- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

AGENCY: Employment and Training Administration (ETA).

Type of Review: New Collection.

Title: Prisoner Reentry Initiative (PRI) Reporting System.

OMB Number: 1205–0NEW.

Frequency: Quarterly.

Affected Public: Not-for-profit institutions.

Type of Response: Recordkeeping; Reporting.

Number of Respondents: 30.

Annual Responses: 6,490.

Average Response time: 64 hours.

Total Annual Burden Hours: 15,150.

Total Annualized Capital/Startup Costs: 0.

Total Annual Costs (operating/maintaining systems or purchasing services): 0.

Description: Respondents are Faith-Based and Community Organization (FBCO) grantees. Selected standardized information pertaining to customers in Prisoner Reentry Initiative (PRI) programs will be collected and reported for the purposes of general program oversight, evaluation and performance assessment. ETA will provide all grantees with a PRI management information system to use for collecting participant data and for preparing and submitting the required quarterly reports.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. E5–7963 Filed 12–27–05; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11306, et al.]

Proposed Exemptions; Pennsylvania Institute of Neurological Disorders, Inc. Profit Sharing Plan (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

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

Written Comments and Hearing Requests

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

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

Notice to Interested Persons

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

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

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

Pennsylvania Institute of Neurological Disorders, Inc. Profit Sharing Plan (the Plan) Located in Sunbury, PA

[Application No. D–11306]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale (the Sale) by the Plan of a parcel of unimproved real property known as Lot 20, Section ''F'', Monroe Manor, Inc., (Lot #20 Kingswood Drive, Selinsgrove, PA 17870) (the Property) to Mahmood Nasir, M.D. (Dr. Nasir), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) All terms and conditions of the Sale are at least as favorable to the Plan as those that the Plan could obtain in an arm's-length transaction with an unrelated party;

(b) The Sales price is the greater of $81,000 or the fair market value of the Property as of the date of the Sale;

(c) The fair market value of the Property has been determined by a qualified independent appraiser;

(d) The Sale is a one-time transaction for cash;

(e) The Plan does not pay any commissions, costs, or other expenses in connection with the Sale; and

(f) The Plan fiduciaries will determine, among other things, whether it is in the interest of the Plan to go forward with the Sale of the Property, will review and approve the methodology used in the appraisal that is being relied upon, and will ensure that such methodology is applied by a qualified independent appraiser in determining the fair market value of the Property as of the date of the Sale.

Summary of Facts and Representations

1. The Pennsylvania Institute of Neurological Disorders, Inc. (the Employer) is the sponsor of the Plan. Dr. Nasir is the sole owner and shareholder of the Employer. Dr. Nasir is also the President of the Employer. The Employer is located in Sunbury, Pennsylvania.

The Plan is a defined contribution profit sharing plan which was effective as of September 1, 1993. As of December 31, 2004, the Plan had seven participants, who are as follows: Dr. Nasir, Denise Bebenek, Teresa Gelnett, Julie Rebuck, Judy S. Smink, Hollie Vankirk, and Cassie J. Wolfe. The Trustees of the Plan are Dr. Nasir and Rubina Nasir. As of December 31, 2004, the Plan had total assets of $403,241.99.

2. In July 1995, the Plan purchased the Property from John A. Bolig and Christabelle M. Bolig, unrelated third parties, for $49,000.[1] The Property is a 22,500 square foot parcel of unimproved real property located at Lot #20 Kingswood Drive, Selinsgrove, Pennsylvania 17870. The Property is adjacent to property owned and resided on by Dr. Nasir. The applicant represents that the Property has not been leased to, or used by, any party in interest with respect to the Plan since the date of acquisition by the Plan. The value of the Property represents approximately 16.57% of the Plan's total assets as of December 31, 2004. The applicant represents that the only Plan expenditure with respect to the Property is $511.72 in annual real estate taxes from 1995 (*i.e.*, the year of original acquisition) until the present. Therefore, the total cost to the Plan for the Property was $54,628.92 as of the present date ($5,628.92 + $49,000 = $54,628.92). Since the date of the purchase, the Property has remained vacant and no income has been generated.

3. The Property was appraised (the Appraisal) on June 21, 2005, by Mary Beth Rodriguez (the Appraiser), of the Bowen Agency in Selinsgrove, Pennsylvania. The Appraiser is certified by the Commonwealth of Pennsylvania as a General Appraiser. The Appraiser has certified that she is independent of the Employer, the Trustees, and any other parties in interest.

The Property was valued using the sales approach. The Appraiser compared the Property to three other similar properties sold within a one-half mile of the Property since March 2004. She adjusted the sale price of the comparable properties based upon date of the sale, location, and site/view. The Appraiser determined that the fair market value of the Property was $81,000 as of June 21, 2005.

The Appraiser did not attribute any special benefit to the value of the Property from the ownership of Dr. Nasir of the adjacent property due to a number of factors. First, there is a driveway dividing the two parcels. Second, the ownership of the Property by Dr. Nasir does not affect Dr. Nasir's interest in the adjacent lot. Finally, the value of the sum of the separate values for the Property and the adjacent parcel already owned by Dr. Nasir is greater than the value if the Property and the adjacent lot were sold as one combined lot. Therefore, the Appraisal does not include any premium for assemblage value.[2]

4. The applicant represents that the proposed transaction is in the interest of the Plan because a gain will be realized when the parcel of land is sold to Dr. Nasir and the proceeds can be reinvested in other investments with a higher rate of return without incurring carrying costs such as real estate taxes. The Property is the only real property owned by the Plan. The transaction will be a one-time cash sale and will enable the Plan to diversify its investment portfolio.

Furthermore, the applicant represents that the proposed transaction is in the best interest and protective of the Plan because the Sale will be for an amount equal to the greater of: (i) $81,000 which represents the fair market value of the Property as of June 21, 2005, or (ii) the current fair market value of the Property, as established by a qualified independent appraiser on the date of the Sale. This amount exceeds the original acquisition cost of the Property, plus expenses and real estate taxes incurred by the Plan from the date of the acquisition until the date of the proposed Sale. The Plan will not pay any commissions, costs, or other expenses in connection with the Sale. The applicant states that the Appraisal will be updated as of the date of the transaction.[3]

5. The Plan fiduciaries will determine, among other things, whether it is in the interest of the Plan to go forward with the Sale of the Property, will review and approve the methodology used in the appraisal that is being relied upon, and will ensure that such methodology is applied by a qualified independent appraiser in determining the fair market value of the Property as of the date of the Sale.

6. The proposed transaction will occur within 30 days of the publication of the grant of the prohibited transaction exemption.

7. In summary, the applicant represents that the subject transaction satisfies the statutory criteria contained in section 408(a) of the Act and section 4975(c)(2) of the Code for the following reasons:

(a) All terms and conditions of the Sale will be at least as favorable to the Plan as those that the Plan could obtain in an arms-length transaction with an unrelated party;

(b) The fair market value for Property has been determined by a qualified independent appraiser;

(c) The Sale will be a one-time transaction for cash;

(d) The Plan will not pay any commissions, costs, or other expenses in connection with the Sale; and

(e) The Plan will receive an amount equal to the greater of: (i) $81,000; or (ii) the current fair market value of the Property as of the date of the Sale.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the

[1] The Department expresses no opinion herein as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of part 4 of Title I of the Act.

[2] "Assemblage" value reflects the willingness of a purchaser to pay above market value for a parcel of property in order to preserve such purchaser's interest in their present holdings of other parcels which are adjacent to such property.

[3] For this purpose, the updated appraisal must take into account any new data on recent sales of similar property in the local real estate market, which may affect the valuation conclusion.

applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Blessed Chuksorji of the Department, telephone (202) 693–8567 (this is not a toll-free number).

The Zieger Health Care Corporation Retirement Fund (the Plan) Located in Farmington, Michigan

[Exemption Application No. D–11313]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B, 55 FR 32836, 32847 (August 10, 1990).[4]

I. Transactions

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975, by reason of sections 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The in-kind contribution and transfer to the Plan (the In-Kind Contribution) by Zieger Health Care Corporation (ZHCC), acting through its wholly-owned subsidiary, Botsford General Hospital (the Hospital), both of which are parties in interest with respect to the Plan, of the Hospital's right, title, and interest in five (5) limited liability corporations, (collectively, the LLCs or individually, an LLC) where the sole asset of each such LLC is one of five (5) parcels of improved real property situated in southeastern Michigan (individually, an Underlying Property, collectively, the Properties).

(b) The holding by the Plan of ownership interests in the LLCs that own the Properties.

(c) The leaseback by the Plan to the Hospital of the Underlying Property held by each of the LLCs, (individually, a Lease or collectively, the Leases).

(d) The sale of an Underlying Property (or ownership interest in an LLC, as the case may be) by the Plan to ZHCC or its affiliates, pursuant to a right of first offer (the RFO), as described in each Lease, at any time during the term of such Lease.

(e) Any payment or payments to the Plan by the Hospital, pursuant to contingent rent payments(s) (the Contingent Rent Payment(s)), as described in each Lease, during the term of such Lease.[5]

II. Conditions

The exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a) ZHCC contributes to the Plan no less than:

(1) Cash in the amount of $3.3 million in the year 2005;

(2) Cash in the amount of $2 million in each of the years 2006, 2007, and 2008; and

(3) Cash in the amount of $3 million in the year 2009.

(b) A qualified, independent fiduciary, as defined in section III(c), below, (the Independent Fiduciary), acting on behalf of the Plan, determines in accordance with the fiduciary provisions of the Act, whether and on what terms to enter into each of the Transactions.

(c) The Independent Fiduciary represents the Plan's interests for all purposes with respect to each of the Transactions and determines, prior to entering into any of the Transactions, that each such transaction is feasible, in the interest of the Plan, and protective of the Plan and its participants and beneficiaries.

(d) The Independent Fiduciary reviews, negotiates, and approves the specific terms of each of the Transactions.

(e) The Independent Fiduciary monitors compliance by ZHCC and its affiliates, as defined in section III(a), below, with the terms of each of the Transactions and with the conditions of this proposed exemption to ensure that such terms and conditions are at all times satisfied.

(f) The Independent Fiduciary manages the acquisition, holding, leasing, and disposition of the Plan's ownership interests in the LLCs that own the Properties and takes whatever actions are necessary to protect the rights of the Plan with respect the Plan's ownership interests in such LLCs.

(g) The terms and conditions of each of the Transactions are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties.

(h) The Independent Fiduciary determines the fair market value of the In-Kind Contribution, as of the date such contribution is made. In determining the fair market value of the In-Kind Contribution, the Independent Fiduciary obtains an updated appraisal from an independent, qualified appraiser selected by the Independent Fiduciary and ensures that the appraisal is consistent with sound principles of valuation.

(i) Each Lease has a term of years, commencing on the closing date of the In-Kind Contribution and ending ten (10) years thereafter. Each Lease is a triple net ''bondable'' lease in which the Hospital's obligation to pay rent to the Plan is absolute and unconditional. The rental payment under each Lease is no less than the fair market rental value of the leased premises, as determined by the Independent Fiduciary, and is net of all costs related to the leased premises, including costs of capital improvements and all other costs to operate, maintain, repair and replace in good condition, and repair the systems and structural and non-structural components of the buildings on the leased premises, including without limitation, the roof, foundation, landscaping, storm water management, utilities, and all other capital and non-capital repairs and replacements, all in a manner befitting office buildings comparable to the buildings on the leased premises and in accordance with all applicable laws. Each Lease contains a commercially reasonable standard for determining whether repair or replacement is necessitated. All such maintenance, repair, and replacement work is the responsibility of the Hospital. As discussed in representation number 6 in the Summary of Facts and Representations, below, and except as otherwise provided in each Lease, the Hospital is required to restore the leased premises in the event of casualty or condemnation, regardless of any lack or insufficiency of insurance proceeds or condemnation awards therefore (but subject to all applicable laws);

(j) ZHCC and the Hospital agree to make one or more Contingent Rent Payment(s) to the Plan, if the Plan does not earn an annual return on each of the Properties equal to a fixed interest rate of 8 percent (8%) in any year (the Minimum Funding Rate). Each Contingent Rent Payment is due on the *earliest* of: (1) The end of the ten (10) year term of the Leases, (2) the termination of any of the Leases (including a termination due to default,

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

[5] The transactions described in section I (a)–(e), above, collectively, are referred to herein as the Transactions.

destruction, or condemnation), or (3) the sale by the Plan of any parcel included in the Properties (or the sale by the Plan of the entity that owns any parcel) (each a Minimum Return Date). If the actual return to the Plan (the Actual Return), as defined in section III (d), below, is less than the sum of the contribution value of the Properties, plus a return on such contribution value equal to the Minimum Funding Rate (the Minimum Return), then ZHCC and the Hospital shall pay to the Plan a Contingent Rental Payment equal to the amount of any such difference. ZHCC and the Hospital shall pay each Contingent Rent Payment to the Plan in cash within 180 days after each Minimum Return Date.

(k) If the Plan desires to sell or convey any of the Properties (or any of the LLCs, as the case may be), during the term of a Lease, the Plan shall first offer the Hospital the right to purchase or otherwise acquire such property or LLC, pursuant to a right of first offer (the RFO): (1) On such terms and conditions as the Plan proposes to market such property or such LLC for sale (Soliciting Offer), which terms and conditions shall reflect the Plan's good faith determination of market conditions and the fair market value for such property or LLC, or (2) on such terms and conditions as are contained within an unsolicited *bona fide* offer from an unaffiliated third party that the Plan desires to accept (Unsolicited Offer). The parties shall negotiate in good faith the terms and conditions of any purchase based on a Soliciting Offer for a period of thirty (30) days following the Plan's notice to the Hospital. In all events, the Hospital shall exercise such right to purchase, if at all, upon notice to the Plan within the thirty (30) day period described above with respect to a Soliciting Offer or within thirty (30) days after notice to the Hospital of an Unsolicited Offer. If the Hospital fails to exercise such right to purchase, the Plan is free to sell such property or LLC (*i.e.*, close on the transfer) to a third party on such terms for the next 360 days. However, the Plan shall not have the right to sell to a third party at a lower effective purchase price or on any other materially more favorable term than the effective purchase price and terms proposed by the Plan to the Hospital without first re-offering such property or LLC to the Hospital at such lower effective purchase price or other more favorable term, nor to sell on any terms following the expiration of such 360-day period, without in either event first re-offering such property or LLC to the Hospital. The RFO shall terminate upon the commencement of the exercise by the Plan of its remedies under the Leases as the result of a monetary event of default by the Hospital that continues uncured following notice and the expiration of applicable cure periods (and a second notice and cure period provided fifteen (15) days before the loss of such right on account of such default).

(l) Subject to the Hospital's RFO, the Plan retains the right to sell or assign, in whole or in part, any of its interests in the Properties (or any of its interests in the LLCs, as the case may be) to any third party purchaser.

(m) ZHCC indemnifies the Plan with respect to any liability for hazardous materials released on the Properties, whether such release occurs prior to or after the execution of the Leases or the In-Kind Contribution;

(n) The In-Kind Contribution is conditioned on the Independent Fiduciary's receipt of favorable engineering and environmental reports prior to closing.

(o) The Plan incurs no fees, commissions, or other charges or expenses as a result of its participation in any of the Transactions.

III. Definitions

(a) The term, ''affiliate,'' means:

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

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

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

(b) The term, ''control,'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term, ''Independent Fiduciary,'' means a fiduciary that:

(1) Has a minimum of five (5) years of experience acting on behalf of employee benefit plans covered by the Act and/or the Code;

(2) Can demonstrate, through experience and/or education, proficiency in matters involving the acquisition, management, leasing, and disposition of real property;

(3) Is an expert with respect to the valuation of real property or has the ability to access (itself or through persons engaged by it) appropriate data regarding the purchase, sale, and leasing of real property located in the relevant market;

(4) Has not engaged in any criminal activity involving fraud, fiduciary standards, or securities law violations;

(5) Is appointed to act on behalf of the Plan for all purposes related to, but not limited to (i) the In-Kind Contribution, (ii) the Leases, (iii) the RFO, (iv) the Contingent Rent Payment(s), and (v) any other transactions between the Plan and ZHCC and its affiliates related to the LLCs and Properties; and

(6) Is independent of and unrelated to ZHCC or its affiliates. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to ZHCC and its affiliates if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with ZHCC,

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration in connection with any Transactions described in this exemption; except that an Independent Fiduciary may receive compensation from ZHCC for acting as an Independent Fiduciary in connection with the Transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decisions, and

(iii) The annual gross revenue received by such fiduciary, during any year of its engagement, from ZHCC and its affiliates exceeds five percent (5%) of the fiduciary's annual gross revenue from all sources for its prior tax year.

(d) The definition of Actual Return to be used in calculating the amount of each Contingent Rent Payment is the sum of: (1) The sales price of any parcel sold, net of selling costs, (2) any net insurance proceeds or net condemnation awards received by the Plan (if any Lease is terminated due to destruction or condemnation), (3) the fair market value of any parcel(s) that the Plan continues to hold, as determined by a three appraiser method (if the parties are unable to otherwise agree), plus (4) the rental income received by the Plan under the Leases prior to the Minimum Return Date, less expenses incurred by the Plan with respect to the Properties and the Leases up to the Minimum Return Date. The liabilities and obligations of the Hospital and ZHCC survive the expiration date of a Lease, or a termination of a Lease, and continue until such liabilities and obligations have been fully paid and fulfilled.

Temporary Nature of Exemption

The exemption, if granted, is temporary and will become effective on the date of publication of the grant of the final exemption in the **Federal Register**. The exemption will expire on the date which is ten (10) years from the date of the grant of the exemption. If the

Hospital wishes to renew the Leases on the Properties between the Hospital and the LLCs (or between the Hospital and the Plan, as the case may be), the Department would encourage the applicant to submit another application prior to the expiration of this exemption, provided that the Independent Fiduciary determines that the conditions of the renewal are feasible, in the interest and protective of the Plan and the Hospital can demonstrate that it can satisfy the terms of such renewal.

Summary of Facts and Representations

1. ZHCC is a not-for-profit Michigan corporation established in 1968 to provide a centralized governance and management structure for its subsidiaries. ZHCC's business operations include the following wholly-owned subsidiaries: (a) The Hospital, (b) Community Emergency Medical Services (CEMS), and (c) Botsford Continuing Care Corporation (BCCC).

The Hospital is a community osteopathic hospital that operates a full service hospital, providing an array of ambulatory and inpatient services for the benefit of the residents living in southeastern Michigan. CEMS provides emergency and non-emergency medical transportation to the general public and health care providers in approximately twenty (20) communities in southeastern Michigan. BCCC owns and operates a 179-bed skilled nursing facility in Farmington, Michigan, a 64 unit assisted living facility, and a 51 unit independent living apartment building. BCCC also provides services to an independent living condominium development that consists of 86 separately owned units located within its campus.

2. The Plan was established January 1, 1968, and restated effective January 1, 2000. The Plan is a non-contributory, single employer, defined benefit pension plan. The Plan covers all employees of the Hospital, CEMS, and BCCC. It is represented that the Hospital, CEMS, and BCCC are the only entities in the controlled group that have employees. As of December 31, 2003, the Plan had approximately 3,344 participants and beneficiaries. As of February 11, 2005, the date the application for exemption was filed, the Plan had approximately 3,300 participants and beneficiaries.

On November 26, 2002, the Board of Directors of ZHCC approved a resolution to freeze benefit accruals under the Plan, effective December 31, 2002. All participants, as of December 31, 2002, are deemed 100 percent (100%) vested. After December 31, 2002, employees could not become participants in the Plan.

As of September 30, 2004, the Plan was approximately 71 percent (71%) funded with assets of $71.2 million and liabilities of $101 million measured on an accumulated benefit obligation basis using a 6 percent (6%) discount rate, under Financial Accounting Standard (FAS) No. 87, Employers' Accounting for Pensions. Of the total assets of the Plan after the execution of the In-Kind Contribution, approximately ten percent (10%) will be involved in the Transactions that are the subject of this exemption.

ZHCC is the sponsor of the Plan, the administrator of the Plan, and the named fiduciary for the Plan. As such, ZHCC is a party in interest with respect to the Plan, pursuant to section 3(14)(A) and 3(14)(C) of the Act. The Hospital, CEMS, and BCCC, as corporations 50% or more owned by ZHCC, are also parties in interest with respect to the Plan, pursuant to 3(14)(G) of the Act.

The general administration of the Plan and the responsibility for carrying out the provisions of the Plan are vested in a Retirement Committee (the Committee) consisting of designated members of the Board of Directors of ZHCC and two (2) members of management. The Board of Directors of ZHCC appoints the members of the Committee. The function of the Committee is to administer the Plan exclusive of those functions assigned to the trustee of the Plan (the Trustee). The Committee is a party in interest with respect to the Plan, pursuant to section 3(14)(A) of the Act.

Under the terms of the Zieger Health Care Corporation Retirement Plan Trust (the Trust), the Trustee of the Plan is Standard Federal Corporate and Institutional Trust (formerly, Standard Federal Bank). The Trustee is a division of LaSalle Bank, a national banking association. The Trustee has discretion with respect to the investment of the assets of the Plan. Pursuant to its authority under the Trust, ZHCC has appointed investment managers to manage the Plan's assets. ZHCC has the power to appoint and remove the Trustee. The Trustee is a party in interest with respect to the Plan, pursuant to section 3(14)(A) of the Act.

The Plan has invested $3,272,836 and $2,691,285, as of December 31, 2003, and December 31, 2002, respectively, in shares of funds managed by the Trustee or its subsidiaries. The applicant represents that these transactions are exempt under Prohibited Transaction Class Exemption 77–4 (PTCE 77–4).[6]

3. The Properties that are the subject of this proposed exemption are described below:

(a) Botsford Center for Rehabilitation and Health Improvement (the Rehab Center) is located at 26905 Grand River Avenue in Redford, Michigan, on a rectangular, level site containing 27,443 square feet or 0.63 gross acres with frontage along Grand River Avenue and Denby Street. All of the typical utilities are available to the site.

The Rehab Center is a one-story building totaling 5,288 square feet of gross building area. The construction of the improvements is represented to be Class C, with average quality of construction. The condition of the building is average.

The Rehab Center was built in 1963, originally as offices of Junior Achievement, with renovations in 1985 and 2001. The Rehab Center is currently 100 percent (100%) owner occupied by the Hospital.

(b) Botsford Kidney Center (the Kidney Center) is located at 28425 West Eight Mile Road in Livonia, Michigan, on a slightly irregular level site containing 209,959 square feet or 4.82 gross acres frontage along West Eight Mile Road. All of the typical utilities are available to the site.

The Kidney Center is a one-story building totaling 16,217 square feet of gross building area. The building has 13,947 square feet of net rentable area, which does not include the common areas of the building. The construction of the improvements is represented to be Class C, with average quality of construction. The condition of the Kidney Center is average.

The Kidney Center was built in 1976 as offices for an architect and was renovated in 1991 and 1995. A tenant owned by the Hospital occupies 28 percent (28%) of the building. The remaining 72 percent (72%) of the building is occupied on a month to month basis with only an expired lease in place by Botsford Kidney Center, Inc. (BKCI). BKCI is a Michigan business corporation owned 80 percent (80%) by individual physicians and 20 percent (20%) by the Hospital.

(c) Brentwood Medical Center (the Medical Center) is located at 28711

[6] The Department is offering no view, herein, as to the applicant's reliance on PTCE 77–4 with respect to the purchases by the Plan of interests in funds managed by the Trustee or its subsidiaries, nor has the Department made a determination that the applicant has satisfied all of the requirements of PTCE 77–4. Further, the Department is not providing any relief, herein, with respect to such purchases.

West Eight Mile Road in Livonia, Michigan, on a slightly irregular, level site containing 84,158 square feet or 1.93 gross acres with frontage along Brentwood Avenue and West Eight Mile Road. All of the typical utilities are available to the site.

The Medical Center is a one-story building with 9,895 square feet of gross building area. The building has 8,542 square feet of net rentable area, which does not include the common areas of the building. The construction of the improvements is represented to be Class C, with average quality of construction. The condition of the building is average.

The Medical Center was built in 1977, and has had several minor renovations since 1997. The Medical Center is currently 63 percent (63%) occupied by the Hospital, the owner, and 37 percent (37%) occupied by Tri-County Urologists, an unrelated third party.

(d) The Planning and Development Building (the P&D Building) is located at 29134 Grand River Avenue in Farmington Hills, Michigan, on a slightly irregular, level site containing 22,744 square feet or 0.52 gross acres. The site is comprised of two parcels, one that has frontage on Grand River Avenue, and one that has frontage on Jefferson Avenue. The only access to the property is via Jefferson Avenue. All typical utilities are available to the site.

The P&D Building is a one-story building totaling 4,063 square feet of gross building area and net rentable area. The construction of the improvements is represented to be Class C, with average quality of construction. The condition of the building is good.

The P&D Building was built in 1987. A department of the Hospital currently occupies 100 percent (100%) of the building.

(e) The South Professional Office Building (the SPO Building) located at 28100 Grand River Avenue in Farmington Hills, Michigan, on an irregular, level site containing 80,150 square feet or 1.84 gross acres. The site does not have any frontage on Grand River Avenue but is located on the campus of the Hospital. The only access to the property is via the access drive to the Hospital. All typical utilities are available to the site.

The SPO Building is a three-story building totaling 43,200 square feet of gross building area. The building has 35,470 square feet of net rentable area, which is comprised of fourteen tenant suites that are located on all three floors. The construction of the improvements is represented to be Class C, with average quality of construction. The condition of the building is average.

The SPO Building was built in 1987. The SPO Building is currently 87.3 percent (87.3%) occupied by multiple tenants, including Hospital departments and unrelated third party tenants.

The SPO Building is currently held in the Botsford Professional Office Building Limited Partnership, LLP (BPOB). BPOB is 90 percent (90%) owned by the Hospital and 10 percent (10%) owned by Botsford Real Estate Services Corporation (BRESC), a wholly owned subsidiary of ZHCC. It is represented that prior to the In-Kind Contribution, BRESC will be merged into the Hospital, thereby dissolving BPOB and resulting in the SPO Building being 100 percent (100%) owned by the Hospital.

The SPO Building is subject to a $1.9 million mortgage. It is represented that the Hospital will pay-off the SPO Building mortgage debt before executing the In-Kind Contribution.

4. ZHCC, the applicant, seeks an individual administrative exemption: (a) For the immediate, voluntary In-Kind Contribution to the Plan of interests in five (5) LLCs each of which will hold one of the Properties, described in paragraph 3, above, and (b) for the continued holding by the Plan of ownership interests in such LLCs and Properties.

It is anticipated that the Hospital will transfer its fee simple interest in each Underlying Property to a separate Michigan LLC of which the Hospital will own a 100 percent (100%) interest. The Hospital then intends to transfer its entire interest in each LLC to the Plan. Because the LLCs will be formed immediately before the In-Kind Contribution, it is represented that the LLCs will have no outstanding obligations or liabilities other than those generated by the transaction.

5. ZHCC believes that the In-Kind Contribution of the Properties does not satisfy the requirements of section 408(e) of the Act relating to the acquisition, lease, or sale of ''qualifying employer real property,'' as defined in section 407(d)(4) of the Act. In this regard, among the provisions in the definition of ''qualifying employer real property,'' set forth in section 407(d)(4) of the Act, is the requirement that parcels of property must be dispersed geographically. ZHCC believes that the In-Kind Contribution of the Properties would violate sections 406 and 407(a) because the Properties are all located within five (5) miles of each other; and therefore, arguably would not be geographically dispersed.

Likewise, as it is anticipated that each of the Properties is to be transferred into an LLC and the interests in the LLCs transferred to the Plan, ZHCC believes that the interests in the LLCs would fail to meet the requirements of 408(e) of the Act applicable to the acquisition or sale of ''qualifying employer securities,'' set forth in section 407(d)(5) of the Act, as interests in the LLCs would fail to meet the requirements of section 407(f)(1) of the Act. Accordingly, ZHCC has requested relief from sections 406(a), 406(b)(1), 406(b)(2) and 407(a) of the Act for the In-Kind Contribution and for the continued holding of ownership interests in the LLCs and the Properties.

6. In addition to the In-Kind Contribution, ZHCC requests an administrative exemption from section 406(a) and 406(b)(1) and 406(b)(2) of the Act for the Leases of the Properties between the Hospital and the LLCs. It is represented that execution of the Leases between the Hospital and the LLCs is a condition to acceptance by the Plan of the In-Kind Contribution. Under the terms of the Leases, the Plan, acting by and through the Independent Fiduciary who manages the LLCs, will lease each Underlying Property to the Hospital under a separate lease agreement. Each of the Leases will be identical as to material terms. For the purpose of each Lease, the Plan will maintain each of the Properties in its respective LLC in which: (1) the Plan will be the sole member and the Independent Fiduciary will be the LLC manager, and (2) the LLC will own such Underlying Property and be the lessor under the Lease.

Each of the Leases has a term of ten (10) years. Each Lease is an absolute net lease (*i.e.*, all costs are paid by the lessee, the Hospital) throughout the term of such Lease. The Leases are ''bondable'' leases in which the Hospital's obligation to pay rent to the LLC is absolute and unconditional. The rental payments are exclusive of all costs related to the leased premises, including real estate taxes, utilities, and insurance, which the Hospital must pay.

The Hospital also bears the costs of capital improvements to the Properties. Under the provisions of the Leases, the Independent Fiduciary must approve any capital alterations made to the Properties.

The Hospital will also bear all costs to operate, maintain, repair and replace in good condition the systems and structural and nonstructural components of the buildings on the Properties, in a manner befitting comparable office buildings in the area and in accordance with all applicable laws. In this regard, it is represented that the Independent Fiduciary has retained and will retain annually an engineering firm to conduct a property condition assessment and make recommendations for maintenance, repair, and replacements. In this regard, the Independent Fiduciary represents that it has received a Property Condition Assessment Report that has identified a number of repairs and replacements that should be made on the Properties. Based on the recommendations of the inspector, the Independent Fiduciary and the Hospital are working to develop a timetable to complete these repairs and replacements and will annually develop a budget for maintenance, repair, and replacement. All such maintenance, repair, and replacement work is the responsibility of the Hospital.

The Leases will contain a commercially reasonable standard for determining whether repair or replacement is necessary. Any disputes between the Independent Fiduciary and the Hospital concerning the Properties will be resolved through mediation. If mediation is unsuccessful, either party may bring suit.

The Leases contain certain casualty provisions that are described, in part, in this and the following paragraphs. In this regard, the Hospital, as lessee, is required at its sole expense to restore, repair, rebuild, or remove and replace all or any part of the leased premises damaged or destroyed in the event of any casualty, regardless of any lack or insufficiency of insurance proceeds. In this regard, the Hospital shall commence such activity after the occurrence of any such casualty within the time period, as set forth in the Lease, unless prevented by circumstances beyond the Hospital's control, and shall pursue such activity to completion. All casualty insurance proceeds are deposited with the LLC or the Plan, as the lessor, and disbursed to the Hospital, as needed in accordance with the capital alteration provisions of the Lease.

Failure by the Hospital to commence or substantially complete the restoration, repair, rebuilding, or removal and reconstruction, within certain timeframes as set forth in the Lease, shall be deemed an event of default under the Lease. Any insurance proceeds paid to the Hospital but not applied to the restoration, repair, rebuilding, or removal and reconstruction of the leased premises are due and payable, as additional rent by the Hospital, immediately prior to the termination of the Lease. All insurance proceeds not yet paid to the Hospital become the property of the LLC or the Plan, as lessor, upon such an event of default.

In the event that all or part of the leased premises are damaged or destroyed at any time during the last three (3) years of the term of the Lease, and either (a) the cost to repair or replace exceeds 50 percent (50%) of the full replacement cost, or (b) repair or replacement cannot reasonably be completed within 360 days of the date of the damage or destruction, the Hospital may elect to terminate the Lease; provided all insurance proceeds are paid to the LLC or the Plan, as lessor. If the estimated cost to reconstruct or repair the leased premises exceeds the amount of the insurance proceeds payable as a result of the damage or destruction, the Hospital shall be obligated to contribute any excess amounts needed to fully restore the leased premises. Any such excess amounts shall be paid to the LLC or the Plan, as lessor together with the insurance proceeds.

The Lease contains certain condemnation provisions that are described, in part, in this and the following paragraphs. If at any time during the term of a Lease, there shall be a taking of substantially all of the leased premises, the Lease shall terminate, as of the date of such taking, and the base rent and additional rent shall be apportioned and paid by the Hospital to the date of such taking. If the Lease terminates because of such taking, as of such date, the LLC or the Plan, as the lessor, shall be entitled to the entire condemnation award, except that the Hospital shall be entitled to any portion explicitly attributable to the Hospital's personal property and relocation costs.

In the event of a partial taking, the Lease shall continue and remain unaffected, except that the Hospital shall promptly after such partial taking, at its expense, take commercially reasonable efforts to restore or demolish and reconstruct any improvements altered or damaged by such partial taking. In this regard, the Hospital is entitled to reimbursement from the condemnation award for the aggregate of the funds expended and all other reasonable and customary costs directly related to such restoration or demolition and reconstruction. The balance of the award shall be paid to the LLC or the Plan, as lessor. Following any partial taking, the base rent shall be re-determined by the independent fiduciary based on an independent determination of fair market value by a qualified, independent appraiser.

Failure by the Hospital to commence and substantially complete restoration or reconstruction of the leased premises, within the time periods set in the Lease, unless such failure is due to circumstances beyond the Hospital's control, shall be deemed an event of default under the Lease, whereupon LLC or the Plan, as lessor, shall be entitled to the entire award, or so much thereof as has not been disbursed and used in such reconstruction or restoration.

In the event of a taking of all or part of the leased premises for temporary use, the Lease shall continue without change. There shall be no re-determination of base rent. Any periodic payments of the condemnation award made for such temporary use will be made to the Hospital until the expiration or termination of the Lease and to the LLC or the Plan, as lessor thereafter. In the event of a lump sum payment of the condemnation award, the Hospital shall be entitled to an amount equal to a maximum of three (3) months rent with the balance of such condemnation award deposited with the LLC or the Plan, as lessor. In addition, the Hospital is entitled to file any claim against the condemnor for damages for negligent use, waste or injury to the leased premises throughout the balance of the term of the Lease. The amount recovered for such damages shall be first applied by the Hospital to any necessary repair or restoration of the leased premises.

The Hospital in the event of any taking shall not be entitled to any payment based upon the value of the unexpired term of the Lease, other than the unearned portion of prepaid base rent or amounts attributable to the Hospital's personal property and any reasonable removal and relocation costs.

The Hospital, as the sole lessee under each of the Leases, will be solely responsible for all payments of rent to the LLC or the Plan, as lessor. The rental payments under the Leases are set at fair market rates. Subject to final due diligence and the approval of the Independent Fiduciary, the annual base rent for each of the Properties will be the current fair market rental value identified in appraisals prepared by an independent, qualified appraiser. It is estimated that the Leases will generate in the aggregate an average of $1 million in annual rental income for the Plan over the ten (10) year term of the Leases.

Under the terms of each Lease, the rental rate increases at 2.5 percent per year, compounded. The Independent Fiduciary represents that this provision is intended to protect the Plan against inflation. In this regard, the Independent Fiduciary represents that over the past ten (10) years, the average annual increase in the Consumer Price Index (CPI) has been 2.45 percent (2.45%). The Independent Fiduciary maintains that using a fixed percentage, rather than pegging the rent to a variable index, such as the CPI, provides certainty for the Plan as owner of the Properties. Further, it is represented that: (a) In recent years, negotiated base rental rates have increased by less than 2.5 percent (2.5%); and (b) the Congressional Budget Office estimates that the average annual increase in the CPI over the next ten (10) years will be 2.2 percent (2.2%).

The Leases provide that the Hospital will indemnify and hold the Plan harmless from all liabilities, obligations, damages, penalties, claims, costs, charges, and expenses, including reasonable architects' and attorneys' fees (excluding consequential damages and indirect losses) [7] during the term of a Lease, related to (i) any work done in or about the leased premises or any part of the leased premises by the Hospital or any party claiming by or through or at the request of the Hospital; (ii) any use, non-use, possession, occupation, condition, operation, maintenance, or management of the leased premises by the Hospital or any party acting on behalf of the Hospital; (iii) any negligence on the part of the Hospital or any of its agents, contractors, employees, subtenants, licensees, or invitees; (iv) any failure on the part of the Hospital to perform or comply with any of the covenants, agreements, terms, provisions, conditions, or limitations in the Leases; (v) any violation of any environmental law, the ADA, and other applicable laws; and (vi) any liability for hazardous materials released on the leased premises, whether such release occurred prior to or after (a) the execution of the Leases, or (b) the In-Kind Contribution.

It is represented that the Independent Fiduciary has retained Atwell-Hicks Development Consultants (Atwell) to conduct a Phase I Environmental Site investigation. In this regard, it is represented that Atwell did not identify any environmental concerns associated with the Properties or surrounding adjacent properties that could impact business environmental risk. No further investigations or actions were recommended at this time.

The Hospital will have the authority to sublease all or a portion of any of the Properties to a third party. Currently, portions of the Kidney Center, the SPO Building and the Medical Center are leased to unrelated third parties. Any leases currently in existence between the Hospital and unrelated third parties with regard to any of the Properties will be treated as subleases upon consummation of the Leases between the Hospital and the LLCs.

The provisions of all of the subleases are similar. The term of each of the subleases is generally for a period of five (5) years. It is represented that the initial rental rates due from the Hospital under the Leases of the Properties are higher than the aggregate rents to be paid under the subleases. In this regard, for calendar year 2005, the annual sublease income, including a proportionate share of expenses related to the SPO Building, the Kidney Center, and the Medical Center was $783,221. Taking into account the expenses that the Hospital bears with respect to the subleasing of the Properties, the applicant maintains that there are no current or anticipated profits to share with the Plan. In this regard, the Independent Fiduciary represents that since the tenant in an absolute net lease bears all of the costs of a property (as does the Hospital under the provisions of the Leases), such leases do not normally provide for profit sharing.

The Independent Fiduciary has negotiated an arrangement designed to ensure that any economic benefit derived from the subleases flows through to the Plan. In this regard, rents paid by subtenants will be sent to a postal lockbox and deposited directly into a cash account that can be used only to pay the rent and other obligations of the Hospital, as lessee under the Leases. Neither ZHCC nor the Hospital will have the right to withdraw funds from this cash account. The Independent Fiduciary will direct withdrawal of funds from this account. In this regard, on a monthly basis, the Independent Fiduciary will notify the Hospital of the amount of funds applied toward its rental obligations during the previous month, and the Hospital will have the right to deduct such amount from the next installment of rent due under the Leases. If any rentals are set aside, recovered, rescinded, or required to be returned for any reason, including the bankruptcy, insolvency, or reorganization of any subtenant, then the rental obligations of the Hospital to which the subtenant's rentals were applied will remain in existence, and the Leases will be enforceable as to such rentals. The Hospital will pay all fees and expenses related to the lockbox, the cash account, and any related postal or banking services.

The subleases will survive the expiration of the Leases, if entered into on commercially reasonable terms and for fair market rent. Any new subleases will include a provision stating that in the event of default by the Hospital under the Leases, the subtenant will pay all rents to the Plan or as directed by the Plan.

The applicant maintains that the Independent Fiduciary did not require a security deposit. In this regard, it is represented that security deposits are not customarily required under medical office leases because of the favorable risk profile of medical office tenants. It is further represented by the applicant that the subtenants, like the Hospital, are reliable tenants who have fulfilled their rental obligations on a timely basis.

7. The applicant has also requested an administrative exemption from section 406(a) and 406(b)(1) and 406(b)(2) for the sale of any of the Properties (or ownership interest in any of the LLCs, as the case may be), pursuant to the RFO, specified in the provisions of the Leases of the Properties as negotiated by the Independent Fiduciary. In this regard, the Properties (or LLCs, as the case may be) are to be offered to the Hospital, in accordance with a Soliciting Offer the terms of which are set by the Plan, or in accordance with an Unsolicited Offer made to the Plan by an unrelated third party.

The Independent Fiduciary will be responsible for any negotiations if the Hospital elects to purchase any of the Properties under terms of the RFO. The Hospital has a period of thirty (30) days to decide whether to accept such offer on its terms and, if the Hospital fails to do so, the Plan may sell to a third party on the offered terms or better. It is represented that the RFO does not ''run with the land'', so that the Hospital has no rights once the Plan sells to a third party. The Hospital cannot avail itself of the RFO, if there is an uncured monetary default under any Lease.

8. Further, an administrative exemption from sections 406(a) and 406(b)(1) and 406(b)(2) of the Act is needed for any Contingent Rent Payment(s) made to the Plan by ZHCC and/or the Hospital under the terms of the Leases on the Properties. In this regard, ZHCC and the Hospital have agreed to make one or more Contingent Rent Payment(s) that will provide a return to the Plan on each of the Properties equal to the Minimum Funding Rate. As of a Minimum Return Date, if the Actual Return (as defined in section III(d), of the exemption) to the

[7] The applicant has represented that the exclusion for consequential damages and indirect losses referred to in this sentence, would prevent the Plan from making a claim for damages that do not flow directly and immediately from the Hospital's activities, but only from some indirect result of those activities. For example, if the Hospital's negligence leads to a loss of rental income, this loss would be part of the Plan's direct damages. But if the loss of rental income causes the Plan to default on an obligation to a third party, this default would result in consequential damages that do not flow directly from the Hospital's activities.

Plan is less than the sum of the fair market value of such property when contributed plus a return equal to the Minimum Funding Rate, then ZHCC and/or the Hospital within 180 days, will pay to the Plan a Contingent Rent Payment equal to the difference. Under the terms of each of Leases of the Properties, the liabilities and obligations of ZHCC and the Hospital survive the expiration date or termination of a Lease and continue until such liabilities and obligation have been fully paid and fulfilled.

9. The applicant maintains that the requested exemption is administratively feasible in that the subject Transactions are similar to those granted by the Department in Prohibited Transactions Exemption 2004–19 [8] and include similar terms which protect the interests of the Plan and its participants and beneficiaries.

10. The applicant maintains that the exemption is in the interest of the Plan in that the proposed contributions, both those to be made in-kind and in cash are entirely in excess of the minimum funding obligations of ZHCC under section 302 of the Act and section 412 of the Code. As a result of the In-Kind Contribution, including the additional contributions of cash, and the income from the Leases, the Plan will be more than 110 percent (110%) funded for the actuarial present value of the accumulated Plan benefits liability under FAS 35. The Independent Fiduciary represents that the proposed exemption would place the Plan in a better actuarial and financial position over a five (5) year period from 2005–2009, with a higher funding percentage and a large funding standard account credit balance, with lower cash contributions from ZHCC. It is represented that the Plan will be less reliant on the ZHCC's ability to generate cash for payments to the Plan. Further, as the Properties are marketable and have a value independent of the Hospital, as the lessee, the Plan's reliance on the Hospital's creditworthiness would be reduced.

In addition to improving the Plan's funded status, it is represented that the overall diversification of the Plan's portfolio will improve as a result of the In-Kind Contribution. In this regard, the Plan's investment policy statement currently permits investments in equities (domestic and international), fixed income, real estate, immediate participation guarantee contracts issued by insurers, and cash equivalents. Currently, the Plan holds no real estate assets and owns no employer securities. If the exemption is granted and the Properties become assets of the Plan, the contributed real estate would replace a portion of the Plan's fixed income allocation. It is represented that adding real estate assets like the Properties to a portfolio of publicly-traded securities should enhance the overall portfolio diversification, given the low correlation of returns between real estate and other asset classes, and can be expected to improve the Plan's risk adjusted returns. It is further represented that the In-Kind Contribution and the Leases would not cause the Plan to fail to satisfy the diversification requirement as set forth in section 404 of the Act, notwithstanding the fact that approximately 10 percent (10%) of the Plan's assets would be invested in real estate in a single metropolitan area.

11. The applicant maintains that there are sufficient safeguards in place with regard to the subject Transactions that are designed to protect the interests of the Plan and its participants and beneficiaries. In this regard, pursuant to a letter agreement (the Agreement) between Fiduciary Counselors Inc. (FCI) and the Committee, FCI has been appointed to act as the qualified Independent Fiduciary on behalf of the Plan and investment manager with authority and discretion to acquire, hold, lease, and dispose of the Properties and acquire, hold, and dispose of the LLCs, as the case may be. FCI represents that it understands and acknowledges its duties and responsibilities, and obligations to act as a fiduciary under the Agreement and in accordance with the applicable fiduciary responsibility provisions of the Act.

If any party terminates the Agreement or if FCI decides to assign its obligations to perform services, the parties to the Agreement shall notify the Department within 15 days of any decision regarding the resignation, termination, or change in control of the Independent Fiduciary. Any replacement or successor Independent Fiduciary must be independent and qualified and must assume responsibility prior to the effective date of the removal of the predecessor Independent Fiduciary.

It is represented that FCI is qualified to serve as the Independent Fiduciary and investment manager for the Plan. In this regard, FCI is an investment adviser registered under the Investment Advisers Act of 1940 and a ''qualified professional assets manager'' as that term is defined in Prohibited Transaction Exemption 84–14. Since its inception in 1999, FCI has been involved in a variety of transactions requiring an independent fiduciary, such as prohibited transaction exemptions, conversions of common and collective mutual funds, mergers of mutual funds and ESOP transactions, and other transactions involving plan assets totaling more than $5 billion.

With regard to its independence, neither FCI nor its affiliates are affiliates of ZHCC or its affiliates within the meaning of 29 CFR 2570.31(a) of the Department's regulations. FCI represents that the fees it will receive in the current year from ZHCC will not exceed five percent (5%) of its annual gross income for the prior fiscal year. It is represented that while ZHCC is paying FCI's fees, the contract with FCI specifically provides, and ZHCC has acknowledged, that FCI's duties and obligations are solely for the benefit of the Plan and its participants and beneficiaries.

Nell Hennessy (Ms. Hennessy), President of FCI, will lead the project on behalf of FCI with respect to the Transactions that are the subject of this proposed exemption.

FCI is responsible for deciding whether and on what terms to agree on behalf of the Plan to the In-Kind Contribution and the Leases of the Properties. FCI will negotiate the specific terms of and the closing of the In-Kind Contribution and the Leases and will determine on behalf of the Plan the value of the assets to be obtained by the Plan by virtue of the consummation of such transactions. In making such decision, FCI will review the Plan's financial and actuarial condition, asset allocation, investment portfolio, investment policy statement, and other material relevant to making a determination as to the suitability of engaging in these transactions within the context of the Plan's overall assets.

In addition to its responsibilities with regard to the In-Kind Contribution and the Leases, FCI will be responsible for the following ongoing functions: (a) Monitor and enforce the Plan's rights and interests with respect to the Properties that are the subject of this exemption and any Leases or other agreements with ZHCC regarding the use of such Properties; (b) propose, negotiate, and decide whether to enter into any agreement to amend the Leases; (c) evaluate and decide whether to grant requests for forbearance of the terms of the Leases; (d) arrange for such appraisals of the Properties as may be necessary to satisfy the Plan's responsibilities under the Act and the subject exemption to establish and report the value of such Properties; (e)

[8] ARINC Incorporated Retirement Income Plan granted 69 FR 68391 (November 24, 2004) and proposed 69 FR 55179 (September 13, 2004).

report annually to the Committee concerning the physical and financial condition of the Properties; (f) determine whether continued ownership of the Properties is in the interest of the participants and beneficiaries of the Plan and whether, when, and on what terms to seek prudently to sell any of the Properties in accordance with the provisions of any contract between the Plan and ZHCC; and (g) in the event FCI determines to sell or otherwise dispose of any of the Properties, negotiating the terms and conditions of, and consummating the sale or disposition.

To carry out its responsibilities, FCI retained an experienced legal counsel in the law firm of Warner, Norcross & Judd LLP (Warner Norcross) to advise with respect to legal issues raised by the Transactions. In addition, FCI retained a qualified, independent appraiser, as discussed more fully, in paragraph 12 below, to determine the fair market value of the Properties and the fair market rent for the Leases. In this regard, it is represented that Ms. Hennessy physically inspected the Properties with the appraiser and a real estate partner from Warner Norcross.

FCI represents that it has retained and, if the Transactions are consummated, periodically will retain engineering and environmental experts to assess the physical condition of the Properties and make an environmental site assessment. It is represented that an engineering firm has conducted and will conduct its assessment in general conformance with the American Society of Testing and Materials guidelines for property condition assessments. It is further represented that an environmental firm has produced and periodically will produce Phase I environmental reports. FCI represents that any defects identified by the engineering and environmental experts will either be corrected or taken into account in determining whether to accept the Properties and the fair market value at which the Properties will be contributed.

FCI has represented that it will also retain an expert in insurance issues to evaluate the adequacy of the insurance coverage that ZHCC currently maintains and will maintain on the Properties. FCI further represents that, if appropriate, it will recommend changes in or additions to such coverage. Further, it is represented that FCI and its advisors will continue to analyze the condition of the Properties and the safeguards available to protect the Plan if the Transactions are consummated.

12. It is represented that FCI retained Stout Resius Ross Inc. (SRR), a qualified independent appraiser, to determine the fair market value of the Properties for purposes of the In-Kind Contribution and the fair market rental value of the Properties for purposes of the Leases. It is represented that the FCI solicited proposals from a number of appraisal firms, interviewed two firms and selected SRR based on their experience and references.

It is represented that SRR is qualified in that it has 19 professionals focusing on real estate valuation and consulting, including two professionals that are designated members of the Appraisal Institute with the MAI designation. SRR professionals hold general certified appraiser licenses in a number of states, including Michigan. It is represented that the real estate valuation group at SRR completes valuations of over 500 commercial properties per year. SRR has experience in the valuation of different property types, including hospital office buildings.

As requested by FCI, the scope of SRR's assignment for each of the Properties included the following: (a) Inspection of each of the Properties and surrounding area; (b) collection of current assessment and zoning data; (c) estimation of the highest and best use of each of the Properties; (d) research and analysis of sales and rentals of similar properties; (e) an estimate of the value of the Properties; (f) an estimate of the fair market rent for a ten-year absolute net lease; (g) an estimate of the fair market rent for a standard term lease; (h) consideration of the rent escalation factor contained in the Leases; (i) consideration of the RFO contained in the Leases; and (j) consideration of the adaptability of the Properties for alternative uses.

As requested by FCI, SRR determined the fair market value of the Rehab Center, the Medical Center, the Kidney Center, and the P&D Building based on: (a) The fee simple [9] ''as is,'' because these properties were not leased to third parties or were only subject to short-term leases; and (b) the leased fee estates [10] under the Leases with the Hospital. For the SPO Building, SRR determined the fair market value based on: (a) The leased fee estate ''as is,'' because a portion of the SPO Building is currently leased to third parties at below market rental rates, and (b) the leased fee estate under the Lease with the Hospital.

In making its determinations of the fair market value of each of the Properties ''as is'', SRR used the ''sales comparison'' [11] and the ''income capitalization'' [12] approaches, but did not use the cost approach,[13] due to the age of the improvements and the difficulty in accurately estimating physical depreciation.

In making its determination of the fair market value of the leased fee estate under the Leases with the Hospital, SRR incorporated a lease structure that would have the Hospital as a tenant for a ten (10) year term of the Lease, on an absolute net [14] basis. According to SRR, the ten (10) year term of the Lease, reduces rollover risk for the landlord under the Leases. The following factors influenced the estimation of a fair market rental rate and influenced an overall capitalization rate of 9.25 percent (9.25%): (a) The terms of the Leases, (b) the market rental rates applicable to each of the Properties to be included in the Leases, and (c) an estimation of management fees and replacement reserves. Additionally, SRR determined that the rental rate for each of the Properties is calculated by deducting $0.75 per square foot from the applicable market rental rate. This was calculated by accounting for the additional reimbursement of management fees and replacement reserves.

SRR examined the Leases under three (3) separate scenarios, one utilizing a direct capitalization approach and the other two utilizing a discounted cash flow analysis (DCF). The first DCF analysis examined the result if the Hospital were to vacate the premises after the expiration of the ten-year term of the Leases.

The second DCF analysis examined the result if the Hospital were to renew the Leases after the expiration of the ten-year term of the Leases.

It is represented that SRR concluded that the final reconciled value should be the fair value based on the actual terms of the Leases, including the actual

[9] SRR defines a ''fee simple'' as absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by governmental powers of taxation, eminent domain, police power, and escheat.

[10] SRR defines a ''leased fee estate'' as an ownership interest held by a landlord with the rights of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the leased fee are specified by contract terms contained within the lease.

[11] The ''sales comparison approach'' estimates the market value based on sales and listing of similar properties.

[12] The ''income capitalization approach'' estimates value by capitalizing the net income a property is capable of generating at market rates.

[13] The ''cost approach'' estimates the market value of the land as if vacant and the cost to replace the improvements less depreciation to their current conditions.

[14] SRR defines an ''absolute net lease'' as a lease in which tenant pays its pro-rata share of all operating expenses, including management fees and capital expenditures.

distribution of responsibility and cost for capital maintenance, and not on a more generalized market value based on market standard lease terms. FCI concurs with SRR in this view. As of March 22, 2005, the fair market values of the Properties and fair market rental value of the Properties were as follows:

Name of property	Fair market rental value per square foot absolute net under Leases with Hospital	Fair market value of "Leased fee" estate under Leases with Hospital
Rehab Center	$12.25	$630,000
Kidney Center	12.25	1.7 million
Medical Center	12.25	1 million
P&D Building	12.75	510,000
SPO Building	14.75	5.1 million

It is represented that FCI will continue to do due diligence before accepting the Properties for the Plan and that SRR's final valuation will be adjusted to reflect any subsequent information or developments so that the value of the Properties and the LLCs will reflect fair market value when contributed.

In determining whether the In-Kind Contribution will be in the interest of the Plan and its participants and beneficiaries, FCI considered not only the abstract value of the Properties, as determined in SRR's appraisals but a realistic assessment of the marketability of the Properties to parties other than ZHCC in the event the Leases are terminated and the Hospital no longer occupies the Properties, either by choice at the end of the Leases or due to a default under the Leases. The Properties are currently occupied almost exclusively by the Hospital or by medical practices that are associated with the Hospital. However, it is represented that the Properties are suitable for use by other occupants so the value of the Properties can be realized even if the Hospital were to default on the Leases. Based on the appraisals prepared by SRR, FCI believes that the Plan could recoup 87 percent (87%) of the leased value if the Properties were sold to independent third parties. In this regard, it is represented that with the exception of the SPO Building, the Properties are not on the campus of the Hospital; and therefore, could be sold separately.

All of the Properties are on or near major thoroughfares, in commercial areas. Thus, there should be multiple opportunities for sale or rental of the Properties to one or more unrelated users.

Under the terms of each of the Leases, ZHCC will have a RFO to purchase the leased premises, if the Plan chooses to sell any of the Properties prior to the end of the term of the Lease. FCI considered whether the RFO would materially impair the Plan's ability to sell the Properties for fair value during the term of the Leases. In this regard, FCI represented that, as structured, the RFO will not bar the Plan from marketing the Properties for sale at fair market value, since ZHCC can only purchase the Properties at fair market value. It is the opinion of FCI that any purchaser will not be burdened by the RFO, and therefore, the RFO should not affect the price that a purchaser is willing to pay for any of the Properties.

As the Properties are currently used for professional medical offices and facilities, FCI requested that SRR analyze the fitness of each of the Properties for alternative uses within the overall area and market in which they are located. This analysis is presented in the Highest and Best Use section of SRR's report. Factors affecting this include the strength and growth patterns of the region and the physical structure as well as the permitted uses of the Properties.

In the opinion of SRR, the most probable use of the Rehab Center, the Kidney Center, and the Medical Center is as a medical office space given the medical design of the examination rooms. However, it is represented that each of these buildings could be converted to a general office use for a tenant other than the Hospital by utilizing the tenant improvement allowances to reconfigure the interior of the buildings.

SRR represented that the most probable use of the P&D Building based on the design of the building is general office use. However, by utilizing tenant improvement allowances, it is the opinion of SRR that the P&D Building could likely be reconfigured for commercial/retail use.

SRR represented that medical office use is the most probable use for the SPO Building. In the opinion of SRR, significant renovations would be required to convert the SPO Building to general office use. Furthermore, SRR represented that general office use for the SPO Building would not be a likely alternative given the location of the SPO Building on the campus of the Hospital.

FCI has addressed whether the SPO Building would continue as a medical office building if the Hospital were to fail. In this regard, although the SPO Building could be reconfigured for other professional offices if necessary, FCI anticipates that the SPO Building would continue to be leased to doctors and other medical specialists. It is represented that vacancy rates for medical offices within a 7-mile radius of the site are significantly lower than general office space (8 percent (8%) compared to 18 percent (18%)) and this difference has been consistent over the last three (3) years. In the opinion of FCI, since this space has already been configured for medical offices, which generally command a higher rent because of the build outs needed for medical practices, it is likely that the space in the SPO Building would remain leased to doctors and other medical professionals.

13. FCI has determined that the In-Kind Contribution and the Leases are appropriate and in the interest of the Plan's participants and beneficiaries. FCI believes that the terms of the In-Kind Contribution and the Leases when taken as a whole are consistent with an arm's length negotiation between unrelated parties. In this regard, the In-Kind Contribution and the Leases include the following important features to protect the interests of the Plan and its participants and beneficiaries:

(a) The bondable nature of the absolute net Leases for the entire term of such Leases means that the Hospital, not the Plan, will bear not only the ordinary maintenance, tax and insurance expenses associated with a triple net lease but also all capital expenses associated with the Properties.

In addition, the Hospital will not have a tenant's typical right to rent abatement in the event any of the Properties suffer damages and cannot be occupied.

(b) The Plan has the unencumbered right to sell the Properties and to lease them to any party when the Leases expire.

(c) ZHCC has accepted a RFO. The RFO is subject to forfeiture in the event of ZHCC's unsecured monetary default. The RFO will not run with the land but will be extinguished, if the Hospital declines to exercise the right with respect to any of the Properties and the Plan sells that property to a third party.

(d) ZHCC and the Hospital have agreed to provide the Plan a minimum rate of return on each of the Properties as of the 10th anniversary of the In-Kind Contribution or on the earlier sale of any of the Properties or termination of a Lease or related lease on such property (including a termination due to default, destruction, or condemnation). This will take the form of one or more Contingent Rent Payment(s) to the Plan so that the Plan's actual return on the property (including rental payments) will not be less than the Minimum Funding Rate. This provision will protect the Plan if the value of any of the Properties were to decline.

(e) The Properties are discreet parcels of real estate with office buildings suitable for other tenants. FCI has insisted that each of the Properties be owned by a separate LLC, because that will facilitate separate sales in the future if FCI determines that such sales would be in the best interests of the Plan and its participants and beneficiaries. The LLCs are special purpose entities that will be single member LLCs, owned and managed entirely by the Plan. This LLC structure protects the remaining assets of the Plan from any liability arising from the Properties and facilitates future sales without transfer taxes, and without changing the underlying economic benefits for the Plan. For tax purposes, the LLCs will be treated as partnerships so the attributes of the Properties will be passed through to the Plan. This is the structure typically used by plans that acquire real estate.

FCI requested SRR to consider the potential impact on the value if each of the Properties is owned by a separate LLC. In this regard, SRR represented that if the LLC is 100% owned by the Plan, and the owner has control over the operation of the entity as well as the assets within the entity, then there would not be any discount to the value of the entity. The LLC would be valued based on the opening balance sheet of the entity, reflecting the market value of the assets less any applicable liabilities (*e.g.* mortgages), if they exist.

14. It is represented that ZHCC's cash position is the key to its ability to make the payments required by the proposed Transactions. In the opinion of FCI, the proposed Transactions would not appear to place a financial burden on ZHCC that would jeopardize its ability to satisfy its obligations to the Plan and its other creditors. It is represented that at the end of 2004, ZHCC had $79.7 million in cash and marketable securities (which could easily be converted to cash) of which $50.3 million (63%) was unrestricted. The annual rent under the Leases, $915,254, represents less than five percent (5%) of ZHCC's anticipated net cash for operations for 2005. FCI represents that it will continue to review ZHCC's financial situation prior to entering into the proposed Transactions and will take ZHCC's financial situation into consideration both in deciding whether it is prudent to enter into the proposed Transactions and what should be the final value assigned to the contributed Properties.

Further, FCI examined the Hospital's most recent financial information. In this regard, the Hospital's financial results for the first half of 2005 indicate that the Hospital's revenue was up 4 percent (4%) and expenses were down 3 percent (3%) for the six-month period ending June 30, 2005, compared to the same period last year.

FCI did not require financial projections for the full ten (10) years of the Leases. FCI states that projections beyond five (5) years were not available and would be highly speculative. FCI did review the Hospital's financial projections through 2010. In this regard, FCI represents that the Hospital provided five-year projections, even though it normally prepares one-year projections for its lenders. Based on five-year projections, it is the opinion of FCI that the Hospital should have sufficient cash flow to make the payments under the Leases, the Contingent Rent Payment, and the additional contributions to the Plan as required under the conditions of this exemption.

15. FCI provided a written report to the Department of its conclusions and summarized the analysis and consideration it took into account in reaching such conclusions. In the opinion of FCI, the In-Kind Contribution and the Leases will immediately improve the Plan's funding, improve the Plan's overall portfolio of assets in terms of anticipated risk-adjusted return, and reduce the Plan's reliance on future cash contributions from ZHCC. The Plan will receive a portfolio of marketable real estate, fully leased to a single tenant obligated to pay rent at fair market value with regular annual increases. The terms of the Leases relieve the Plan of any exposure to the costs, including capital improvements, for the first ten (10) years after the Properties are contributed to the Plan. Further, in the view of FCI, the In-Kind Contribution and the Leases satisfy the criteria set forth in sections 404 and 408(a) of the Act. Accordingly, for the reasons set forth above, FCI concluded, as the Independent Fiduciary for the Plan, that the In-Kind Contribution and the Leases are prudent and in the interest of the Plan's participants and beneficiaries.

16. The Department notes that the appointment of an independent fiduciary to represent the interests of the Plan with respect to the transactions that are the subject of the exemption request is a material factor in its determination to propose exemptive relief. The Department believes that it would be helpful to provide its views on the responsibilities of an independent fiduciary in connection with the in-kind contribution, directly or indirectly, of property to an employee benefit plan.

As noted in the Department's Interpretive Bulletin, 29 CFR 2509.94–3(d),[15] apart from consideration of the prohibited transaction provisions, plan fiduciaries must determine that acceptance of an in-kind contribution is consistent with the general standards of fiduciary conduct as set forth in the Act. It is the view of the Department that acceptance of an in-kind contribution is a fiduciary act subject to section 404 of the Act. In this regard, section 404(a)(1)(A) and (B) of the Act requires that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

In addition, section 404(a)(1)(C) of the Act requires that fiduciaries diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Accordingly, the fiduciaries of a plan must act ''prudently,'' ''solely in the interest'' of the plan's participants and beneficiaries, and with a view to the need to diversify plan assets when

[15] 59 FR 66736, December 28, 1994.

deciding whether to accept an in-kind contribution. If accepting an in-kind contribution is not ''prudent,'' not ''solely in the interest'' of the participants and beneficiaries of the plan, or would result in an improper lack of diversification of plan assets, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if a contribution in-kind does not constitute a prohibited transaction under section 406 of the Act.

The selection of an independent qualified appraiser to determine the value of an in-kind contribution and the acceptance of the resulting valuation are fiduciary decisions governed by the provisions of part 4 of Title I of the Act. In discharging its obligations under section 404(a)(1) of the Act, the independent fiduciary must take steps calculated to obtain the most accurate valuation available. In addition, the fiduciary obligation to act prudently requires, at a minimum, that the independent fiduciary conduct an objective, thorough, and analytical critique of the valuation. In conducting such verification, the independent fiduciary must evaluate a number of factors relating to the accuracy and methodology of the valuation and the expertise of the independent qualified appraiser. Reliance solely on the valuation provided by the appraiser would not be sufficient to meet this prudence requirement.

17. In summary, the applicant represents that the subject Transactions meet the statutory criteria of section 408(a) of the Act and 4975(c)(2) of the Code because:

(a) The Leases are expected to generate approximately $1 million in income for the Plan annually for a period of ten (10) years; (b) subject to the Hospital's RFO, the Plan retains the right to sell or assign, in whole or in part, any of its interests in the Properties (or any of its interests in the LLCs, as the case may be) to any third party purchaser; (c) FCI has established the fair market value of the Properties and the fair market rental value of the Properties with the assistance of a independent, qualified appraiser; (d) the Plan will be in a stronger financial position as a result of the In-Kind Contribution; (e) the Plan will acquire a valuable investment in that the Properties are likely to appreciate in value and are adaptable for other uses; (f) the In-Kind Contribution of real property will diversify the Plan holdings; (g) FCI has determined that the In-Kind Contribution and the Leases are appropriate and in the interest of the Plan's participants and beneficiaries; (h) FCI is responsible for reviewing, negotiating, and approving the specific terms of each of the Transactions, and has determined that the terms of the In-Kind Contribution and the Leases are consistent with an arm's length negotiation between unrelated parties; (i) the In-Kind Contribution is conditioned on receipt of favorable engineering and environmental reports prior to closing; (j) the Plan will incur no fees, commissions, or other charges or expenses as a result of its participation in any of the Transactions; (k) ZHCC will indemnify the Plan with respect to any liability for hazardous materials released on the Properties, whether such release occurs prior to or after the execution of the Leases or the In-Kind Contribution; (l) if the Actual Return to the Plan is less than the sum of the contribution value of the Properties plus a return on such contribution value equal to the Minimum Funding Rate, then ZHCC and the Hospital will make Contingent Rent Payments to the Plan equal to the amount of any such difference; (m) each Lease is a triple net ''bondable'' lease in which the Hospital's obligation to pay rent to the Plan is absolute and unconditional; (n) FCI will manage the acquisition, holding, leasing, and disposition of each of the Properties and the acquisition, holding, and disposition of the interests in each of the LLCs and will take whatever actions are necessary to protect the rights of the Plan with respect the Plan's ownership of such Properties and LLCs; (o) FCI will represent the Plan's interests for all purposes with respect to each of the Transactions and determine, prior to entering into any of the Transactions, that each is feasible, in the interest of the Plan, and protective of the Plan and its participants and beneficiaries; (p) FCI will monitor compliance by ZHCC and its affiliates with the terms of each of the Transactions and with the terms of this exemption; (q) the In-Kind Contribution plus the additional voluntary cash contributions will exceed the minimum funding requirement for the year 2005; and (r) FCI has determined that the Hospital should have sufficient cash flow to make the Lease payments, the Contingent Rent Payment(s), and the additional cash contributions to the Plan.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include participants and beneficiaries of the Plan, trustees, unions, vested terminates, retirees, and all other interested persons or parties involved in the Transactions. It is represented that these various classes of interested persons will be notified as follows.

All interested persons will be provided with a copy of the notice of this proposed exemption (the Notice), plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of the right to comment and to request a hearing. The Notice and the Supplemental Statement will be provided to all interested persons within seven (7) days of the publication of the Notice in the **Federal Register**. The Notice and the Supplemental Statement will be sent by first class mail to all interested persons. It is represented that for the purpose of sending the Notice and Supplemental Statement by mail, the last known addresses of such interested persons will be used.

The Department must receive written comments and requests for a hearing no later than thirty-seven (37) days from the date of the publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

The Donlar Corporation Profit Sharing Plan (the Plan) Located in Roseville, MN

[Exemption Application No. D–11325]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B, 55 FR 32836, 32847 (August 10, 1990).[16] If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, in connection with the termination of the Plan, to the cash sale of a parcel of improved real property (the Property) owned by the Plan to Mr. Donald A. Kainz (Mr. Kainz), a party in interest with respect to the Plan; provided that:

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

(a) The Plan receives a price for the sale of the Property to Mr. Kainz equal to the *greater* of:

(1) $418,000; or

(2) The fair market value of the Property, plus the ''assemblage value'' to Mr. Kainz, as determined by an independent, qualified appraiser, as of the date of such sale; or

(3) The cost to the Plan to acquire and hold the Property;

(b) The Plan incurs no fees, commissions, or other charges or expenses as a result of its participation in the sale of the Property to Mr. Kainz;

(c) Prior to entering into the subject transaction:

(1) With respect to the past use and/or leasing of the Property by the Donlar Corporation (the Employer), the Employer files a Form 5330 with the Internal Revenue Service (IRS);

(2) With respect to the entire period of such use and/or leasing, the Employer pays all appropriate excise taxes, plus interest on such taxes to the IRS; and

(3) With respect to the past use and/or leasing of the Property by the Employer, the Employer pays to the Plan the present value of the fair market rent, including interest, due to the Plan from the Employer in the form of a lump sum total rent payment in arrears with respect to the past use and/or leasing of the Property by the Employer, as determined by Mike Amo (Mr. Amo) an independent, qualified, appraiser, for the entire period of such use and/or leasing of the Property by the Employer;

(d) The termination of the Plan and the distribution of its assets is in accordance with the provisions of the Plan and all applicable statutes and regulations, including section 4044 of the Act, relating to the allocation of assets; and

(e) Upon termination of the Plan, each participant in the Plan receives 100 percent (100%) of the balance of his or her account in the Plan in cash, including each participant's *pro rata* share of the value of the Property, as of the date of the sale of the Property to Mr. Kainz.

Summary of Facts and Representations

1. The Employer, a corporation located in Roseville, Minnesota, engages in the construction business. As an employer any of whose employees are covered by the Plan, the Employer is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act.

Mr. Kainz is a shareholder and director of the Employer. As such, Mr. Kainz is a party in interest with respect to the Plan, pursuant to sections 3(14)(E) and 3(14)(H) of the Act.

2. The Plan is a defined contribution pension plan with individual participant accounts. The Employer adopted the Plan, effective July 1, 1973, as amended and restated July 1, 1997. As of July 7, 2005, the date of the application for exemption, there were sixteen (16) participants in the Plan. Mr. Kainz is a participant in the Plan.

Mr. Kainz and Lawrence S. Dotte (Mr. Dotte) serve as trustees of the Plan (the Trustees). As Trustees, Mr. Kainz and Mr. Dotte are fiduciaries and parties in interest with respect to the Plan, pursuant to section 3(21) and 3(14)(A) of the Act.

The financial statement for the Plan prepared by Larson Allen, CPA, indicates that, as of June 30, 2004, the aggregate fair market value of the total assets in the Plan was $5,481,798. As of June 30, 2004, approximately 60.9 percent (60.9%) of the assets of the Plan consisted of real property valued at $3,342,500.[17]

Effective December 31, 2004, the Board of Directors of the Employer resolved to terminate the Plan and to cease contributions. As of the same date, participation in the Plan ceased, as did crediting service, vesting, and benefit accrual under the Plan. On April 1, 2005, the Employer submitted to the IRS Form 5310, Application for determination for Terminating Plan, with respect to the Plan. In connection with the termination of the Plan, it is represented that all participants became 100 percent (100%) vested. A favorable determination letter from the IRS is expected upon termination of the Plan. It is represented that the Plan's trust will be liquidated after the IRS issues a favorable determination letter.

3. On June 1, 1984, the Plan purchased the Property that is the subject of this exemption for a purchase price of $73,000 from Gordon R. and Shirley Hove and Robert A. and Hazel G. Lindborg. It is represented that none of the previous owners were parties in interest with respect to the Plan.

It is represented that the Trustees made the decision to purchase the Property as a long term growth investment for the Plan. Since the acquisition of the Property in June 1984, until November 30, 2004, the Plan has paid $13,426 in real estate taxes, $45,126 in financing costs, and $5,447 in utility costs. Accordingly, the total cost to the Plan to acquire and hold the Property, as of November 30, 2004, was approximately $136,999.

At the time the Plan acquired the Property approximately 18.37% of the Plan's total assets were invested in the Property. As of December 31, 2003, and June 30, 2004, respectively, the value of the Property represented approximately 6.60 percent (6.60%), and 7 percent (7%) of the Plan's total assets.[18]

4. The Employer and the Trustees (collectively, the Applicants) have requested a prospective administrative exemption that would permit the sale of the Property to Mr. Kainz for cash; provided that, among other conditions the Plan receives a price equal to the *greater* of: (1) $418,000; or (2) the fair market value of the Property, plus the ''assemblage value'' to Mr. Kainz, as determined by an independent, qualified appraiser, as of the date of such sale; or (3) the cost to the Plan to acquire and hold the Property. In addition, the Plan will not incur fees, commissions, or other charges or expenses as a result of its participation in the sale of the Property to Mr. Kainz.

5. The Property is described as a rectangular 51 acre tract of cropland and woods located adjacent to and south of 100th Street Northeast, within the eastern half of Section 11 of Watab Township, Benton County, Minnesota.

It is represented that the northern half of the Property is level but slopes gradually down to Sucker Creek and back up again south of the creek. The highest and best use of the Property is described as rural residential development. It is represented that access for the purpose of developing areas south of Sucker Creek would require the acquisition of an easement for a road from the south.

The Property is improved by a one-story, steel and wood storage garage (the Garage) situated on a concrete slab.

Overhead electric and underground telephone lines are available to the site. Water and sewer would be via private drilled well and sewer disposal systems. There are two wells on the site.

[17] It would appear that a substantial percentage of the assets of the Plan involve real property. In this regard, the Department notes that the general standards of fiduciary conduct under section 404 of the Act would apply to investments by the Plan. Section 404(a)(1)(C) of the Act requires, among other things, that a fiduciary diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. It is the responsibility of the fiduciary of the Plan to determine whether the diversification requirements of section 404(a)(1)(C) of the Act have been satisfied. It is the Department's position that both section 408(a) of the Act and the regulations promulgated thereunder make clear that a fiduciary of a plan that has received an administrative exemption is not insulated from responsibility and/or potential liability under section 404 of the Act.

[18] The Department, herein, is providing no relief from section 404 of the Act for the acquisition and holding of the Property by the Plan.

5. It is represented that Rita Kainz, the wife of Mr. Kainz, the proposed purchaser of the Property, owns a parcel of real estate (the Kainz Land) contiguous to the Property owned by the Plan. In this regard, the Kainz Land is situated within the eastern half of Section 11 (14.2 acres) and western half of Section 12 (14 acres) of Watab Township, Benton County, Minnesota. It is represented that the Kainz Land was purchased in 1979, five (5 years) prior to the Plan's acquisition of the Property in 1984 and was purchased from unrelated individuals that were different than the sellers of the Property to the Plan.

The Kainz Land is described as an irregular-shaped 28.20 acre tract consisting of approximately 19 acres of cropland and 9 acres of woods. The Kainz Land is predominately south of Sucker Creek, but a portion of the Kainz Land lies north of Sucker Creek.

Overhead electric and underground telephone lines are available to the Kainz Land. Water and sewer for the Kainz Land would be via private drilled well and sewer disposal systems or a cluster system or future area sewer district.

Accessibility to the Kainz Land is adequate for residential and agricultural uses. Most of the Kainz Land is nearly level and developable for residential use.

6. The applicant maintains that the requested exemption is administratively feasible in that Mr. Kainz is a willing buyer of the Property, for a purchase price that includes ''the assemblage value'' of the Property.

The applicant further maintains that the exemption is feasible in that it involves a one-time sale by the Plan of the Property to Mr. Kainz for cash. The applicant also points out that if the exemption were not to be granted, the Plan would incur additional costs, fees, commissions or other charges or expenses associated with the sale of the Property to an unrelated third party.

7. The applicant maintains that safeguards will be in place at the time the transaction is entered that are designed to protect the interests of the Plan and its participants and beneficiaries. In this regard, the application file contains two (2) appraisals reports of the fair market value of the Property, dated June 30, 2004, and December 6, 2004, respectively.

These appraisals were prepared by Mr. Amo, an Associate Appraiser with St. Cloud Appraisal, Inc. in St. Cloud, Minnesota.

In these appraisals, Mr. Amo estimated the value of the Property using only the Sales Comparison Approach. In this regard, Mr. Amo indicates that vacant land is typically valued using the Sales Comparison Approach. Even though there are improvements on the Property, the Cost Approach was not applied, as Mr. Amo believes the Garage situated on the Property, does not contribute to the value of the Property in its projected highest and best use as residential development land. Further, Mr. Amo did not consider the Income Capitalization Approach to be valid in this case. It is represented that Mr. Amo is qualified to appraise the Property in that he is a member of the Appraisal Institute, a Certified Assessment Evaluator, a Certified General Appraiser, and a Certified Appraiser Assessor. Mr. Amo represents that he has had twenty (20) years of experience with St. Cloud Appraisal, Inc. Mr. Amo has also served as county assessor of Morrison County and city assessor of St. Cloud. In addition, Mr. Amo has experience as a lecturer and instructor in appraisal courses for the University of Minnesota.

Mr. Amo is independent in that he has no present or prospective interest in the Property and has no personal or professional interest with respect to the parties involved. It is represented that Mr. Amo's engagement and compensation were not contingent upon the development or reporting of predetermined results.

To measure the ''assemblage value'' of the Property to Mr. Kainz by virtue of the fact that the Kainz Land is contiguous to the Property, Mr. Amo prepared the December 6, 2004, appraisal report. In this regard, Mr. Amo appraised: (1) The value of the Property at $398,000 ($7,804 per acre); (2) the value of the Kainz Land at $259,000 ($9,184 per acre); and (3) the value of the Property and the Kainz Land under one ownership (the Combined Site) (79.20 acres) at $677,000 ($8,548 per acre). In the opinion of Mr. Amo, the Combined Site: (1) Benefits from the amenity of Sucker Creek, and (2) is fully able to be developed from both the north and the south access points. According to Mr. Amo, the ''assemblage value'' of the Combined Site is $20,000 ($253 per acre), as of December 6, 2004, as calculated by subtracting the value of the Combined Site from the sum of the values of the subject Property and the Kainz Land. ($677,000 minus ($398,000 + $259,000) = $20,000) Accordingly, the fair market value of the Property, as of December 6, 2004, plus an ''assemblage value'' is $418,000. ($398,000 + $20,000 = $418,000)

8. The applicant maintains that the subject transaction is in the interest of the Plan, because the Plan has been terminated and the sale of the Property to Mr. Kainz is the most effective means of liquidating the Plan's assets in preparation for making cash distributions to participants. In this regard, it is represented that the termination of the Plan and the distribution of its assets will be in accordance with the provisions of the Plan and all applicable statutes and regulations, including section 4044 of the Act, relating to the allocation of assets. Further, upon termination of the Plan, each participant in the Plan will receive 100 percent (100%) of the balance of his/her account in the Plan in cash, including each participant's *pro rata* share of the value of the Property, as of the date of the sale of the Property to Mr. Kainz.

9. It is represented that, in the past, a portion of the Property was used and/or leased by the Employer as a staging site for construction equipment, materials, and supplies. In this regard, the Employer confirms that it has used, since 1990, a portion of land area of the Property and since 1994, the Garage on the Property to store equipment and building materials. It is represented that the Employer's use of the Property ceased on June 29, 2005.

The Employer has represented that on July 7, 2005, it filed a Form 5330 with the IRS and attached a check made payable to the United States Treasury in the amount of $11,582.11 which the Employer has represented reflects the excise tax due from the Employer for engaging in a use of plan assets by a disqualified person from July 1, 1990 through June 29, 2005.

The application file contains an appraisal report, prepared by Mr. Amo, dated May 31, 2005, of the present value of the fair market rent, including interest, due to the Plan from the Employer for the Employer's prior use of all or part of the Garage and a portion of land area of the Property for the period from June 30, 1990, through June 30, 2005.

The scope of Mr. Amo's assignment was to estimate the nature and extent of the Employer's occupancy of the Property, including the term and intensity of such occupancy. To assist him in this task, Mr. Amo represents that he reviewed the appraisals of the Property which he prepared during the past decade. Further, Mr. Amo represents that those reviews were supplemented by statements from representatives of the Plan. In this regard, Mr. Kainz, as one of the Trustees, assisted Mr. Amo with the development of an occupancy schedule for the dates preceding the time period covered by Mr. Amo's appraisals and inspections of the Property. In this regard, Mr. Amo has estimated that the Employer utilized one-half acre of the land area of the Property during 1990, 1991, 1992, and 1993. For the period from 1994 through June 30, 2005, Mr. Amo concluded that the Employer utilized one acre of the land area of the Property in addition to all or part of the Garage located on the Property.

The scope of Mr. Amo's assignment also included estimating the market rent for rural industrial land, as well as for rural garage storage space, during the term of the Employer's occupancy of the Property, and calculating the present value of the fair market rent, including interest, due to the Plan from the Employer in the form of a lump sum total rent payment in arrears.

In reaching his conclusion on the present value of the fair market rent, including interest, due to the Plan, Mr. Amo used the following assumptions: (a) A 4.5 percent (4.5%) effective rate of interest, as being a representative average during the relevant time period; (b) an annual frequency of conversion; (c) the land rent calculated using the market value estimate for the site utilized times a capitalization rate of 8 percent (8%); (d) occupancy of the land of the Property commencing on June 30, 1990, and occupancy of the Garage commencing after June 30, 1994, and (e) Garage market rent based on comparisons with unheated, basic storage unit rents in residential garages with additional consideration for the remote and un-secure location of this structure.

In addition, in a letter dated September 28, 2005, Mr. Amo clarified that in completing his analysis of the present value of the fair market rent, including interest, due to the Plan he considered the access roadway to the Property. In this regard, Mr. Amo indicated that in the market where the Property is located, rents paid for land and building occupancy include the rights to ingress and egress.

Mr. Amo's final conclusion, as of June 30, 2005, of the present value of the fair market rent, including interest, due to the Plan from the Employer in the form of a lump sum total rent payment in arrears, was $19,595.11. In this regard, the Employer represents that on June 30, 2005, it paid $19,595.11 to the Plan for the use and/or leasing of the Property for the period from July 1, 1990 through June 30, 2005, and that such amount represented the fair market rental value of the Property due to the Plan.[19]

10. In summary, the applicant represents that the subject transaction meets the statutory criteria of section 408(a) of the Act and 4975(c)(2) of the Code because:

(a) The Plan will receive a price for the sale of the Property to Mr. Kainz equal to the greater of:

(1) $418,000; or

(2) The fair market value of the Property, plus the ''assemblage value'' to Mr. Kainz, as determined by an independent, qualified appraiser, as of the date of such sale; or

(3) The cost to the Plan to acquire and hold the Property;

(b) The Plan will incur no fees, commissions, or other charges or expenses as a result of its participation in the sale of the Property to Mr. Kainz;

(c) Prior to entering into the subject transaction:

(1) With respect to the past use and/or leasing of the Property by the Employer, the Employer filed a Form 5330 with the IRS and with respect to the entire period of such use and/or leasing, the Employer paid all appropriate excise taxes, plus interest on such taxes to the IRS; and

(2) With respect to the past use and/or leasing of the Property by the Employer, the Employer paid to the Plan the present value of the fair market rent, including interest, due to the Plan from the Employer in the form of a lump sum total rent payment in arrears, as determined by an independent, qualified, appraiser, for the entire period of such past use and/or leasing of the Property by the Employer;

(d) The termination of the Plan and the distribution of its assets will be in accordance with the provisions of the Plan and all applicable statutes and regulations, including section 4044 of the Act, relating to the allocation of assets;

(e) Upon termination of the Plan, each participant in the Plan receives 100 percent (100%) of the balance of his or her account in the Plan in cash, including each participant's *pro rata* share of the value of the Property, as of the date of the sale of the Property to Mr. Kainz;

(f) The subject transaction is a one-time sale by the Plan of the Property for cash; and

(g) Mr. Amo, an independent, qualified appraiser determined the present value of the fair market rent, including interest, due to the Plan from the Employer in the form of a lump sum total rent payment in arrears with respect to the past use and/or leasing of the Property by the Employer and will determine the fair market value of the Property including ''assemblage value,'' as of the date of the sale of the Property to the Employer.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

[19] The Department, herein, is providing no retroactive relief from the prohibitions as set forth in section 406 of the Act for the past use and/or leasing of the Property by the Employer.

Signed at Washington, DC, this 21st day of December 2005.

Ivan Strasfeld,

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

[FR Doc. 05–24493 Filed 12–27–05; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2005–16; Exemption Application No. D–11231 et al.]

Grant of Individual Exemptions; Wachovia Corporation (Wachovia)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

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

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

Statutory Findings

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

(a) The exemption is administratively feasible;

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

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

Wachovia Corporation (Wachovia) Located in Charlotte, NC

[Prohibited Transaction Exemption 2005–16; Exemption Application No. D–11231]

Exemption

Section I. Covered Transactions

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,[1] shall not apply, effective January 2, 2002, to (1) the in kind transfer by the Wachovia Retirement Savings Plan (the Plan) of its shares in the Wachovia Equity Index Fund (the Index Fund), a mutual fund in which Evergreen Investment Management Company, LLC, a wholly owned subsidiary of Wachovia, the Plan sponsor, serves as the investment adviser, to the Wachovia Enhanced Stock Market Fund (the Enhanced Fund), a bank collective investment fund, also maintained by Wachovia in exchange for Enhanced Fund units;[2] and (2) the in kind redemption by the Enhanced Fund of the Index Fund shares received on behalf of the Plan in return for a pro rata distribution of cash and transferable securities held by the Index Fund.

Section II. Specific Conditions

This exemption is subject to the following conditions:

(a) Mercer Investment Consulting, Inc. (Mercer), a fiduciary, which was acting on behalf of the Plan, and which was independent of, and unrelated to, Wachovia and its subsidiaries, as defined in paragraph (e) of Section IV below, had the opportunity to review the in kind transfer and in kind redemption transactions, and received, in advance of such transactions, full written disclosures concerning the Funds, which included, but were not limited to the following:

(1) A prospectus or its equivalent for each of the Funds;

(2) The management fees, as negotiated under the applicable investment management agreements, and the costs;

(3) The reasons why the Plan Committee (the Plan Committee) considered such investment to be appropriate for the Plan; and

(4) Whether there were any limitations applicable to the Plan with respect to which assets of the Plan could be invested in the Enhanced Fund and the nature of such limitations.

(b) On the basis of the foregoing information, Mercer recommended,

(1) The in kind transfer of the mutual fund shares that were held on behalf of the Plan in the Index Fund, in exchange for units in the Enhanced Fund; and

(2) The in kind redemption by the Enhanced Fund of Index Fund shares received from the Plan for cash and certain transferable securities.

(3) The Plan Committee followed Mercer's recommendation by acting on such advice.

(c) Before recommending the covered transactions, Mercer determined that:

(1) The terms of the transactions were fair to the participants in the Plan, and were comparable to, and no less favorable than, the terms obtainable at arm's length between unaffiliated parties; and

(2) The transactions were in the best interest of the Plan and its participants and beneficiaries.

(d) The in kind transfer transaction was a one-time transaction for the Plan and the mutual fund shares transferred were equivalent in value to the units in the Enhanced Fund.

(e) The in kind redemption transaction was a one-time transaction and the resulting cash and transferable securities constituted a pro rata portion of the assets held on behalf of the Plan in the Index Fund prior to the transaction.

(f) In the case of the exchange by the Plan of Index Fund shares for Enhanced Fund units, the per unit value of the Enhanced Fund units that were issued to the Plan in exchange for the Plan's Index Fund shares had an aggregate value that was equal to the value of the mutual fund shares transferred to the Enhanced Fund on the date of the transfer, as determined in a single valuation performed in the same manner and at the close of business on the same day in accordance with Securities and Exchange Commission

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

[2] The Index Fund and the Enhanced Fund are collectively referred to herein as the Funds.