Wis. Ct. App. 1999) (recognizing the right of a third-party beneficiary of a contract to enforce such contract).

**Wyoming:** Hoiness-LaBar Ins. v. Julien Const. Co., 743 P.2d 1262, 1273 (Wyo. 1987) (adopting rule that third-party beneficiary of insurance contract is entitled to maintain action against an agent for breach of duty to procure appropriate coverage).
Federal Tax Authority

40 The requirements for qualified annuity plans under section 403(a) of the Code have been consistently interpreted by the IRS to prohibit the payment of rate credits or premium refunds to the employer prior to the termination of the plan and the purchase of annuities to cover all liabilities. Treas. Reg. § 1.404(a)-8. The same principle would appear applicable, by analogy, to the distribution of demutualization compensation.


42 See, e.g., Treas. Reg. §§ 1.401(m)-1(b)(4)(B)(ii) (employer matching contributions); 1.415-6(b)(7) (annual additions).

43 Treas. Reg. § 1.401(a)(4)-1(c)(8).

44 See Treas. Reg. § 1.415-6(b).

45 See Code § 419(e)(4); Treas. Reg. § 1.419-1T, Q&A-3.

46 Treas. Reg. § 1.512(a)-5T, Q&A-3.

47 The only IRS letter ruling that addresses demutualization compensation and VEBAs concluded that a VEBA would not have income when it received the compensation as a contribution from the employer (who was taxable on the funds in the first instance). LTR 20011063 (Dec. 20, 1999).

48 Treas. Reg. § 1.419-1T, Q&A-3(c).

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EXHIBIT A

FORM OF ASSIGNMENT OF COMPENSATION AGREEMENT

ASSIGNMENT
OF DEMUTUALIZATION COMPENSATION

AGREEMENT made [date], between [group policyholder name and address] (the “Group Policyholder”), and [name, capacity and address of proper assignee, such as (a) Prudential Trust Company or other trustee as trustee for XYZ Plan, (b) Prudential Insurance Company of America as custodian for XYZ Plan, or (c) a designated bank account or brokerage account in the name of the corporate owner for the benefit of the XYZ Plan] (the “Assignee”).

Purpose and Background

A. The Prudential Insurance Company of America (“Prudential”), a New Jersey mutual life insurance company, has issued Policy No. [policy number], a [type of group policy, such as disability insurance policy or annuity contract], to Group Policyholder (the “Group Policy”). Under either the terms of the Group Policy or otherwise applicable law, Group Policyholder has a membership interest in Prudential.

B. On December 15, 2000, Prudential’s Board of Directors unanimously adopted a Plan of Reorganization (the “Plan of Reorganization”) under which Prudential will, after receiving the required approvals, convert to a New Jersey stock life insurance company, extinguishing the Group Policyholder’s membership interest in Prudential (a process known as “demutualization.”). Under the Plan, the stock life insurance company to which Prudential will convert will become an indirect wholly owned subsidiary of Prudential Financial, Inc., a New Jersey stock business corporation (the “Holding Company”). Under the Plan of Reorganization, common stock in the Holding Company, cash, or policy credits (“Compensation”) may be provided to or for the account of the Group Policyholder upon extinguishment of the Group Policyholder’s membership interest under the Group Policy.

C. The Plan of Reorganization does not prohibit the Group Policyholder from assigning the Demutualization Compensation that may be provided to or for its account upon extinguishment of its membership interest under the Group Policy. The Group Policyholder wishes to assign the Demutualization Compensation to Assignee, and the Assignee wishes to acquire the Demutualization Compensation from the Group Policyholder.

Assignment and Release

Group Policyholder and Assignee, therefore, agree:

1. Assignment. Group Policyholder hereby assigns to Assignee all of its interest in the Demutualization Compensation that may be provided under the Plan to or for its account upon extinguishment of its membership interest in the Company under the Group Policy. As a component of such assignment, Group Policyholder hereby provides the following information to ensure that the assignment is properly reflected in the books and records of Prudential:
   
   Name of Assignee:
   
   Business Address:
   
   Account/Other Reference Numbers:

2. Release. Assignee hereby releases Group Policyholder from any obligation it may have to transfer to the Assignee the Demutualization Compensation that is provided under the Plan to or for the account of the Group Policyholder upon extinguishment of the Group Policyholder’s membership interest in the Company under the Group Policy.

3. Representations and Warranties. Group Policyholder warrants and represents that: (a) there are no liens or encumbrances on the Group Policy; (b) it has the right to assign the Demutualization Compensation to Assignee under the terms of the applicable Group Policy, the terms of any “employee benefit plan” (as such term is defined under Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) on behalf of which such Group Policy has been purchased or held by the Group Policyholder, or the requirements of otherwise applicable law; and (c) that any conditions necessary or appropriate to the assignment of the Demutualization Compensation have been satisfied.

(over)
5. **Notification.** Group Policyholder authorizes Assignee to notify Prudential of this assignment and to direct Prudential to provide the Demutualization Compensation to or for the account of the Assignee that it would have provided under the Plan of Reorganization to or for the account of the Group Policyholder upon extinguishment of the Group Policyholder’s membership interest in Prudential under the Group Policy, including any other information that may be requested by Prudential to facilitate such assignment.

6. **Other Agreements.** Nothing herein contained shall alter or impair the right or obligations of Group Policyholder or Assignee under the terms of any other agreement between Group Policyholder and Assignee, or as provided by law.

In witness whereof the parties have signed this instrument.

__________________________  ______________________________
[Group Policyholder]        [Assignee]
Date:                      Date:

The Prudential Insurance Company of America
Date: