

the ESOP incurred no fees, commissions, or other charges or expenses as a result of its participation in each of the transactions.

*Effective Date:* The exemption will be effective July 7, 2004.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on May 13, 2005, 92 FR 25608.

**FOR FURTHER INFORMATION CONTACT:**

Angelena C. Le Blanc of the Department, telephone (202) 693-8551 (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 9th day of August, 2005.

**Ivan Strasfeld,**

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

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**DEPARTMENT OF LABOR**

**Employee Benefits Security  
Administration**

[Application No. D-11231, et al.]

**Proposed Exemptions; Wachovia  
Corporation (Wachovia)**

**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](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.

**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.

**Wachovia Corporation (Wachovia),  
Located in Charlotte, NC**

[Application No. D-11231]

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) 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, August 10, 1990).

**Proposed Exemption**

*Section I. Covered Transactions*

If the proposed exemption is granted, 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,<sup>1</sup> shall not apply, effective January 2, 2002, to (1) the in kind transfer by the Wachovia Retirement Savings Plan (the

<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Plan) of its shares in the Wachovia Equity Index Fund (the Index Fund), a mutual fund in which Evergreen Investment Management Company, LLC (Evergreen), 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;<sup>2</sup> 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 proposed 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 publicly-traded 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 (SEC) Rule 17a-7 (Rule 17a-7) under the Investment Company Act of 1940 (the 1940 Act), as amended, (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7.

(g) In the in kind redemption transaction, the Enhanced Fund received a pro rata portion of the cash and transferable securities held on behalf of the Plan in the Index Fund that was equal in value to the number of mutual fund shares redeemed for such cash and transferable securities, as determined in a single valuation performed in the same manner and at the close of business on the same day in accordance with Rule 17a-7, (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7.

(h) For purposes of the covered transactions, the fair market value of all transferable securities received by the Enhanced Fund in the in kind redemption transaction was determined by reference to the last sale price for transactions as reported in the consolidated transaction reporting system (the Consolidated System), a recognized securities exchange, or the National Association of Securities Dealers Automated Quotation System (the NASDAQ System).

(i) Within 90 days after the completion of the transactions, Mercer received confirmation of the following information:

(1) The number of Index Fund shares exchanged by the Plan and the number of Enhanced Fund units received by the Plan immediately before the in kind transfer transaction (and the related per share net asset value and the total dollar value of the shares held) as reported by the Funds; and

(2) The identity, the current market price of each transferable security received by the Enhanced Fund in the in kind redemption, and the aggregate dollar value of the securities allocated to the Plan in the Enhanced Fund pursuant to the redemption, and the net asset value of Enhanced Fund units after the redemption;

(j) Subsequent to the completion of the transactions, Mercer conducted a post-transaction review in which it verified:

(1) The number and current market price of all Enhanced Fund units transferred to the Plan in exchange for the Index Fund shares;

(2) The number and current market price of all Index Fund shares transferred by the Plan to the Enhanced Fund in exchange for Enhanced Fund units;

(3) The identity of each transferable security, the number of shares of such security transferred, the closing price on the relevant national exchange as of the date of the transfer, and the proper valuation of the securities for the purposes of the transfer;

(4) The aggregate dollar value of the Index Fund shares that were being held by the Plan immediately before the transfer and the aggregate dollar value of the Enhanced Fund units held by the Plan immediately after the transfer were valued at their daily net asset values in accordance with their normal procedures.

(5) The use, by the Index Fund and the Enhanced Fund of the same methodology to value the securities transferred by the Index Fund to the Enhanced Fund in the in kind redemption transaction.

(k) No sales commissions, fees or other costs were paid by the Plan in connection with the transactions, and no additional management fees are being charged to the Plan by Wachovia through the Enhanced Fund.

(l) Wachovia did not enter into the transactions unless Mercer concurred with such transactions.

(m) The Plan's dealings with the Index Fund, the Enhanced Fund and Wachovia were on a basis that was no less favorable to the Plan than dealings

<sup>2</sup> The Index Fund and the Enhanced Fund are collectively referred to herein as the Funds.

between the Enhanced Fund and other investors.

### Section III. General Conditions

This exemption is subject to the following general conditions:

(a) Wachovia maintains, or causes to be maintained, for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph (b) of this Section III to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in paragraph (b) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the plan fiduciary responsible for recordkeeping, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below. (b)(1) Except as provided in paragraph (b)(2) of this Section III and notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (a) of this Section III are unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Mercer or any other fiduciary of the Plan; or

(iii) Any participant or beneficiary of the Plan or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraphs (ii) and (iii) of this paragraph (b)(1)(ii) and (iii) of this Section III shall be authorized to examine trade secrets of Wachovia, or any commercial or financial information, which is privileged or confidential.

### Section IV. Definitions

For the purposes of this proposed exemption, (a) The term "Wachovia" means Wachovia Corporation and any affiliate of Wachovia as defined below in Section IV(b).

(b) An "affiliate" of a person includes:

(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 in any such person; and

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

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

(d) The term "relative" means a "relative," as that term is defined in section 3(15) of the Act, (or a "member of the family," as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(e) As applied to Mercer, the term "independent fiduciary" means a fiduciary who is (1) independent of and unrelated to Wachovia and its affiliates, and (2) appointed to act as investment adviser to the Plan for all purposes related to, but not limited to, (i) the transfer of Index Fund shares to the Enhanced Fund in exchange for units in the Enhanced Fund, and (ii) the Enhanced Fund's redemption of the Index Fund shares received from the Plan for cash and transferable securities. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to Wachovia if (1) such fiduciary directly or indirectly controls, is controlled by or is under common control with Wachovia; (2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption, except that Mercer may receive compensation for acting as an independent fiduciary from Wachovia in connection with the transactions contemplated herein and in connection with the provision of ongoing investment advice to the Plan Committee if the amount of payment of such compensation is not contingent upon or in any way affected by Mercer's ultimate decision; and (3) the annual gross revenue received by such fiduciary from Wachovia and its affiliates during any year of its engagement, exceeds 5 percent (5%) of Mercer's annual gross revenue from all sources for its prior tax year.

(f) The term "transferable securities" means securities (1) for which market quotations are readily available (as determined under Rule 17a-7) and (2) which are not (i) Securities which, if distributed, would require registration

under the Securities Exchange Act of 1933 (the 1933 Act); (ii) securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Index Fund, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange; (iii) certain portfolio positions (such as forward foreign currency contracts, futures, and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require special trading facilities or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership; (iv) cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements) which are not readily distributable; (v) other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and (vi) securities subject to "stop transfer" instructions or similar contractual restrictions on transfer. Notwithstanding the above, the term "transferable securities" also includes securities that are considered private placements intended for large institutional investors, pursuant to Rule 144A under the 1933 Act, which are valued by the unrelated investments managers for the Funds, or if applicable, by the independent fiduciary, which will confirm and approve all such valuations.

*Effective Date:* If granted, this proposed exemption will be effective as of January 2, 2002.

### Summary of Facts and Representations

1. Wachovia, headquartered in Charlotte, NC, the predecessor entity to the current Wachovia, also headquartered in Charlotte, NC, was an independent bank holding company providing a wide range of commercial and retail banking and trust services to the public through its individual banking subsidiaries. On September 1, 2001, First Union Corporation (First Union) merged with Wachovia. The merger of Wachovia and First Union was accomplished through a stock exchange whereby each share of Wachovia common stock outstanding was converted into two shares of common stock of First Union, with the appropriate number of stock purchase rights under First Union's shareholder rights plan. In addition to the two shares of First Union stock, each share of

Wachovia common stock was exchanged, at the shareholder's option, for either a one-time cash payment of \$0.48; or two of the combined company's (*i.e.*, Wachovia and First Union) Dividend Equalization Plan "DEP" rights, each of which entitled the holder to receive cumulative quarterly dividends equal to the difference, if any, between \$0.30 and the amount of quarterly dividends paid by the combined company on each share of common stock.

Wachovia Bank, NA (Wachovia Bank) is a federally chartered bank and trust company based in Charlotte, North Carolina. It is also Wachovia's primary subsidiary. Wachovia Bank provides a wide range of commercial and retail banking and trust services through full-service banking offices in Connecticut, Delaware, Pennsylvania, South Carolina, Virginia and Washington, DC.

Wachovia, the surviving entity, is the fourth largest bank holding company in the United States. Wachovia continues to provide the public with banking and trust services through the merger-created subsidiary, Wachovia Bank. As of March 31, 2005, Wachovia reported consolidated assets of \$506.8 million.

2. On January 1, 2002, following the merger of Wachovia and First Union, the First Union Savings Plan (the First Union Plan) and the Wachovia Retirement Savings and Profit Sharing Plan (the Wachovia Plan), a predecessor to the current Plan, both tax qualified 401(k) plans, were merged based on a decision by Wachovia's management. The merged plan is referred to herein as "the Plan" and Wachovia Bank serves as the Plan's directed trustee. Under the terms of the Plan, each participant may direct the investments of his or her individual account balances among various investment options offered under the Plan.

The Plan is administered by the Wachovia Administrative Committee (the Plan Committee), which is comprised of nine employees, who are officers of Wachovia and its affiliates. As of May 4, 2005, the Plan held total assets of \$6.4 billion and had 96,963 participants and beneficiaries.

3. The Plan Committee is advised by Mercer Investment Consultants, Inc. of Atlanta, Georgia (Mercer), an investment adviser registered under the 1940 Act. Mercer provides investment advisory services to tax deferred compensation plans subject to ERISA with approximately \$900 billion in assets as of September 16, 2004. Mercer is not affiliated with either Wachovia or its predecessors. Mercer regularly advises the Plan Committee on the performance investment options offered under the

Plan, as well as those formerly offered under the First Union Plan.

4. As a result of the Merger, two S&P 500 Index Funds were held by the Plan. They were the "Wachovia Index Equity Fund" (*e.g.*, the Index Fund) and the "First Union Enhanced Stock Market Fund" (*e.g.*, the Enhanced Fund). The Index Fund, which was carried over from the former Wachovia Plan, was an open-end investment management company registered under the 1940 Act. Shares in the Index Fund were offered publicly to individual and institutional investors. Evergreen of Boston, Massachusetts, a wholly owned subsidiary of Wachovia, served as investment adviser to the Index Fund.

The Index Fund managed its portfolio in a manner intended to duplicate the performance of the S&P 500 Index. The Index Fund charged the Wachovia Plan annualized expenses and advisory fees of approximately 44 basis points with respect to the Class Y shares held by the Plan. As of December 31, 2001, the Wachovia Plan held approximately 33% of the outstanding Index Fund Y shares, valued at \$122,058,370. Following the merger, the Index Fund was eliminated because its management style duplicated the Enhanced Fund, a bank collective investment fund maintained by First Union and offered as an investment option under the First Union Plan.

The Enhanced Fund's objective is to provide total rate of return equal to or exceeding that of the S&P 500 Index. To achieve this objective, the Enhanced Fund invests primarily in a diversified portfolio of common stock and S&P 500 futures.

Prior to the merger, the First Union Plan held 54.9% of the outstanding units in the Enhanced Fund. Immediately following the merger, the Plan's Enhanced Fund holdings increased to 59.6% of the outstanding units. Other employee benefit plan investors, unrelated to Wachovia, own the remaining units in the Enhanced Fund.

The Enhanced Fund does not charge any management fees to the Plan. The costs associated with providing investment advisory services to the Enhanced Fund are borne by Wachovia and its affiliates. Unaffiliated qualified plans holding units in the Enhanced Fund pay Wachovia asset-based investment advisory fees. However, the Plan does not pay any such fees.

5. Mercer was initially retained by the First Union Plan to act as its independent investment adviser. Mercer counseled the fiduciaries of the First Union Plan with respect to the impending merger of the two Plans.

Subsequent to the corporate merger, the Wachovia Plan Committee retained Mercer to serve as its investment adviser for the Plan. In this respect, Mercer acknowledged its fiduciary status with respect to the Plan. Mercer's fees were to be paid by Wachovia.

Mercer and the Plan Committee determined that two S&P 500 Index Funds would be inconsistent with the Plan's design and would present communication problems. Mercer compared the performance of both Funds, the fees charged thereunder, considered the potential confusion to Plan participants arising from the offering of two similar Funds, and the desire to streamline Plan administration. During the fall of 2001, Mercer then recommended, and the Plan Committee accepted, the elimination of the Index Fund through a "mapping transaction," which involved two separate transactions.<sup>3</sup> First, the Plan exchanged its 5,825,619.074 shares of the Index Fund for 1,711,987.3214 units of the Enhanced Fund, which represented equivalent fair market value. Once the Index Fund shares entered the asset base of the Enhanced Fund, the Enhanced Fund immediately redeemed the Index Fund shares in kind for the underlying transferable securities and cash consideration totaling \$5,881,028. The transactions were conducted contemporaneously at the closing prices of the applicable securities on January 2, 2002. As noted above, the transactions resulted in the receipt, by the Enhanced Fund, of approximately 33% of each securities position held on behalf of the Plan by the Index Fund. The Enhanced Fund has held these transferable securities for investment, subject to normal trading and portfolio turnover.

6. At the time of entering into the transactions, Wachovia and Mercer had no reason to believe that a prohibited transaction would occur. Rather, Wachovia believed that the Act's prohibited transaction provisions were not violated because the Index Fund shares were exchanged for Enhanced

<sup>3</sup> It is represented that the two-step "mapping transaction" minimized the transaction costs that would have been incurred by the Plan otherwise and the adverse tax consequences to other Index Fund shareholders. Specifically, if the Index Fund had redeemed the Plan's shares in cash, it would have been forced to liquidate large amounts of its holdings and incurred significant transaction costs, such as brokerage and other administrative costs, which could have been borne proportionately by the Plan. In addition, the Index Fund reserved the right to pay the Plan in kind upon the redemption of its shares. If the Index Fund had exercised this right, the Plan would have been required to receive and manage a securities portfolio which it was not equipped to manage (as a self-directed plan), which costs were avoided.

Fund units at fair market value. However, upon review of the foregoing transactions by Wachovia's counsel, it was determined that Prohibited Transaction Class Exemption (PTCE) 77-3 (42 FR 18734, April 8, 1977), might not apply to the transactions nor could Wachovia avail itself of the statutory exemptive relief provided under section 408(b)(8) of the Act.<sup>4</sup> Wachovia explains that because it was unclear whether PTCE 77-3 and section 408(b)(8) apply to (a) a noncash disposition of mutual fund shares and (b) an acquisition of common trust fund units for noncash consideration, counsel for Wachovia advised it to seek retroactive exemptive relief from the Department.

Accordingly, Wachovia requests an administrative exemption from the Department with respect to (a) the in kind transfer by the Plan of its shares in the Index Fund in exchange for units in the Enhanced Fund; and (b) 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. If granted, the exemption will be effective as of January 2, 2002.

7. In advance of the decision to eliminate the Plan's Index Fund holdings, Mercer received full written disclosures concerning the Funds from Wachovia. Such disclosures included: (a) a prospectus or its equivalent for each of the Funds; (b) the management fees, as negotiated under the applicable investment management agreements, and the costs; (c) the reasons why the Plan Committee considered such investment to be appropriate for the Plan; and (d) 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. As noted above, on January 2, 2002, acting on

Mercer's advice, the Plan Committee caused the Plan to enter into the recommended transactions.

8. Mercer also evaluated the transactions in terms of their fairness to the Plan and to the Plan participants and the arm's length nature of such transactions. The three key areas that Mercer evaluated included: (a) a performance comparison of the two Funds; (b) an analysis of the expense ratios of each Fund; and (c) the specific details of the transactions. These evaluations are further described below.

(a) *Performance.* As of December 31, 2001, Mercer explains that both Funds had performances similar to the S&P 500 Index. However, the Enhanced Fund tracked the return of the Index more closely than that of the Index Fund for one, three, and five year periods ending December 31, 2001. Mercer illustrates these findings in the following table:

#### PERFORMANCE AFTER FEES FOR PERIODS ENDING DECEMBER 31, 2001

[In percent]

	1 year	3 years	5 years	7 years
Enhanced Fund .....	- 10.9	- 1.1	10.8	16.0
Index Fund .....	- 12.2	- 1.5	10.2	N/A
S&P 500 .....	- 11.9	- 1.0	10.7	15.9

(b) *Expense Ratio.* Mercer states that the Index Fund's expense ratio for December 31, 2001 was 0.41%. However, Mercer explains that a participant's account in the Enhanced Fund would not incur a fee because fees in this Fund are billed internally and are absorbed by the human resource department. Additionally (and as noted above), Wachovia Bank does not charge asset-based management or other fees to the Plan.

(c) *Transaction Details.* Mercer states that prior to the transactions, it reviewed the proposed structure and determined that the transactions would be fair to the Plan and no less favorable to the Plan than an arm's length transactions between unrelated parties.

9. The in kind transfer of the Index Fund shares by the Enhanced Fund was a one-time transaction. 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 Rule 17a-7 (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7.

10. The in kind redemption of the Index Fund shares by the Enhanced Fund for the underlying transferable securities and cash, was a one-time transaction. In the redemption transaction, the Enhanced Fund received a pro rata portion of the cash and transferable securities held on behalf of the Plan in the Index Fund that was equal in value to the number of mutual fund shares redeemed for such cash and transferable securities, as

determined in a single valuation performed in the same manner and at the close of business on the same day in accordance with Rule 17a-7, (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7. Furthermore, the fair market value of all transferable securities received by the Enhanced Fund in the in kind redemption transaction was determined by reference to the last sale price for transactions as reported in the Consolidated System, a recognized securities exchange, or the NASDAQ System.

11. Within 90 days following the completion of the transactions, Mercer received confirmation of the following information from Wachovia: (a) The number of Index Fund shares exchanged by the Plan and the number of Enhanced Fund units received by the Plan immediately before the in kind

<sup>4</sup> In relevant, PTCE 77-3 permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or

principal underwriter, provided certain conditions are met.

Section 408(b)(8) of the Act provides statutory exemptive relief, in pertinent part, for any transaction between a plan and a common or collective trust fund maintained by a party in interest which is a bank or trust company supervised by a state or federal agency, if the following conditions are met: (a) The transaction is

a sale or purchase of an interest in the fund, (b) the bank or trust company receives not more than reasonable compensation, and (c) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank or trust company or an affiliate) who has authority to manage and control the assets of the plan.

transfer transaction (and the related per share net asset value and the total dollar value of the shares held) as reported by the Funds; and (b) the identity and current market price of each security received by the Enhanced Fund in the in kind redemption, the aggregate dollar value of the securities allocated to the Plan in the Enhanced Fund pursuant to such redemption and the net asset value of Enhanced Fund units after the redemption. Mercer represents that compliance with the above SEC rules precluded the exercise of discretion and required that the transactions between affiliated funds be conducted at arm's length.

12. Additionally, Mercer states that it reviewed the results of the transactions with the Plan Committee.<sup>5</sup> The review was made to ensure that the transactions had been executed as planned, that none of the parties had exercised discretion and/or deviated from the plan, and that in all respects the transactions were carried out as planned. Among the items reviewed by Mercer with the Plan Committee were the following: (a) The number and current market price of all Enhanced Fund units transferred to the Plan in exchange for the Index Fund shares; (b) the number and current market price of all Index Fund shares transferred by the Plan to the Enhanced Fund in exchange for Enhanced Fund units; (c) the identity of each security, the number of shares of such security transferred, the closing price on the relevant national exchange as of the date of the transfer, and the proper valuation of the securities for the purposes of the transfer; and (d) the aggregate dollar value of the Index Fund shares that were held by the Plan immediately before the transfer and the aggregate dollar value of the Enhanced Fund units held by the Plan immediately after the transfer were valued at their daily net asset values in accordance with their normal procedures. In addition, Mercer confirmed that the Index Fund and the Enhanced Fund used the same methodology to value the securities received by the Enhanced Fund in the in kind redemption. Specifically, Mercer determined that all securities were valued at their closing prices on the relevant national exchange as of

January 2, 2002, the date the transactions were consummated, and all Fund shares and units were valued at their daily net asset values in accordance with Rule 17a-7. Based upon the foregoing, Mercer concluded that the value of the Enhanced Fund units received by the Plan in the exchange was equal to the net asset value of the Index Fund shares given by the Plan. Moreover, Mercer noted that the participants' accounts reflected equivalent value before and after the transactions.

Mercer represents that the transactions involved 3% of the Plan's aggregate assets, and that the transactions resulted in the receipt by the Enhanced Fund of approximately 33% of each securities position held by the Index Fund. As noted above, subsequent to the in kind redemption, the Enhanced Fund has held these securities for investment, subject to normal trading and portfolio turnover.

13. Wachovia represents that had the Plan carried out an in kind exchange it would have been required to establish a separate account, engage an investment manager, and establish a daily valuation system in order to integrate the assets received through the in kind redemption into the Plan's self-directed design. This result would have meant significant start-up and ongoing administrative fees for the Plan. In the case of a cash redemption, which would have required the consent from the Index Fund manager, Wachovia explains that the Plan would have borne its ratable share of the transaction costs associated with liquidating the Index Fund investments to cover the Plan's cash redemption. The Plan would also have borne its ratable share of the transaction costs associated with the purchase by the Enhanced Fund of securities with the cash transferred to it by the Plan in exchange for the purchase of Enhanced Fund units.

14. In summary, it is represented that the transactions have satisfied (or will satisfy) the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Mercer had the opportunity to review in advance 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, after it had received full written disclosures concerning the Funds.

(b) On the basis of the disclosures, Mercer recommended both the in kind transfer transaction and the in kind redemption transaction, and the Plan Committee followed Mercer's recommendation by acting on such advice.

(c) Before recommending the 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 of the Index Fund shares by the Enhanced Fund 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 Rule 17a-7 (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7.

(g) In the in kind redemption transaction, the Enhanced Fund received a pro rata portion of the cash and transferable securities held on behalf of the Plan in the Index Fund that was equal in value to the number of mutual fund shares redeemed for such cash and transferable securities, as determined in a single valuation performed in the same manner and at the close of business on the same day in accordance with Rule 17a-7, (using sources independent of Wachovia), and the procedures established by the Enhanced Fund pursuant to Rule 17a-7.

(h) For purposes of the covered transactions, the fair market value of all transferable securities received by the Enhanced Fund in the in kind redemption transaction was determined by reference to the last sale price for transactions as reported in the Consolidated System or the NASDAQ System.

(i) Within 90 days after the completion of the transactions, Mercer received confirmation of the following information: The number of Index Fund

<sup>5</sup> Mercer notes that in its review, it found a discrepancy of \$11,650.66 between the valuation of the Index Fund shares and the Enhanced Fund units. Mercer explains that this discrepancy was determined to be immaterial as the discrepancy represented less than one tenth of one basis point of the total value of the investment. Moreover, Mercer determined that no Plan participant had been adversely affected by the \$11,650.66 discrepancy.

shares exchanged by the Plan and the number of Enhanced Fund units received by the Plan immediately before the in kind transfer transaction (and the related per share net asset value and the total dollar value of the shares held) as reported by the Funds; (2) the identity, the current market price of each security received by the Enhanced Fund in the in kind redemption, and the aggregate dollar value of the transferable securities allocated to the Plan in the Enhanced Fund pursuant to the redemption, and the net asset value of Enhanced Fund units after the redemption;

(j) Subsequent to the completion of the transactions, Mercer conducted a post-transaction review in which it verified: (1) The number and current market price of all Enhanced Fund units transferred to the Plan in exchange for the Index Fund shares; (2) the number and current market price of all Index Fund shares transferred by the Plan to the Enhanced Fund in exchange for Enhanced Fund units; (3) the identity of each transferable security, the number of shares of such security transferred, the closing price on the relevant national exchange as of the date of the transfer, and the proper valuation of the securities for the purposes of the transfer; (4) the aggregate dollar value of the Index Fund shares that were being held by the Plan immediately before the transfer and the aggregate dollar value of the Enhanced Fund units held by the Plan immediately after the transfer were valued at their daily net asset values in accordance with their normal procedures; and (5) the use, by the Index Fund and the Enhanced Fund, of the same methodology to value the securities transferred by the Index Fund to the Enhanced Fund in the in kind redemption.

(k) No sales commissions, fees or other costs were paid by the Plan in connection with the transactions, and no additional management fees are being charged to the Plan by Wachovia through the Enhanced Fund.

(l) Wachovia did not enter into the transactions unless Mercer concurred with such transactions.

(m) The Plan's dealings with the Index Fund, the Enhanced Fund and Wachovia were on a basis that was no less favorable to the Plan than dealings between the Enhanced Fund and other investors.

#### Notice to Interested Persons

Notice of proposed exemption will be provided to all interested persons by first class mail within 45 days of publication of the notice of pendency in the **Federal Register**. Such notice shall

include a copy of the notice of pendency, as published in the **Federal Register**, and supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on the proposed exemption. Comments are due within 75 days of the date of publication of the proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Silvia M. Quezada of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

#### **Dakotas and Western Minnesota Electrical Workers Apprenticeship Plan (the Plan), Located in Fargo, ND**

[Exemption Application No: L-11316]

#### **Proposed Exemption**

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the lease (the Lease) of a portion of a parcel of improved real property (the Premises) by the Plan from the Dakotas Chapter of the National Electrical Contractors Association (the Dakotas NECA), a party in interest with respect to the Plan; provided that, at the time the transaction is entered into, the following conditions are satisfied:

(a) An independent, qualified fiduciary (the I/F), acting on behalf of the Plan, determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Before the Plan enters into the proposed Lease of the Premises, the I/F reviews the transaction, negotiates the terms of the transaction to ensure that such terms are at least as favorable to the Plan as an arm's length transaction with an unrelated party, and determines whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) The I/F monitors compliance with the terms and conditions of this exemption, as described herein, and ensures that such terms and conditions are at all times satisfied;

(d) Throughout the duration of the Lease of the Premises, the I/F monitors compliance with the terms of the Lease of the Premises and takes any and all steps necessary to ensure that the Plan is protected, including, but not limited

to, notifying Dakotas NECA of the Plan's intention to extend the Lease of the Premises at the conclusion of the initial five (5) year term of the Lease;

(e) The rent paid by the Plan for the Premises under the terms of the Lease and under the terms of any subsequent extension of the Lease is at no time greater than the fair market rental value of the Premises, as determined by an independent, qualified appraiser retained by the Board of Trustees of the Plan (the Trustees);

(f) The Plan pays no rent for the Premises, any remodeling or maintenance costs, any taxes, insurance, operating expenses or other costs, expenses, or charges for the Premises for the period from the date of the Plan's first occupancy of the Premises to the date the final exemption is published in the **Federal Register**. Nothing in this condition (f) shall preclude the payment by the Plan of rent plus its proportionate share of the cost of taxes, maintenance, and insurance on the Premises after the final exemption is published in the **Federal Register** and the Lease of the Premises is executed;

(g) Under the provisions of the Lease, the transaction is on terms and at all times remains on terms that are at least as favorable to the Plan as those that would have been negotiated under similar circumstances at arm's length with an unrelated third party;

(h) The transaction is appropriate and helpful in carrying out the purposes for which the Plan is established or maintained;

(i) The Trustees maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below, in paragraph (j)(1) of this exemption to determine whether the conditions of this exemption have been met; except that—

(1) If the records necessary to enable the persons described, below, in paragraph (j)(1) of this exemption to determine whether the conditions of this exemption have been met are lost or destroyed, due to circumstances beyond the control of the Trustees, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the Trustees shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for



examination as required by paragraph (i) of this exemption; and

(j)(1) Except as provided, below, in paragraph (j)(2) of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (i) of this exemption 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 any other applicable federal or state regulatory agency;

(B) Any fiduciary of the Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to the Plan and any employee organization whose members are covered by the Plan, or any duly authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described, above, in paragraph (j)(1)(B)–(D) of this exemption are authorized to examine trade secrets or commercial or financial information that is privileged or confidential.<sup>6</sup>

#### Summary of Facts and Representations

1. The Plan is a multi-employer employee welfare benefit plan, as that term is defined in section (3)(1) of the Act. The Plan is exempt from federal income taxation under section 501(c)(3) of the Code. As of March 24, 2005, the date the application was filed, there were 850 participants in the Plan. The Plan had assets totaling \$564,407, as of June 30, 2004.

The Plan is maintained under a collective bargaining agreement between the Dakotas NECA, representing contributing employers, and four (4) local unions (the Locals) representing employees who are members of the International Brotherhood of Electrical Workers. Specifically, the Locals and their geographic locations have been identified as: (a) Local 426 (Sioux Falls, SD); (b) Local 1250 (Rapid City, SD); (c) Local 714 (Bismarck and Minot, ND); and (d) Local 1426 (Fargo and Grand Forks, ND). As employee organizations any of whose members are covered by the Plan, the Locals are parties in

interest with respect to the Plan, pursuant to section 3(14)(D) of the Act.

2. Eight (8) individuals serve as Trustees of the Plan. Four (4) of the Trustees are appointed by contributing employers and either are employed by or are members of the Board of Directors of the Dakotas NECA. Four (4) of the Trustees are appointed by members of the Locals. One such Trustee is a representative of Local 1426.

Under the Agreement and Declaration of Trust, the Trustees may use Plan assets to lease premises to house the functions of the Plan, to pay proper and necessary expenses, and to enter into contracts. It is represented that this is a sufficient conveyance of authority to permit the Trustees to enter into the proposed transaction, if granted. The Trustees are parties in interest with respect to the Plan, pursuant to section 3(14)(A) of the Act, and fiduciaries, as defined in section 3(21) of the Act.

3. The Dakotas NECA is a North Dakota non-profit corporation founded in 1949. Its membership currently comprises 34 electrical contractors in North and South Dakota and western Minnesota, who are signatories to collective bargaining agreements with the Locals. The Dakotas NECA is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act, as an employer association.

It is represented that the Dakotas NECA currently provides office space and other services to the Plan under an arrangement that is represented to meet the requirements of section 408(b)(2) of the Act.<sup>7</sup> In this regard, it is represented that an entry in the Plan's financial statement relates to an arrangement whereby Dakotas NECA and the Plan share the cost of office space and administrative services, including secretarial and bookkeeping services, the services of the Plan's Director, and ancillary costs for office equipment and supplies.

4. The Plan provides benefits in the form of apprenticeship and other training programs to persons employed as commercial and residential electricians in the states of North Dakota, South Dakota, and the western regions of Minnesota. The Plan sponsors a five (5) year course of study for apprentices entering the electrical trade and other courses of study that allow

journeyman electricians to upgrade their skills. Generally, apprentices attend classes two (2) nights a week. There are currently 98 apprentices enrolled in training programs.

It is represented that the geography of the Dakotas includes a number of small to mid-sized population centers, but no single large metropolitan area. In order to satisfy its purposes, the Plan has established training facilities located throughout its jurisdiction. In this regard, the Locals in Bismarck, Minot, and Grand Forks, North Dakota and the Locals in Sioux Falls and Rapid City, South Dakota offer space in their union halls to the Plan for use as training facilities. It is represented that the Plan pays rent (currently \$2,600 per year per facility) to these Locals to help defray expenses for the use of the space in these union halls. It is represented that the Locals that make training space available for the Plan rely on the exemption provided by and satisfy the requirements of Prohibited Transaction Class Exemption 78–6 (PTCE 78–6).<sup>8</sup>

It is represented that the Fargo area has the largest population base of all the cities within the geographic coverage of the Plan. A significant portion of the participant base of the Plan, in particular, 63 out of 98 apprentices reside in or near Fargo. Prior to the occupancy of the Premises by the Plan in November 2003, apprentices from Local 1426 in Fargo, received training in space rented from Northwest Technical College (NTC) in Moorhead, Minnesota. The rent at NTC was approximately \$2,380 per year for approximately fifty (50) evenings of use. It is represented that the Plan also incurred expenses of several thousand dollars annually for additional space to conduct journeyman training and other functions. It is represented that the space at NTC was too small and was subject to repeated and numerous scheduling conflicts. The arrangement at NTC permitted no flexibility in the training schedule. The NTC facility provided no storage and did not allow the Plan's apprentices to use its training modules or computers.

<sup>8</sup> PTCE 78–6 permits, in part, collectively bargained multiple employer apprenticeship plans to lease real property (other than office space) from a sponsoring employee organization; provided the terms of the transaction are at least as favorable to the apprenticeship plan as an arm's length transaction with an unrelated party; the transaction is appropriate and helpful in carrying out the apprenticeship plan's purposes; and the apprenticeship plan maintains certain records for a period of six (6) years. The Department is not offering a view, herein, as to whether the relief provided by PTCE 78–6 covers the leasing of training space between the Plan and certain Locals. Further, the Department is not providing, herein, any relief with respect to the leasing of training space to the Plan by such Locals.

<sup>6</sup> The Department notes that the relief proposed herein, is conditioned upon the adherence by the Trustees to the material facts and representations set forth in the application file and upon compliance with the conditions, as set forth in this exemption.

<sup>7</sup> The Department is offering no view, herein, as to whether the provision of office space and other services rendered to the Plan by the Dakotas NECA is covered by the statutory exemption provided in sections 408(b)(2) of the Act and the Department's regulations, thereunder, pursuant to 29 CFR 2550.408b–2. Further, the Department is not providing, herein, any relief with respect to the provision of office space and other services to the Plan by the Dakotas NECA.



In this regard, instructors had to set up modules or computers for hands-on training projects during the early part of each class and dismantled the project by the end of each class to leave the classroom ready for the students of the NTC.

It is represented that the Plan recognized the inadequacy of the NTC facility as long ago as 1997. In this regard, the Plan looked at several buildings to buy and space to lease, but did not find a suitable affordable facility. Specifically, in the fall of 1999, the Plan viewed space to lease at the Skills and Technology Center. It is represented that this building was being renovated, and raw space was available to lease at a base rent of \$4.00 to \$5.00 per square foot. The cost of building out the space would have been in addition to the rent. Also, taxes, utilities, and maintenance expenses would have been added to the rent. In late 2000, the Plan considered the purchase of a building adjacent to the Fargo Labor Temple, but found it unsuitable because of its size and price.

It is represented that, unlike the other Locals, Local 1426 in Fargo does not own a union hall and prefers to lease space for a union hall and union activities from the Fargo Labor Temple. In this regard, it is represented that there is no space in the Fargo Labor Temple to accommodate apprenticeship and journeyman training.

In order to provide a training facility in Fargo, contributing employers in that area agreed, beginning June 1, 1997, to increase contributions to the Plan by four cents (4¢) per hour. This funding has been segregated into a separate Plan account (the Fargo Account). It is represented that the contributing employers and Local 1426 intend to continue contributions to the Fargo Account at four cents (4¢) per hour for the duration of the transaction that is the subject of this proposed exemption. This source of funding is expected to generate approximately \$20,000 per year. The decision whether to allocate more than the current four cents (4¢) per hour rests with the membership of Local 1426. As of June 30, 2004, the assets in the Fargo Account totaled \$271,361. It is proposed that the current balance and the cash flow attributable to future special contributions to the Fargo Account are to be fully expended by the Plan to purchase or lease and equip a training facility in Fargo.

5. In March 2003, the Dakotas NECA purchased a building at 2901 First Avenue North, Fargo, North Dakota (the Building). The Dakotas NECA acquired the Building when it was required to relocate because its lease had expired. It

is represented that the Dakotas NECA occupies Suite 1 of the Building that constitutes approximately 4,940 square feet in size.

It is represented that the Premises, located in Suite 2 of the Building, also constituting approximately 4,940 square feet, is suitable for a training facility. At its expense, the Dakotas NECA improved the space in order to meet the needs of the Plan. In this regard, the Premises contain three classrooms, one computer lab, hands-on training areas, a welding training area, and storage space. It is represented that the Plan purchased the necessary equipment and furniture for the Premises using money from the Fargo Account.

Dakotas NECA proposes to lease the Premises to the Plan. In this regard, it is represented that the Plan has occupied the Premises, at no expense to the Plan, since November 1, 2003. The Dakotas NECA has agreed to waive receipt of payment of any rent, taxes, operating expenses, or other costs or expenses as the result of the Plan's occupancy of the Premises from the date of such occupancy to the date the final exemption is published in the **Federal Register**.

Notwithstanding the Plan's occupancy of the Premises since November 2003, the applicant maintains that retroactive relief is not necessary and has not been requested. In the opinion of the applicant, the term of the Lease of the Premises has not begun and will not begin to run until after the proposed exemption is granted. In this regard, it is represented that the date of the Lease will reflect a date no earlier than the date of the publication of the final exemption in the **Federal Register**. Accordingly, the applicant seeks only a prospective exemption to permit the Plan to enter into the Lease of the Premises with Dakotas NECA.<sup>9</sup>

The applicant represents that relief provided by PTCE 78-6 is analogous to the type of lease transaction for which the Plan seeks an exemption. Furthermore, the applicant states that the proposed transaction satisfies the conditions specified in PTCE 78-6. However, as the relief provided by PTCE 78-6 from sections 406(a)(1)(A), (C) of the Act does not extend to an association of contributing employers, such as the Dakotas NECA, the applicant has requested an administrative exemption from section 406(a) of the Act.

<sup>9</sup> The Department is not providing any retroactive relief, herein, with respect to any violations of section 406 of the Act that may have arisen in connection with the Plan's occupancy of the Premises since November 2003.

The Trustees representing the contributing employers and the Trustee representing Local 1426 have abstained from deliberations and have not voted on the subject transaction in order to avoid actual and colorable conflicts of interest. Nevertheless in order to make certain that all necessary relief is granted, the applicant has also requested an exemption from the self-dealing and conflict of interest provisions, as set forth in section 406(b)(1) and (b)(2) of the Act.

6. The proposed term of the Lease of the Premises is five (5) years, commencing no sooner than the date of the publication in the **Federal Register** of the final exemption for the subject transaction. The proposed net rental amount is \$7.85 per square foot of rentable area, plus the Plan's proportionate share of the cost of taxes, maintenance, and insurance on the Premises. The Plan is expected to lease 4,940 square feet of space in the Building. Upon expiration of the initial five (5) year term of the Lease, the Plan may exercise a series of one (1) year options to continue occupying the Premises, provided that: (a) the Plan gives the Dakotas NECA not less than two (2) months' prior written notice exercising its option to extend the term of the Lease; and (b) the Plan is not in default of the Lease at the time it exercises its option to extend. It is represented that the base rent during the extended term shall be the *lesser of*: (a) \$2,600 per year or the arrangement in effect for the Plan's facilities in other areas, or (b) the fair market rental of the Premises. It is represented that with the exception of the Plan's option to renew the Lease, the terms of the proposed Lease are typical of a standard commercial lease.

7. The applicant maintains that the proposed exemption is administratively feasible, because the Plan will maintain records for review by the Department and others to insure that the conditions of the exemption are satisfied. Further, it is represented that all the terms of the proposed transaction are known and have been disclosed in the application. Further, the applicant maintains that the proposed exemption is administratively feasible in that the Dakotas NECA, the contributing employers, and the Locals all share the same interest in a skilled and satisfied workforce.

8. The applicant maintains that the proposed transaction is in the interest of the Plan, as the rent under the proposed Lease of the Premises is more affordable to the Plan than an arm's length market rate transaction would be. In this regard, the Plan has obtained opinions of the fair market rental value of the Premises

from the following four (4) appraisers all of which are familiar with the real estate market in Fargo:

(a) Chuck Helmstetter, a real estate broker with Property Resources Group, opined that, as of October 16, 2003, rentable space in the Fargo area similar to the Premises would lease at a rental rate of from \$11.50 to \$14.00 per square foot annually with the tenant paying a prorated share of operating costs;

(b) Arnie Kuhn, CRB, CRS, ABR, a licensed real estate broker and President of Rust-National, Inc. d.b.a. Arnie & Mary Realtors, as of October 16, 2003, estimated that the fair market rental value in Fargo for space similar to the Premises would range from \$12 to \$14 per square foot on a triple net basis;

(c) Scott M. Mandy, MAI, of Appraisal Services, Inc., as of May 11, 2004, using five comparable rental properties in Fargo, estimated the gross rent for the Premises to be from \$12.50 to \$13.00 per square foot; and

(d) Nathan J. Brooberg, John G. Flaherty, MAI, and Robert J. Strachota (Mr. Strachota), MAI, CRE, MCBA, FIBA, and President of the Shenehon Company, prepared a market rental analysis which indicated that, as of October 13, 2004, the fair market net rent of the Premises was within a range of from \$11.50 to \$12.50 per square foot on a gross rental basis for a new lease in which the tenant pays all the operating expenses and taxes. Based on these estimates of the range of rental values for the Premises, it is the applicant's position that the net rent under the terms of the proposed Lease of \$7.85 per square foot is at a minimum \$3.65 to as much as \$6.15 below the market rate in the Fargo area. Accordingly, the applicant maintains that if the exemption were denied the Plan would have to pay higher rent for equivalent space elsewhere.

Further, the applicant maintains that the proposed Lease is in the interest of the Plan in that at the conclusion of the initial five (5) year term, the Plan at its option may extend its lease of the Premises on a basis which is both financially favorable and consistent with the *lesser* of: (a) \$2,600 per year or the arrangement in effect for the Plan's facilities in other areas; or (b) the fair market value of the Premises.

It is also represented that the subject transaction is in the interest of the Plan and its participants in that under the proposed Lease, the Plan enjoys a dedicated training facility tailored to meet the needs of providing appropriate apprenticeship training in Fargo now and in the future.

9. It is represented that the Plan has sufficient cash to pay for the rent on the

Premises under the terms of the proposed Lease. In this regard, the entire corpus of the assets of the Plan (\$564,407, as of June 30, 2004) is available to cover the Plans' expenses. The annual projected rental amount under the Lease is \$38,779. Based on the Plan's most recent financial statements, dated June 30, 2004, this annual projected rental amount represents 6.8 percent (6.8%) of the Plan's assets. It is estimated that the Plan's total annual outlay on the Premises, which includes rent and the Plan's proportionate share of the cost of taxes, maintenance, and insurance is \$50,870 or 9 percent of the Plan's assets.

In addition, the Plan has assets in the Fargo Account dedicated to the purchase or leasing and equipping of a training facility in Fargo. It is represented that over the initial five (5) year term of the Lease, the total amount of rent payable by the Plan will be \$193,895. It is represented the total expenses, including rent, and the Plan's proportionate share of the cost of taxes, maintenance, and insurance will be \$256,820. It is represented that the total amount payable by the Plan either has been or will be accumulated in the Fargo Account over the five (5) year term of the Lease. In this regard, the sum of the contributions to the Fargo Account, as of June 30, 2004, (\$271,361) plus the projected future contributions to such account of \$20,000 per year until May 2008, (\$80,000) totals approximately \$351,361 which exceeds the rent, plus the proportionate share of the cost of taxes, maintenance, and insurance payable by the Plan (\$256,820) over the initial five (5) year term by \$94,541.

10. The proposed exemption contains conditions that are designed to ensure the presence of adequate safeguards to protect the interests of the Plan regarding the subject transaction. In this regard, Mr. Strachota, who assisted in the preparation of the appraisal prepared by the Shenehon Company, as discussed in paragraph 8(d) above, has been retained to act as the I/F with respect to the decision whether the proposed Lease is an appropriate and prudent transaction for the Plan.

It is represented that the engagement of Mr. Strachota as the I/F also addressed the issue of the effectiveness of the abstention by the employer Trustees under section 302(c)(5) of the Taft Hartley Act.

Mr. Strachota has agreed on behalf of the Plan to prepare a market rental analysis of the Building. In addition, Mr. Strachota has consented to act as an I/F on behalf of the Plan. In this regard, in a letter dated February 15, 2005, Mr.

Strachota represents that he understands that he is acting as a fiduciary to the Plan, as that term is defined in section 3(21) of the Act.

It is represented that Mr. Strachota is qualified to act as the I/F in that he is an expert in the field of real estate valuation and real estate acquisition and leasing. In this regard, Mr. Strachota is the President of Shenehon Company, a real estate and business valuation firm established in 1929, and located in Minneapolis, Minnesota. Mr. Strachota is a graduate of the University of St. Thomas in St. Paul, Minnesota and holds a master of business administration from the University of Minnesota where he also has teaching experience. Among many professional associations and societies, Mr. Strachota is a Fellow of the Institute of Business Appraisers, holds a designation of Counselor of Real Estate (CRE) from the American Society of Real Estate Counselors, and is a member of the Appraisal Institute (MAI) certified through December 31, 2007. Mr. Strachota's professional duties include the preparation of valuations and market analyses of real estate, business enterprises, and intangible property rights, among many other assignments.

Mr. Strachota represents that he has no personal interest or bias with respect to the subject matter of his rental analysis or to the parties involved. It is represented that Dakotas NECA is responsible for paying Mr. Strachota's fee. Mr. Strachota represents that the market rental analysis he prepared of the Building conforms to accepted professional, ethical, and performance standards of real estate appraisal practice.

In a letter dated May 20, 2005, the parameters of the scope of the I/F's assignment included the following elements: (a) Mr. Strachota must determine that the transaction is feasible and in the best interests of and protective of the interests of the Plan and its participants and beneficiaries; (b) before the Plan enters into the proposed Lease, Mr. Strachota must review the transaction, negotiate the terms of the transaction to ensure that such terms are at least as favorable to the Plan as an arm's length transaction with an unrelated party, and determine whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act; (c) Mr. Strachota must monitor compliance with the terms of the exemption and the Lease and ensure that such terms are at all times satisfied; and (d) Mr. Strachota is responsible for taking any and all steps necessary to insure that the Plan is at all times protected, including but

not limited to providing notice of the Plan's intention to extend or terminate the Lease and negotiating any such extension at the conclusion of the initial five (5) year term of the Lease.

Based on the Trustees prior determinations that it is necessary, reasonable, and appropriate that the Plan have a training facility in Fargo, that the Premises is suitable in size and attributes, and that the Plan has the financial ability to undertake the proposed Lease, Mr. Strachota concurs with the Trustees assessment that it is necessary, reasonable, and appropriate for the Plan to have a dedicated training facility in Fargo and that the Plan is financially capable of entering into the Lease.

Based on the market analysis prepared by the Shenehon Company, as discussed in paragraph 8(d), above, Mr. Strachota has concluded that the proposed net rent per square foot under the terms of the Lease is below the current fair market net rent for the Premises. Further, Mr. Strachota points out that fair market net rents may be expected to increase over time, so that the net rent under the Lease is likely to become even more favorable. Mr. Strachota finds that the non-financial terms of the Lease are unremarkable and typical of a commercial lease of space and are at least as favorable to the Plan as would be found in an arm's length transaction with an unrelated party.

Based on all of the above analysis, Mr. Strachota concludes that the proposed transaction is feasible and in the best interest of and protective of the Plan and its participants and beneficiaries. Finally, Mr. Strachota directs that the transaction proceed, conditional upon the issuance of a final exemption by the Department.

11. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Mr. Strachota, acting as the I/F on behalf of the Plan, will determine prior to entering the transaction(s) whether the transaction is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Mr. Strachota will review, negotiate, and approve the terms of the transaction prior to entering into the Lease of the Premises and will determine whether or not to accept the transaction for the Plan in accordance with the fiduciary provisions of the Act;

(c) Mr. Strachota will monitor compliance with the terms and conditions of this exemption, as described herein, and will ensure that

such terms and conditions are at all times satisfied;

(d) Throughout the duration of the Lease of the Premises, Mr. Strachota will monitor compliance with the terms of the Lease of the Premises and will take any and all steps necessary to ensure that the Plan is protected, including but not limited to notifying Dakotas NECA of the Plan's intention to extend the Lease of the Premises at the conclusion of the initial five (5) year term of the Lease;

(e) The rent paid by the Plan for the Premises under the terms of the Lease and under the terms of any subsequent extension of the Lease at no time will be greater than the fair market rental value of the Premises, as determined by an independent, qualified appraiser retained by the Trustees;

(f) The Plan will not pay any rent for the Premises, any remodeling or maintenance costs, any taxes, insurance, operating expenses or other costs, expenses, or charges for the Premises for the period from the date of the Plan's first occupancy of the Premises to the date the final exemption is published in the **Federal Register**;

(g) Under the provisions of the Lease, the transaction will be on terms and at all times will remain on terms that are at least as favorable to the Plan as those that would have been negotiated under similar circumstances at arm's length with an unrelated third party;

(h) The transaction is appropriate and helpful in carrying out the purposes for which the Plan is established or maintained; and

(i) The Trustees will maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, such records as are necessary to determine whether the conditions of this exemption have been met.

#### **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.

Signed at Washington, DC, this 9th day of August, 2005.

**Ivan Strasfeld,**

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

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**BILLING CODE 4510-29-P**

## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

[TA-W-57,115, TA-W-57,115A]

#### **Basf Corporation, Coatings Division, Southfield, MI, Including an Employee of Basf Corporation, Coatings Division, Southfield, MI, Located in Morganton, NC; Amended Notice of Certification Regarding Eligibility To Apply for Worker Adjustment Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment