

stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch Auction process;

(d) A person is "independent" of TD Ameritrade if the person is (1) not TD Ameritrade or an affiliate; and

(2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3-101, as modified by section 3(42) of the Act; and

(f) The term "Settlement Agreement" means a legal settlement involving TD Ameritrade and a U.S. state or federal authority that provides for the purchase of an Auction Rate Security by TD Ameritrade from a Plan.

*Effective Date:* This exemption is effective as of July 20, 2009.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 16, 2009 at 75 FR 78768.

*For Further Information Contact:* Ms. Anna Mpras Vaughan of the Department, telephone (202) 693-8565. (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 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 14th day of February, 2011.

**Ivan Straszfeld,**

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

[FR Doc. 2011-3589 Filed 2-16-11; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Proposed Exemptions From Certain Prohibited Transaction Restrictions

**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 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D-11528, Wachovia Corporation and Its Current and Future Affiliates or Successors (collectively, Wachovia or the Applicant; and D-11635, The Parvin Nahvi, M.D., Inc. 401(k) Profit Sharing Trust (the Plan); *et al.*

**DATES:** 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.

**ADDRESSES:** 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.

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-5700, 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](mailto: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.

*Warning:* If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

#### SUPPLEMENTARY INFORMATION:

##### 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).

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.

**Wachovia Corporation and Its Current and Future Affiliates or Successors (Collectively, Wachovia or the Applicant)**

Located in San Francisco, California  
[Application No. D-11528]

**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).<sup>1</sup>

*Section I. Sales of Auction Rate Securities From Plans to Wachovia: Unrelated to a Settlement Agreement*

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Wachovia, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

*Section II. Conditions Applicable to Transactions Described in Section I*

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Wachovia to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Wachovia for its own employees (a Wachovia Plan), the Unrelated Sale is made pursuant to a written offer by Wachovia (the Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that

are due and unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Wachovia, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Wachovia Plan) receives advance written notice regarding the Unrelated Sale, where such notice contains all of the material terms of the Unrelated Sale, including, but not limited to, the material terms described in the preceding sentence;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or an individual retirement account (an IRA (as defined in Section V(e)) owner who is independent (as defined in Section V(d)) of Wachovia. Notwithstanding the foregoing: (1) In the case of an IRA which is beneficially owned by an employee, officer, director or partner of Wachovia, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, the decision to accept the Offer may be made by Wachovia after Wachovia has determined that such purchase is in the best interest of the Wachovia Plan or pooled fund;<sup>2</sup>

(h) Except in the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, neither Wachovia nor any affiliate exercises investment discretion or renders investment advice

within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Wachovia and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Wachovia and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Wachovia or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of Wachovia, or commercial or financial information which is privileged or confidential; and

(3) Should Wachovia refuse to disclose information on the basis that

<sup>1</sup> For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

<sup>2</sup> The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Wachovia for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Wachovia of all relevant information.

such information is exempt from disclosure, Wachovia shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Section III. Sales of Auction Rate Securities From Plans to Wachovia: Related to a Settlement Agreement*

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Wachovia, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

*Section IV. Conditions Applicable to Transactions Described in Section III*

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement and acceptance of the Offer does not constitute a waiver of any claim of the tendering Plan;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

- (1) The securities available for purchase under the Offer;
  - (2) The background of the Offer;
  - (3) The methods and timing by which Plans may accept the Offer;
  - (4) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer, if the Offer had any limitation on such dates;
  - (5) The timing for acceptance by Wachovia of tendered Auction Rate Securities, if there were any limitations on such timing;
  - (6) The timing of payment for Auction Rate Securities accepted by Wachovia for payment, if payment was materially delayed beyond the acceptance of the Offer;
  - (7) The expiration date of the Offer; and
  - (8) How to obtain additional information concerning the Offer;
- (c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and
- (d) All of the conditions in Section II have been met.

*Section V. Definitions*

For purposes of this proposed exemption:

(a) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(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 "Auction Rate Security" or "ARS" means a security: (1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is "independent" of Wachovia if the person is: (1) Not Wachovia or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3-101, as modified by section 3(42) of the Act; and

(f) The term "Settlement Agreement" means a legal settlement involving Wachovia and a U.S. state or federal authority that provides for the purchase of an ARS by Wachovia from a Plan.

**DATES: Effective Date:** If granted, this proposed exemption will be effective as of February 1, 2008.

**Summary of Facts and Representations**

1. The Applicant, Wachovia, is a global financial services firm headquartered in North Carolina. Among other things, Wachovia includes banks, registered investment advisers subject to the Investment Advisers Act of 1940 and broker-dealers registered with the U.S. Securities and Exchange Commission. In this last regard, Wachovia acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities. Wachovia is one of the largest diversified financial services companies in the United States. Wachovia provides a broad range of retail banking and brokerage, asset and wealth management, and corporate and investment banking products and services to customers through 3,330 retail financial centers in 21 states from Connecticut to Florida and west to Texas and California, and nationwide retail brokerage, mortgage lending and auto finance businesses. On December

31, 2008, Wachovia was acquired by Wells Fargo & Company (WF). WF is a nationwide, diversified community-based financial services company with total assets of \$1.2 trillion and market capitalization of \$140 billion as of December 31, 2009.

2. The Applicant describes Auction Rate Securities and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

3. The Applicant states that, under a typical Dutch Auction process, Wachovia is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. Wachovia may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) A failed auction (i.e., an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate, resulting in no ARS being sold through the auction process); or (b) an auction from clearing at a rate that Wachovia believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Wachovia has been appointed by the issuer of the securities to serve as a

dealer in the auction and is paid by the issuer for its services. Wachovia is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Wachovia. That agreement provides that Wachovia will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Wachovia.

5. The Applicant states further that Wachovia may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Wachovia, for those orders that Wachovia successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Wachovia act as dealer, such other broker-dealers may share auction dealer fees with Wachovia for orders submitted by Wachovia.

6. According to the Applicant, since February 2008, only a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.<sup>3</sup>

7. The Applicant represents that, in certain instances, Wachovia may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security.<sup>4</sup> In connection with Wachovia's role in the acquisition and holding of ARS by various Wachovia clients, including the Plans, Wachovia entered into Settlement Agreements with certain U.S. states and federal authorities. Pursuant to these Settlement Agreements, among other things, Wachovia was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Wachovia. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Wachovia for cash equal to the par value of such securities, plus any accrued but unpaid interest and/or dividends. The Applicant states that, prospectively, additional shares of ARS may be

tendered by Plans to Wachovia pursuant to a Settlement Agreement. Accordingly, the Applicant is requesting retroactive and prospective relief for the Settlement Sales. The Applicant is also requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of Auction Rate Securities by a Plan to Wachovia has occurred outside the Settlement process. If granted, this proposed exemption will be effective as of February 1, 2008.

8. Specifically, the Applicant is requesting exemptive relief for the sale of Auction Rate Securities under two different circumstances: (a) Where Wachovia initiates the sale by sending to a Plan a written Offer to acquire the ARS (i.e., an Unrelated Sale), notwithstanding that such Offer is not required under a Settlement Agreement; and (b) where Wachovia is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (i.e., a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (also referred to as a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that, with the exception of sales of ARS involving Wachovia Plans and pooled funds maintained or advised by Wachovia: (a) Each Covered Sale will be made pursuant to a written Offer; and (b) the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Wachovia.<sup>5</sup> Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Wachovia intends to purchase ARS from the Plan. Offers made in connection with an Unrelated Sale will contain all of the material terms of the Unrelated Sale, including: (a) The identity and par value of the Auction Rate Security; (b) the interest or dividend amounts that are due with respect to the Auction Rate Security;

and (c) the most recent rate information for the Auction Rate Security (if reliable information is available). Offers made in connection with a Settlement Agreement will specifically include, among other things: (a) The background of the Offer; (b) the method and timing by which a Plan may accept the Offer; (c) the expiration date of the Offer; (d) a description of certain risk factors relating to the Offer; (e) how to obtain additional information concerning the Offer; and (f) the manner in which information concerning material amendments or changes to the Offer will be communicated. The Applicant states that, with very narrowly tailored exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia), neither Wachovia nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.<sup>6</sup> In the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, the decision to engage in a Covered Sale may be made by Wachovia after Wachovia has determined that such purchase is in the best interest of the Wachovia Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS (plus accrued but unpaid interest and dividends, to the extent applicable), and such value is readily ascertainable. The Applicant represents further that Wachovia will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) With only very narrow exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia), each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS,

<sup>3</sup> The Department notes that Prohibited Transaction Exemption 80-26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

<sup>4</sup> The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

<sup>5</sup> However, in the case of an IRA beneficially owned by an employee, officer, director or partner of Wachovia, the decision to accept the Offer or retain the ARS may be made by such employee, officer, director or partner of Wachovia.

<sup>6</sup> The Applicant states that while there may be communication between a Plan and Wachovia subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

plus any accrued but unpaid interest or dividends;

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e) With only very narrow exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia): (1) The decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Wachovia (unless the IRA owner is an employee, officer, director or partner of Wachovia); and (2) neither Wachovia nor any affiliate shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Wachovia shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due but unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available); and

(j) Each Offer made in connection with a Settlement Agreement shall describe the material terms of the Settlement Sale, including the following (and shall not constitute a waiver of any claim of the tendering Plan): (1) The background of the Offer; (2) the methods and timing by which the Plan may accept the Offer; (3) the purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer and the timing for acceptance by Wachovia of tendered ARS for payment; (4) the expiration date of the Offer; and (5) how to obtain additional information concerning the Offer.

#### Notice to Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified, and, therefore, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this

notice in the **Federal Register**.

Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

*For Further Information Contact:* Gary Lefkowitz of the Department, telephone (202) 693-8546. (This is not a toll-free number.)

#### **The Parvin Nahvi, M.D., Inc. 401(k) Profit Sharing Trust (the Plan), Located in Templeton, CA**

*Application No. D-11635*

#### **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, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, in connection with the cash sale by the Plan (the Sale) of a parcel of improved real property (the Property), to Dr. Parvin Nahvi and Dr. Javad Sani (the Applicants), the 100% owners of the Plan sponsor, Parvin Nahvi, M.D., Inc. (the Employer), and parties in interest with respect to the Plan; provided that:

(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 Plan's obligations with respect to the remaining principal balance of a loan (the Loan) on the Property that is secured by a first deed of trust (the Deed of Trust) with Santa Lucia Bank, an unrelated lender, are:

(1) Satisfied in full out of the proceeds of the Sale, or

(2) assumed in full by the Applicants, who indemnify and hold the Plan harmless for any further payment on, or any claims arising in connection with, the Loan;

(c) The Plan receives an amount in cash, equal to the greater of:

(1) The original purchase price paid by the Plan for the Property, plus additional contributions or expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, less the Loan principal assumed by the Applicants pursuant to Section (b)(2), or

(2) The Property's appraised value of \$1,825,000, which represents the fair

market value of the Property, less the Loan principal assumed by the Applicants pursuant to Section (b)(2);

(d) The fair market value of the Property has been determined by a qualified independent appraiser (the Appraiser) and is updated by such appraiser on the date the Sale is consummated;

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

(f) The Plan incurs no real estate fees, or commissions, in connection with the Sale; and

(g) The Plan fiduciaries (1) determine whether it is in the interest of the Plan to proceed with the Sale, (2) review and approve the methodology used in the appraisal that is being relied upon, and (3) ensure that such methodology is applied by the Appraiser in determining the fair market value of the Property on the date of the Sale.

#### **Summary of Facts and Representations**

##### *Background*

1. The Employer, a California professional medical corporation, is the sponsor of the Plan. The Applicants are participants in the Plan and the sole shareholders of the Employer. The Applicants are related through marriage and are both fiduciaries and trustees (the Trustees) of the Plan. The remaining employees covered under the Plan are the Applicants' three children. The Employer is located in Templeton, California.

2. The Plan is a profit sharing plan qualified under section 401(a) of the Code and an individual account plan as described in section 3(34) of the Act, having an original effective date of January 1, 2002. Under the Plan, each Plan participant may direct the Trustees to invest any portion of his or her individual account in any asset which is administratively feasible for the Plan to hold, provided the acquisition of which would not result in disqualification of the Plan under the Code. The Plan provides separate individual accounting so that each participant bears the sole risk of loss attributable to his or her investment decision.

3. According to the Plan's 2009 Annual Return/Report of Employee Benefit Plan (the 2009 Annual Report), as of December 31, 2009, the Plan had five participants holding combined net assets of \$1,459,184.<sup>7</sup> According to the Applicants, as of December 31, 2009, the Plan's five participants, together with their percentage holdings of total Plan's assets, consist of Dr. Javad N. Sani, owning 57.69%, Dr. Parvin Nahvi,

<sup>7</sup> This figure takes into account the Plan's Loan liability of \$500,946 as of December 31, 2009.

owning 32.28%, and the Applicants' children, Farhad Sani, Roya Sani, and Sara Sani, owning 4.13%, 3.28%, and 2.62%, respectively.

4. As Trustees, the Applicants caused the Plan, on August 5, 2004, to purchase, on behalf of the participants, the Garden Street Inn, a 13-room bed and breakfast located at 1212 Garden Street, San Luis Obispo, California, from Dan and Kathy Smith, unrelated third parties. The Property, originally constructed in 1898, is a rectangular shaped, two-story building containing approximately 5,998 square feet on the first and second level combined and an additional 754 square foot finished basement that is currently used as a manager's unit. The Applicants represent that the purpose of the investment was to obtain an income producing piece of real estate.

5. The total purchase price for the Property, inclusive of any closing costs and \$85,890 allocated to furniture and fixtures, was \$2,213,348.<sup>8</sup> Of the total purchase price, the Plan paid \$1,463,348 in cash and financed the remainder through a first deed of trust with Santa Lucia Bank, of Atascadero, California, an unrelated party, in the original principal amount of \$750,000. According to the Applicants, there are no other deeds of trust or encumbrances on the Property. The Applicants state that the Loan underlying the Deed of Trust has a maturity date of August 4, 2014 and it carries a 6.5% fixed interest rate for 5 years, after which it is subject to an adjustable rate of interest. Subject to any payment changes, the Loan is payable in 119 monthly installments. According to the Plan's 2009 Annual Report, the outstanding balance of the Loan as of December 31, 2009 was \$500,946. In addition, the Applicants state that, as of August 31, 2010, the outstanding principal balance of the Loan had been paid down to \$479,876.43.<sup>9</sup>

6. The Applicants note that the Plan does not own any property aside from the subject Property. In addition, the Applicants represent that no parties in interest with respect to the Plan own or lease any property adjacent to the Property. The Applicants further represent 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.

<sup>8</sup> 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.

<sup>9</sup> The Applicants state that, as trustees of the Plan, they have applied the income derived from the Property's operation since its purchase to paying down the principal balance of the Loan.

7. According to the Applicants, aside from the Property's acquisition price (including real estate taxes), the aggregate cost of holding the Property by the Plan has been paid out of the income generated by the Property. According to the Applicants, in respect of the years 2004 through 2008, the Property yielded net income to the Plan in the amounts of: \$9,175, \$30,433, \$30,492, \$64,639, and \$14,125, respectively. However, the Applicants state that, in 2009, the Property suffered a loss of \$21,035.<sup>10</sup>

8. Furthermore, during the five month period ending on May 31, 2010, the Property suffered an additional loss of approximately \$3,017, for a total loss of \$24,052. The Applicants explain that, prior to June 1, 2010, the Property was managed by an unrelated third party, the Hotel Management Group (HMG), which had been charging the Plan \$3,000 per month in maintenance fees. Due to the inability of the Plan to continue paying such fees, the management contract with HMG was terminated as of June 1, 2010, and since then, the Applicants have managed the Property themselves without receiving any compensation for their services. As a result, from June 1, 2010 through August 31, 2010, the Plan received approximately \$16,836 in net income from the Property.

Financial data provided by the Applicants, summarized below, reveals that for the period beginning in 2004 and continuing through August 31, 2010, the Plan received total income of \$2,503,275 and incurred total expenses of \$2,361,627, related to its holding of the Property, yielding aggregate net income of \$141,648. As a result, through August 31, 2010, the Plan's aggregate net acquisition and holding costs with respect to the Property were \$2,071,700 (the original purchase price of \$2,213,348, less aggregate net income of \$141,648).

Item of Income/Expense	2004—8/31/2010 (\$)
<b>Revenue:</b>	
Rooms Department <sup>11</sup>	2,490,046.00
Other Income .....	13,229.00
<b>Total Income .....</b>	<b>2,503,275.00</b>
<b>Departmental Expenses:</b>	
Rooms Department .....	955,938.00
Cost of Other Income	4,312.00
<b>Fixed Expenses:</b>	
Real Estate Taxes .....	69,467.00
Insurance .....	40,084.00

<sup>10</sup> According to data provided by the Applicants, this loss was mainly attributable to a \$76,829 drop in revenue received from room rents compared with the previous year and a corresponding drop in expenses of only \$41,000.

Item of Income/Expense	2004—8/31/2010 (\$)
Mortgage Interest Expense .....	256,813.00
UBIT on Property .....	0.00
Other .....	10,327.00
<b>Undistributed Expenses:</b>	
Operating Expenses ...	96,152.00
Marketing Expenses ...	77,765.00
Energy Costs .....	97,138.00
Administrative & General .....	12,753,631.00
<b>Total Expenses .....</b>	<b>2,361,627.00</b>
<b>Net Income .....</b>	<b>141,648.00</b>

**The Appraisal Report**

9. The Property was originally appraised on June 9, 2009, by Keith Spierling, of Spierling Appraisal and Consulting Services, Arroyo Grande, California. Based on the appraisal report dated June 9, 2009 (the Appraisal Report), the Appraiser is an Associate Member of the Appraisal Institute and has been actively engaged in the appraisal profession for over 25 years, 20 of which with respect to the appraisal of commercial properties. The Appraiser is also certified by the State of California as a State Certified General Appraiser. The Appraiser affirms that he is independent of the Applicants, the Employer, and any other parties in interest. In addition, the Appraiser states that he derives less than 1% of his income from these parties.

10. Pursuant to a letter addressed to the Applicants dated May 14, 2010, the Appraiser stated that the Appraisal Report was completed for Santa Lucia Bank, who was the primary client and the intended user of the Report. He further represented that he was engaged by Santa Lucia Bank so that the Applicants could obtain financing in order to purchase the Property from the Plan as well as seek exemptive relief from the Department for such purchase. Although the Appraisal Report was completed for Santa Lucia Bank as its intended user, the Applicants represent that the Appraisal Report was paid for by Dr. Sani. In this regard, the Applicants state that, in anticipation of applying for the exemption, they approached Santa Lucia Bank about assuming the Loan and also the

<sup>11</sup> Typically, the "rooms department" may include reservations, the front office, housekeeping, telephone, maintenance, and engineering. A "department" is a management convention used in the hotel and lodging industry to ensure efficient coordination and control of activities undertaken to effectively manage a facility. In a very small lodging business, such as a bed-and-breakfast, the owner can supervise each department.

<sup>12</sup> Includes approximately \$184,400 paid to Sterling Hotels Corporation and HMG, unrelated property management companies.

possibility of taking out a second loan. Accordingly, the Applicants explain, the bank required an appraisal of the Property in order to determine whether or not the Applicants could assume the Loan and qualify for the second loan. The Applicants explain further that the policy of the bank is to initiate an appraisal with the client paying the fee. Consequently, Santa Lucia Bank retained Mr. Spierling for an appraisal of the Property and forwarded his bill for services to the Applicants, who paid the amount due in turn.

11. The Appraiser acknowledged, in his letter of May 14, 2010, that the Appraisal Report would be used for purposes of obtaining an administrative exemption from the Department for the Sale. Furthermore, the Appraiser stated that, barring any unforeseen circumstances, he would be able to update the Appraisal Report as of the date of purchase of the Property by the Applicants. According to the Appraiser, such an update would be necessary due to the length of time elapsed between the original Appraisal Report and the contemplated date of purchase of the Property. The Applicants have stated that they would pay the costs associated with updating the Appraisal Report.

12. In the Appraisal Report, the Appraiser valued the Property in fee simple using the Sales Comparison Approach and Income Approach to valuation. The Appraiser indicated that he considered using the Cost Approach in addition to the Sales Comparison Approach and Income Approach, but ultimately decided that the Cost Approach was not appropriate, because the age of the building, the architectural details of the structure, and the lack of similar land sales prevent the Cost Approach from providing a meaningful indicator or adding any credibility to the overall analysis.

The Appraisal Report indicates that the Sales Comparison Approach and Income Approach yielded \$1,875,000 and \$1,850,000 for the Property, respectively. According to the Appraiser, the Sales Comparison Approach was considered the most pertinent to the analysis because of the recent sales of similar properties that were available for a comparative analysis, in spite of the fact that the available comparable sales of properties in the area were somewhat dated. Consequently, the Appraiser determined that the Sales Comparison Approach should be given consideration in the final analysis. Additionally, the Appraiser determined that the Income Approach was the most pertinent in the analysis of income producing properties. In valuing the Property using

this approach, the Appraiser reviewed historical income and expense data and compared such data to similar competitive properties. In conclusion, the Appraiser accorded relatively equal consideration to both approaches to value and determined that the fair market value of the Property as of June 9, 2009 was \$1,860,000, using an exposure of three to sixteen months.

#### The Appraisal Update

13. Because the Appraisal Report was dated more than one year before this proposed exemption was published, the Department required an additional appraisal of the Property to take place, as an update to the original appraisal. In this regard, on November 3, 2010, the Appraiser provided an update to the Appraisal Report (the Appraisal Update), which incorporates the Appraisal Report of June 9, 2009.<sup>13</sup>

14. In the Appraisal Update, the Appraiser valued the Property in fee simple as of October 28, 2010 based upon the same methods of valuation used in the Appraisal Report, the Income Approach and Sales Comparison Approach. The Appraiser states that, upon his most recent inspection, the interior and exterior of the Property revealed no changes since the prior appraisal. However, the Appraisal Update notes that, while there continues to be overall softness in the real estate market in the past year since the date of the Appraisal Report, there is insufficient data to develop any definitive trends in current market price, as no additional sales of smaller, good quality hotels or bed and breakfast facilities since June of 2009 have occurred.

15. The Appraisal Update indicates that the Sales Comparison Approach and the Income Approach yielded \$1,850,000 and \$1,800,000, respectively. Regarding the Sales Comparison Approach, while there were no recent comparable sales data since June of 2009, as noted above, there were several open listings which supported and correlated well with the sales data in the Appraisal Report. In this regard, the Appraisal Update states that the slight decline in the value of the Property based on the Sales Comparison Approach was primarily due to the persistent soft market conditions. Regarding the Income Approach, an updated rental survey was completed which generally revealed that room

rates have remained relatively stable since the date of the Appraisal Report. In addition, the Appraisal Update notes that no sales data was revealed which would contradict the overall capitalization rates used in the prior appraisal.

The Appraisal Update notes that the two approaches are considered pertinent and should be considered in the final analysis. Thus, giving equal weight to each valuation approach, the Appraisal Update states that the fair market value of the Property as of October 28, 2010 was \$1,825,000 assuming an exposure period of 4 to 18 months. Accordingly, the value of the Property constitutes approximately 93.11% of the Plan's total asset value of \$1,960,130.43.

#### Terms of the Sale

16. The Applicants have requested an exemption from the Department to purchase the Property from the Plan. The Applicants represent that, although they do not currently possess enough cash to purchase the Property, they have the ability to sell for cash certain other properties that they currently own in their individual capacities. Furthermore, the Applicants represent that there is a chance that they may not be able to liquidate other real property holdings in order to pay cash for the full purchase price of the Property. In such event, they state that they will assume the remaining principal balance of the Loan from the Plan and pay cash to the Plan for the remainder.<sup>14</sup> In either event, the Applicants state that the Plan's obligations with respect to the Loan will be satisfied in full. Furthermore, the Applicants state that the Plan will not pay any commissions, costs, or other expenses in connection with the Sale, and the Appraisal Report will again be updated by the Appraiser on the date of the Sale.<sup>15</sup>

17. Therefore, in exchange for the Property the Applicants will make a one-time cash payment to the Plan equal to the greater of: (a) The original purchase price paid by the Plan for the Property, plus any expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, and less the Loan principal assumed by the Applicants, or (b) the appraised value of

<sup>14</sup> The Applicants represent that Santa Lucia Bank has authorized the assumption of the existing Loan by the Applicants in the event that the Sale takes place after approval by the Department of the exemption.

<sup>15</sup> 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.

<sup>13</sup> In the same manner that Santa Lucia Bank ordered the Appraisal Report, at the Applicants' behest, Santa Lucia Bank also retained Mr. Spierling to complete the Appraisal Update and forwarded his bill for services to the Applicants, who paid the amount due in turn.

\$1,825,000, which represents the fair market value of the Property, less the Loan principal assumed by the Applicants. In the event that the Applicants assume the remainder of the Loan, they will indemnify and hold the Plan harmless for any further payment on such Loan.

#### *Rationale for the Sale*

18. The Applicants represent that the proposed transaction is in the interest of the Plan because it will divest the Plan of an asset that has been difficult to manage within the Plan as a result of adverse economic conditions. According to the Applicants, the hospitality industry has undergone a downturn as a result of the recent unfavorable economic conditions. As illustrated above, the net income generated by the Property since 2007 has declined precipitously. The Applicants point out that this lack of strong cash flow makes it difficult for the Plan to pay expenses related to the management and maintenance of the Property. In this regard, the Applicants represent that the Property has had several maintenance and safety issues that have gone unaddressed because the Plan cannot afford to make them.

19. Moreover, the Applicants suggest that the Sale is in the interest of the Plan because the Applicants would pay more to the Plan than unrelated third parties would pay to purchase the Property. According to the Applicants, in a sale on the open market the Plan would receive no more than its fair market value, whereas in the proposed transaction, the Applicants would make the Plan whole for any loss in the value of the Property since its acquisition, including any expenses paid by the Plan in holding the Property (net of any income paid to the Plan). As the Property's current fair market value is well below its original acquisition cost, a sale on the open market would cause the Plan to sustain a significant monetary loss. Furthermore, the Applicants note that, in a sale on the open market, the Plan would be forced to pay a real estate commission of approximately 7% on the sale price of the Property. In the proposed transaction, the Plan will not incur any expenses in connection with the Sale, including real estate commissions.

20. Finally, the Applicants, in their capacities as Plan fiduciaries, will (a) Determine whether it is in the interest of the Plan to proceed with the Sale of the Property, (b) review and approve the methodology used in the Appraisal Report that is being relied upon, and (c) ensure that such methodology is applied by the Appraiser in determining the fair

market value of the Property on the date of the Sale.

#### *Summary*

21. In summary, the Applicants represent that the proposed transaction will satisfy 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 arm's length transaction with an unrelated party;

(b) The Plan's obligations with respect to the Loan will be:

(1) Satisfied in full out of the proceeds of the sale, or

(2) Assumed in full by the Applicants, who shall indemnify and hold the Plan harmless for any further payment on, or any claims arising in connection with, the Loan;

(c) The Plan will receive an amount in cash, equal to the greater of:

(1) The original purchase price paid by the Plan for the Property, plus expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, less the Loan principal assumed by the Applicants pursuant to Section (b)(2), or

(2) The appraised value of \$1,825,000, which represents the fair market value of the Property, less the Loan principal assumed by the Applicants pursuant to Section (b)(2);

(d) The fair market value of the Property has been determined by the Appraiser, who will update the Appraisal Report on the date the Sale is consummated;

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

(f) The Plan will incur no real estate fees, or commissions, in connection with the Sale; and

(g) The Plan fiduciaries will (1) determine whether it is in the interest of the Plan to proceed with the Sale, (2) review and approve the methodology used in the appraisal that is being relied upon, and (3) ensure that such methodology is applied by the Appraiser in determining the fair market value of the Property on the date of the Sale.

*For Further Information Contact:* Warren Blinder of the Department, telephone (202) 693-8553. (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.

Signed at Washington, DC, 14th day of February 2011.

**Ivan Strasfeld,**

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

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