



# State of Utah

## DEPARTMENT OF COMMERCE DIVISION OF SECURITIES

*Protecting Investors; Promoting Commerce*

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September 11, 1998

Terrence O. Davis  
Sutherland, Asbill & Brennan, L.L.P.  
1275 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2404

Re: **Pruco Securities Corporation**  
**Request for Interpretive Opinion**  
**File # B00083876**

Dear Mr. Davis:

This letter is in response to your request of October 3, 1997, for an interpretive opinion from the Utah Division of Securities ("Division"). You asked the Division to opine whether agents of Pruco Securities Corporation ("Pruco") who are licensed with the Division and who have passed the Uniform Securities Agent State Law Examination ("Series 63 examination") and the National Association of Securities Dealers, Inc.'s ("NASD") examination for investment company securities and variable insurance contracts ("Series 6 examination") may sell certain certificates of deposit ("CDs") as described below without additional examination requirements. In rendering this opinion, the Division assumes, without deciding, that the following facts are true:

- Pruco is licensed with the State of Utah as a broker-dealer;
- Pruco is a member of the NASD;
- Pruco's agents have passed the Series 63 and Series 6 examinations;
- The CDs would be issued by Prudential Savings Bank, F.S.B., and Prudential Bank and Trust Company (together "Prudential Bank"), each a wholly owned subsidiary of Pruco's parent, Prudential;
- The CDs guarantee a minimum interest for a specified period, plus excess interest, based on the performance of a specified securities index;
- The CDs are insured by the Federal Deposit Insurance Corporation ("FDIC");
- Pruco will not create a secondary market for the CDs;
- The NASD would not require a broker-dealer agent to pass a series 7 examination before selling the CD's.

On the basis of the foregoing facts, and subject to the analysis below, it is the opinion of the Division that Pruco's agents may sell the CDs without further licensing requirements.

Analysis

The Division has the authority to enact rules regarding the licensing of broker-dealers. UCA 61-1-4, 61-1-24. Pursuant to that authority, the Division has enacted Rule R164-4-3, which provides that a broker-dealer agent must pass the Series 63 examination "and any other examination required by the NASD . . . ." R164-4-3(C)(1).

Basically, Pruco argues that the State of Utah has (beyond requiring a Series 63 examination) deferred to the NASD in deciding which examination(s) a broker-dealer must pass before selling a particular type of security. Further, Pruco contends that because the NASD would not require a Series 7 examination to sell the CD's, we should likewise decline to require a series 7 examination. We agree, but with two reservations.

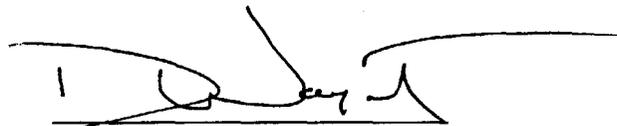
First, the position taken by the NASD appears to be based largely on the decision of the Supreme Court of the United States in *Marine Bank v. Weaver Et Ux.*, 455 U.S. 551 (1982). Neither the Division nor any court in Utah has expressly adopted the holding of *Marine Bank*, and the Division has some doubt as to whether Utah should follow the reasoning of that decision.

Second, the Division is not convinced that the CD's in this case are actually insured by the FDIC. Indeed, Pruco concedes that "[t]he Prudential Bank has not sought written confirmation of the insurability of its product from the Comptroller." Pruco, therefore, proceeds at its own peril in selling the CDs. Indeed the Division takes the position that the lack of confirmation as to insurability is a material fact, within the meaning of UCA 61-1-1, which would have to be disclosed in any offer or sale of the CDs.

The Division's opinion in this matter is a narrow opinion based on a narrow question. The Division has assumed that the facts as presented by Pruco are correct. Very small changes in those facts could radically alter the Division's opinion. If Pruco sells the CDs while representing the above facts to be true and it later turns out that those facts are not true, Pruco may well end up violating the anti-fraud provisions of the Utah Uniform Securities Act.

This opinion relates only to the offering discussed above and shall have no value with respect to other offerings. The Division expresses no opinion as to the merits of the foregoing offer.

Respectfully,



David H.T. Wayment  
Senior Staff Attorney

# Sutherland, Asbill & Brennan,

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October 3, 1997

SUSAN S. KRAWCZYK  
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## **VIA FEDERAL EXPRESS**

Mr. J. Matthew Jenkins,  
Director of Licensing,  
Department of Commerce,  
Division of Securities  
Box 146760  
Salt Lake City, UT 84114-6760

Dear Mr. Jenkins:

We are writing to you on behalf of our client, Pruco Securities Corporation ("Pruco"), a broker-dealer registered with the Division of Securities of the State of Utah, to confirm that Pruco's sales representatives who are or may become registered as agents with the Securities Division and who have taken and passed the Uniform Securities Agent State Law Examination ("Series 63 examination") and the National Association of Securities Dealers, Inc.'s (the "NASD") examination for investment company securities and variable insurance contracts ("Series 6 examination"), may sell certain certificates of deposit ("CDs"), in the manner described below, without satisfying any additional examination requirements.

## **BACKGROUND**

Pruco is an "investment company broker-dealer" and is registered as such with the Securities and Exchange Commission (the "SEC") as well as the various states in which it is required to be registered, including Utah. Pruco is also admitted as a member of the NASD. Pruco's sales representatives are located in all fifty states and the District of Columbia. Sales representatives located in or effecting transactions in Utah are registered as agents with the Utah Division of Securities. As an investment company broker-dealer, Pruco sells investment company securities and variable insurance contracts. Pruco and its sales representatives do not offer equity or debt securities of individual issuers. Pruco primarily acts as a distributor of mutual fund shares and variable insurance contracts issued by certain affiliates of Pruco, including the Prudential Insurance Company of America ("Prudential"). Given the limited nature of Pruco's business, most of its sales representatives have qualified for registration with the NASD by taking the NASD's Series 6 examination (for investment company securities and variable contracts) although a few have taken the NASD's General Securities Registered Representative Examination ("Series 7 examination"). Pruco's sales representatives also have taken the Series 63 examination, where required by applicable state securities law or regulation.

Pruco now proposes to offer and sell equity-indexed CDs issued by the Prudential Savings Bank, F.S.B., and the Prudential Bank and Trust Company (together, the "Prudential Bank"). Each of these institutions is a wholly owned subsidiary of Pruco's parent, Prudential. Each of these institutions is subject to a regulatory oversight structure for financial institutions, including regulation by the Federal Deposit Insurance Corporation (the "FDIC"). The equity-indexed CDs guarantee a minimum interest for a specified period, plus excess interest, based upon the performance of a specified securities index. The equity-indexed CDs qualify for FDIC insurance (up to \$100,000 per individual account). Pruco's activities with respect to the equity-indexed CDs will be limited to offering for sale the equity-indexed CDs issued by the Prudential Bank. Pruco and its sales representatives will not offer CDs issued by any unaffiliated financial institution. Furthermore, Pruco will not create a secondary market for the equity-indexed CDs or for any other CDs. In other words, any person who purchases an equity indexed CD from a sales representative of Pruco and then desires either to dispose of the CD prior to its maturity or to redeem the CD upon maturity must tender it to the Prudential Bank, either in person or through the purchaser's sales representative. Finally, in view of the limit on FDIC insurance, purchasers will be limited to investing up to a maximum of \$100,000 each in equity-indexed CDs.

#### **UTAH EXAMINATION REQUIREMENTS**

Sections 64-1-4 and 61-1-24 of the Utah Uniform Securities Act provide the Director of the Division of Securities with the authority to establish oral or written examination requirements for applicants wishing to become registered as broker-dealers or agents of broker-dealers in the State of Utah. Pursuant to this authority, Rule R164-4-3 of the Rules of the Securities Commission requires each applicant seeking to become licensed as an agent of a broker-dealer in Utah to have passed "the Series 63, Uniform State Agents Securities Law Examination ('USASLE') and any other examination required by the NASD . . . ."

Thus, the examination requirements call for the Series 63 examination and an examination administered by a self-regulatory organization, such as the NASD. In this regard, we note that Utah's examination requirements are similar to those adopted by a majority of states in that those states also require a Series 63 examination plus an NASD examination. Also, we note that in Utah, as with the other states that have similar requirements, the reference to an NASD examination does not specify a particular examination. The logical inference is that the examination required by the NASD for the applicant's proposed activities would be sufficient. Accordingly, we discussed with attorneys in the general counsel's office of the NASD what examinations the NASD would require Pruco's sales representatives to satisfy in light of their overall activities, including the proposed activities with respect to the equity-indexed CDs. We were advised that the NASD would not require Pruco's sales representatives to take and pass the Series 7 examination in lieu of or in addition to the Series 6 examination in order to sell CDs that

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are not considered to be securities under the federal securities laws. In this regard, we were further advised that the NASD follows the analysis in Gary Plastic Packaging Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc., 756 F.2d 230 (2d Cir. 1985), in which a federal appellate court held that CDs offered by a brokerage firm pursuant to a program whereby the brokerage firm, among things, would create a secondary market for the CDs were securities within the meaning of the federal securities laws. On the other hand, CDs offered by brokerage firms for which no secondary market was made available would not be considered securities under the federal securities laws. Since no secondary market will be made available for the equity-indexed CDs proposed to be marketed by Pruco and its sales representatives, the NASD considers the Series 6 examination to be sufficient for their current and proposed activities. The Series 6 examination, then, also should be sufficient to satisfy the examination requirements of the Division of Securities.

#### REQUEST

We hereby request confirmation that the Division of Securities will consider the Series 6 examination (along with the Series 63 examination) sufficient for the proposed activities of Pruco's sales representatives effecting transactions in Utah. We see no policy reason for requiring that the sales representatives take and pass the Series 7 examination in these circumstances: clearly the Series 7 examination has no relevance to the proposed activities with respect to the equity-indexed CDs, since the NASD does not consider such activities to entail the sale of securities and the examination therefore would not be expected to take such activities into account.

We believe that another policy consideration supporting our request is consistency with other states with similar examination requirements. In this regard, as noted above, a majority of the states have adopted examination requirements similar to Utah's in that they too are based on, or defer to, the NASD examination requirements applicable to an applicant's proposed securities activities. The securities administrators of most of these states have confirmed to us that they would follow the NASD in this regard, and, accordingly, would not require sales representatives offering equity-indexed CDs in their states, along with variable contracts and investment company securities, to take and pass the Series 7 examination, in addition to or in lieu of the Series 6 examination, in view of the fact that the NASD would not require the Series 7 examination. Indeed, the Oregon securities administrator issued a favorable response to a similar request submitted by Pruco two years ago. See In Re: Sales of Bank Certificates of Deposit in Oregon, 1995 Ore. Sec. LEXIS 3 (Jan. 18, 1996). (With regard to the rest of the states with similar examination requirements, based on discussions with the securities administrators of the various states, we are seeking written confirmation with regard to the inapplicability of a Series 7 examination requirement based on the same analysis as set forth herein.)

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Please feel free to contact me, at (202) 383-0197, or Terrence Davis, at (202) 383-0202, if we may be able to provide you with any additional information or answer any questions you may have.

Sincerely,



Susan S. Krawczyk

cc: Christopher Sprague  
Terrence Davis