DEPARTMENT OF CORPORATIONS
California's Investment and Financing Authority

WAYNE STRUMPFER
Acting Corporations Commissioner
Sacramento, California

IN REPLY REFER TO:
FILE NO: OP 7027-CSL

COMMISSIONER'S OPINION 06/1C

THIS INTERPRETIVE OPINION IS ISSUED BY THE COMMISSIONER OF CORPORATIONS PURSUANT TO CORPORATIONS CODE SECTION 25618 OF THE CORPORATE SECURITIES LAW OF 1968. IT IS APPLICABLE ONLY TO THE TRANSACTION IDENTIFIED IN THIS OPINION REQUEST, AND MAY NOT BE RELIED UPON IN CONNECTION WITH ANY OTHER TRANSACTION.

Mr. Willie R. Barnes
Musick, Peeler & Garrett LLP
One Wilshire Boulevard, Suite 2000
Los Angeles, CA 90017

Re: Employer-Contribution VEBA Trust and Employee After Tax Contribution VEBA Trust For Pepperdine University

Dear Mr. Barnes:

The Commissioner of Corporations has considered your request for an interpretive opinion contained in your letter dated January 4, 2006, and supplemented by your letters dated March 13, 2006, March 21, 2006, March 27, 2006, April 5, 2006, and April 11, 2006, including all the accompanying material. Your request involves the Employee After Tax Contribution VEBA (Voluntary Employee Beneficiary Association) Trust for Pepperdine University and the Employer Contribution VEBA Trust (hereinafter the "Trusts").

QUESTION OF LAW

The requesting party, Pepperdine University, raises the question whether beneficial interests in the Trusts are securities within the meaning of Corporations Code Section 25019 and are therefore subject to the qualification requirements of the Corporate Securities Law of 1968. Given the limited features of the Trusts, and based on your representations, we conclude that the beneficial interests are not securities because they are excluded from the definition of "security" in Corporations Code Section 25019, as described below.

REPRESENTATIONS OF FACT

You represent that Pepperdine University elected to participate in a program developed by Emeriti Consortium for Retirement Health Solutions ("Emeriti"). Emeriti is a collaborative arrangement of, by, and for colleges, universities, and other higher education-related tax-exempt organizations. Emeriti designed a retiree medical program to help these institutions and their employees cope with the rising cost of retiree health care.

By way of background, the Emeriti program is designed to provide retiree health care benefits which may be funded through employer and employee contributions. In order to provide these benefits to its employees, Pepperdine University established the two Trusts, each of which qualifies under Section 501(c)(9) of the Internal Revenue Code, as Voluntary Employee Beneficiary Associations (VEBAs). One of the Trusts will receive and hold employer contributions made to the program, and the other will receive and hold employee contributions. Employees of Pepperdine University are therefore the beneficiaries of the Trusts, and each employee will hold beneficial interests in both Trusts. The Trustor for the Trusts is Pepperdine University. Fidelity Trust Management Company will serve as trustee, while Fidelity Investment Institutional Operations Company (both referred to as Fidelity) will serve as Third Party Administrator to the Trusts. FBD Consulting, Inc. has been selected to manage the medical reimbursement claims for employees.

The purpose of the Trusts is to allow employees and employers to contribute funds that will eventually be used to pay for retiree health benefits. Both Trusts will receive and hold contributions in individual participant accounts until an employee reaches the age of retirement. During their employment, employees will be able to direct their contributions to a limited amount of registered mutual investment funds offered by Fidelity. In retirement, participants can use the balance in their participant accounts to pay for health insurance premiums and other qualifying medical expenses.

In addition, you represent that the trustee of Trusts will not offer investment advice to participants. Nor will the trustee exercise investment discretion over participant accounts. Also, you indicate the trustee's duties are ministerial, and that of a holding and paying agent.

Additionally, the Trust Agreements, and your letter dated April 5, 2006, state that both Trusts are employee welfare plans subject to ERISA (Employee Retirement Income Security Act of 1974, as amended).

LEGAL ANALYSIS

Corporations Code Section 25019 defines "security" and provides in part that a security does not include "any beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business." The key question in this situation is whether both Trusts are "created for the purpose of carrying on any business." If the Trusts are created for the purpose of carrying on any business, the offer and sale of interests in the Trusts will be subject to the qualification requirements of Corporations Code Section 25110.

There are no California cases or Commissioner's Opinions that specifically define what constitutes "carrying on any business." However, as stated in your letter dated January 4, 2006, previous Commissioner's Opinion Nos. 69/41 and 78/15C, as well as 73/152C, focus on various factors that have guided the Commissioner in determining whether a trust is created for the purpose of carrying on any business. To help determine whether a trust falls within the category of trusts that the Legislature intended to be excluded from the definition of security, the limited purpose and scope of the trust together with the limited and nondiscretionary functions and powers of the trustee are all relevant factors.

Commissioner's Opinion No. 69/41 involved a trust agreement where the trustee was to purchase a master group life insurance policy, select a broker/dealer, receive from one or more manufacturing companies contributions and amounts withheld from employees' paychecks, and remit the appropriate amounts to the insurance company and to the broker-dealer. The Commissioner found that the beneficial interests of the trust were excluded from the definition of security in Corporations Code Section 25019, since the trust agreement strictly limited the functions of the trustee to that of a holding and paying agent. The Commissioner found that the trustee functioned mainly as a conduit only for the handling of paychecks withholds with little if any of the decision-making discretion, which is characteristic of a trust engaged in business. Additionally, this opinion stated that the Legislature, by using the phrase "not created for the purpose of carrying on any business," intended to exclude trusts which are created to perform functions so slight or incidental, transitory or perfunctory that their activities cannot in any sense be regarded as amounting to carrying on a business. (See also Commissioner's Opinion No. 73/152C in which the Commissioner concluded that beneficial interests in a liquidation trust were not securities given the limited purpose of the trust as well as other related factors.)

The limited purpose of the Trusts in this case is similar to the limited purpose of the trust in Opinion No. 69/41 since, much like that opinion where the trust was created to allow the employer to purchase insurance policies, the Trusts are created to defray the costs of and provide certain insured and/or self insured health and life insurance benefits. Furthermore, the functions of the Trusts and powers of the trustee are strictly limited – the Pepperdine Trustee is not engaged in the type of decision-making discretion, which is characteristic of a trust engaged in business. Employees select the mutual funds in which their contributions will be invested; thus, the employees and not the trustee exercise investment discretion over their contributions. The trustee merely serves as a holding and paying agent, paying fund expenses, and holding in trust employee managed participant accounts. The trustee exercises no investment discretion over the trust investments but, rather, carries out the participant's investment directions. Also, the Trusts are further limited since they are available only to a limited class of persons – Pepperdine University employees. In addition, the Trusts are not created to provide investment advice or to allow the trustee to exercise investment discretion over participant accounts. Additionally, according to your representations, we note that although the Trusts allow employees to invest and select mutual investment funds, these employee investment activities are only incidental to the main purpose of the trust, and designed only to ensure that employees can defray the rising cost of retiree health benefits.

Commissioner's Opinion No. 78/15C similarly involved a trust that provided insurance plans for employees including life, medical and disability insurance. The Commissioner found that the functions of the trustee were strictly limited by the trust agreement, and the principal obligation of the trustee under the trust agreement was to hold the contributions by the employers in trust and to pay the premiums on the policies of insurance. Due to the limited functions and discretion of the trustee, the Commissioner found that the beneficial interests in the trust did not constitute securities, as the trust was not created for the purpose of carrying on any business.

Similar to Opinion No. 78/15C, the trustee's functions in the Trusts are limited as well. The trustee does not engage in investment discretion; rather, employees select which mutual funds their contributions are invested. The trustee merely purchases mutual funds selected by the employee, pays fund expenses and holds the mutual fund shares in trust until the employee reaches retirement when the funds are then used to pay for retiree health benefits. In addition, the Trust agreements strictly limit the role of the trustee to performing record keeping and administrative services for the employer if the services are purely ministerial in nature. Finally, the Trust agreements further limit the function of the trustee by prohibiting the trustee from providing investment advice to participants. The functions of the trustee are strictly limited by the trust agreement, and do not allow the trustee to engage in discretionary functions, which are characteristic of a trust engaged in carrying on business.

Your correspondence mentions Commissioner's Opinion No. 90/1C. Unlike the facts of that opinion, the Trusts are created for the purpose of providing a means for Pepperdine employees to purchase retiree health benefits. The Trusts are not created for the purpose of purchasing equity investments, and the investment activity of the Trusts is merely incidental to their comprehensive health benefit function and purpose. Therefore, it is unnecessary to discuss other opinions, such as Opinion No. 90/1C, that address whether beneficial interests in employee stock purchase plans are securities under Corporations Code Section 25019. Similarly, we need not discuss Commissioner's Opinion No. 98/1C, since that opinion interpreted a different statute relating to broker-dealers.

CONCLUSION

Given the limitations as represented by you, including the limitations on the trust and the trustee, we are of the opinion that the beneficial interests in the Trusts are excluded from the definition of security under Corporations Code Section 25019, since we find the Trusts are not created for the purpose of carrying on any business, as described above. Therefore, these beneficial interests are not subject to the qualification requirements of the Corporate Securities Law of 1968.

It is important to note that this opinion relates only to prospective, future transactions involving beneficial interest of the Trusts. (*See* Commissioner's Release No. 61-C). Insofar as the Department understands that there are approximately 30 Pepperdine University employees who have already been admitted into the program, this opinion does not apply to whether the beneficial interests already issued are securities under Corporations Code Section 25019. Nor does this opinion address whether any other transactions in connection with the Trusts involve the offer and sale of securities.

Dated: June 2, 2006
Sacramento, California

WAYNE STRUMPFER
Acting California Corporations Commissioner

By ______________________
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FILE NO. 73709.015

January 4, 2006

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DEPT. OF CORPORATIONS
OFFICE OF LAW AND LEGISLATION

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Re: Employer-Contribution VEBA Trust and Employee After Tax Contribution VEBA Trust For Pepperdine University

Dear Mr. LeBas:

We appreciated the opportunity to briefly discuss with you by telephone on November 26, 2005, the Employee After Tax Contribution VEBA Trust For Pepperdine University ("Pepperdine VEBA Trust"), and receipt of your email reply on November 28, 2005. On behalf of our client, Pepperdine University, we are writing, pursuant to Section 25618 of the California Corporate Securities Law of 1968 ("CSL") and Rule 250.12 thereunder, to obtain a formal interpretive opinion from the Commissioner that, based upon the facts set forth below, the beneficial interests in the Pepperdine Employee-Contribution VEBA Trust and the Employer VEBA Trust (hereinafter "Pepperdine VEBA Trusts") are excluded from the definition of "security" by Corporations Code Section 25019. Therefore, such beneficial interests are not subject to the qualification requirements of the CSL.

BACKGROUND

Pepperdine University has elected to participate in a program developed by the Emeriti Consortium for Retirement Health Solutions ("Emeriti").[1] The program is designed to

[1] An Illinois Not-For-Profit Corporation. According to the Emeriti Retiree Health Plan for Pepperdine University, Summary Plan Description dated August 1,2005:

provide retiree health care benefits which may be funded through employer and employee contributions. In order to participate in the Program, Pepperdine University has adopted a retiree medical plan, which will be funded through two VEBA Trusts, one of which is the Pepperdine VEBA Trust, a voluntary employee contribution trust, and the other is an employer contribution VEBA Trust.

As we discussed in our telephone conversation, McGuireWoods LLP, on behalf of its client, Emeriti, filed a request with the Commissioner for an interpretive opinion that the sale or issuance of participation interests in the voluntary employees' contribution trusts under the Plans are "exempt transactions under Section 25100(n) of the California Corporations Code ("CCC")." The copy of this letter which was provided to us is dated November 22, 2004.

> Emeriti Retirement Health Solutions ("Emeriti") is a collaborative arrangement of, by, and for colleges, universities, and other higher education-related tax-exempt organizations . . .
>
> Emeriti has designed a retiree medical program, called the Emeriti Program, to help colleges, universities, and other higher education-related tax-exempt organizations and their employees cope with the rising costs of retiree health care . . .
>
> The Emeriti Program is a 'turnkey' retiree medical program, which means that Emeriti has created model plan documents and has established relationships with leading service providers and insurance companies . . .
>
> Here is how it works: your employer adopts an Emeriti Retiree Health Plan and two related tax-exempt trusts—an employer-contribution trust and an optional employee-contribution trust. Contributions to these trusts are held in individual participant accounts. Participants direct the investment of their accounts among a range of federally registered investment options available under the plan. In retirement, participants can use their accounts to pay for health insurance premiums and qualified out-of-pocket expenses on a tax-free basis . . .
>
> Emeriti selected Fidelity and Aetna to provide services to the Emeriti Program . . .

Attached to the McGuireWoods letter was an Appendix, which described the general design of the Consortium Program.

Although we have not seen any written reply from the Commissioner to Emeriti's interpretive opinion request, you confirmed what we had been advised, namely, that the Commissioner declined to issue the requested opinion. This request for interpretive opinion submitted on behalf of Pepperdine University is a *de novo* request based on a different provision of the CSL, Corporations Code Section 25019, which provides in pertinent part:

> "…'Security' does not include: (1) any beneficial interest in any voluntary *inter vivos* trust which is not created for the purpose of carrying on any business or solely for the purpose of voting…"

As noted above, our request applies to both the Employer and Employee Funded VEBA Trusts. The amounts received by these trusts will be allocated to individual accounts for employee participants. The participants will be required to direct the investment of contributions allocated to a participant's account. Thus, each participant will have a beneficial interest in both trusts.

FACTS

The Emeriti Program is intended to provide a tax-advantaged method for each member college or university to provide retiree health benefits to its former faculty, staff, and administrators. Each participating organization would qualify under Section 501(c)(3) of the Internal Revenue Code (the "Code"). The retiree health benefits will normally become available to participants when they attain age 65 and will coordinate with Medicare. In some cases, benefits may become available to participants, their spouses, and their dependents who have not attained age 65. Although Emeriti will provide administrative oversight, each college or university will adopt its own retiree medical plan.

In addition to establishing its own independent plan based upon the Emeriti model plan, Pepperdine has established two trusts, each intended to qualify under Section 501(c)(9) of the Code as a tax-exempt Voluntary Employees' Beneficiary Association ("VEBA"). One trust will receive and hold employer contributions made to the program and the other will receive and hold participant contributions. Each VEBA trust will be an individual legal entity dedicated to the plan established by Pepperdine and trusteed by Fidelity Management Trust Company, a Massachusetts trust company (hereinafter all Fidelity related companies will be referred to as "Fidelity"). Plan participants are able to direct the investment of the funds held in their VEBA accounts from a very short list of registered mutual investment funds offered by Fidelity. Following retirement, the balances in the individual accounts held for each participant in

Pepperdine's plan will be available to pay for health insurance premiums and other qualifying medical expenses.

Amounts attributable to employee contributions that are paid by an employer-sponsored plan on account of injury or sickness (e.g., for medical expenses) are generally excludable from gross income for income tax purposes. Code Section 104(a)(3) excludes from income amounts received through accident or health insurance "for personal injuries or sickness." Code Section 105(e) provides that, for this purpose, amounts received under an accident and health plan for employees shall be treated as amounts received through accident or health insurance. Thus, benefits are excludable from income whether provided directly by the plan or through insurance (For example, see PLR 9019023 (1990)). Employee contributions to the VEBA Trust and employer contributions to the employer VEBA Trust allocated to employees will be used to purchase insurance or to directly reimburse participants for expenses incurred due to injuries or sickness, including medical care. Thus, as paid, these amounts will be excluded from the gross income of the participant.

Regarding the tax status of voluntary contributions by plan participants, such contributions are not permitted on a pre-tax basis. The cost of current medical coverage can be provided on a pre-tax basis under Code Section 125. However, plans under Code Section 125 do not permit pre-tax employee contributions to fund retiree medical coverage (Proposed Treas. Reg. Section 1.125-2 Q&A#5). Thus contributions made by participants and deducted directly from each employee's paycheck cannot be made on a "before-tax" basis and, therefore must be made solely on an "after-tax" basis.

One of the goals of the program is to provide a mechanism for participants to make contributions during their careers to augment the amounts set aside for their benefit by Pepperdine. These contributions will be made to a VEBA designed to receive only employee contributions. As in the case of employer derived contributions, it is anticipated that the balances in these accounts will be expended during the lives of the participant, his or her spouse and allowable dependents, so that no residual will remain at death. However, in some cases a balance will remain. It is intended that these balances be used by the participant's spouse and dependents to continue to provide medical benefits after the participant's death.

Copies of the Trust Agreement for each of the Trusts are enclosed as an Appendix to this letter.

ISSUE

Are the beneficial interests in the Pepperdine VEBA Trusts subject to the qualification provisions of the CSL?

CONCLUSION

Based upon our review of the applicable law, our answer to this question is in the negative. Each of the Pepperdine VEBA Trusts is an *inter vivos* trust; neither trust will be created for the purpose of engaging in business nor will they be created solely for the purpose of voting. By virtue of Corporation Code Section 25019, the beneficial interests in these trusts are excluded from the definition of "security," and, therefore, the offer and sale of such beneficial interests may be made in California without the necessity of obtaining a qualification from the Commissioner

DISCUSSION

The CSL provides that, unless an exemption or exclusion is available, no offer or sale of a security may be made in California, unless the security or transaction has first been qualified with the Commissioner. Corporations Code Section 25019 provides in pertinent part:

> "...'Security' does not include (1) any beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business or solely for the purpose of voting..."

As set forth above, following a participant's retirement, funds held in the Pepperdine VEBA trusts will be available to pay for health insurance premiums and other qualifying medical expenses for former employees and their spouses and dependents. Historically, beneficial interests in trusts, like the Pepperdine VEBA Trusts designed to provide benefits to employees of a company upon retirement, have been exempt from the qualification provisions of California's Securities Law, even before the enactment of the CSL. Former Corporations Code Section 28006 provided as follows:

> "A beneficial interest issued by a retirement system shall be exempt from the provisions of the Corporate Securities Law."

Former Corporations Code Section 28002.5 defined a "retirement system" to mean "a trust formed for the purpose of providing benefits on account of members retiring by reason of age or length of service or both."

The Attorney General, in a 1950 Opinion on retirement systems administered by the Commissioner, opined as follows:

> Plan set up by organization of employers, as non-profit corporations, under which contributions collected from employer

> members and paid to national bank as trustee is a retirement system within the meaning of Corporations Code; plan is exempt from licensing requirements under Corp. Code 28103; beneficial interests issued thereunder are not securities within the meaning of Corporate Securities Act. Opinion No. 49-225-May 5, 1950.[2]

Former Corporations Code Section 28102 provided that a retirement system is exempt from licensing and other provisions of the Retirement System Act if all the contributions are paid to an insurer and the insurer pays directly to the employee or his beneficiary. The retirement system, which was the subject of the Attorney General's Opinion was not exempt from licensing because only part of the contributions were paid to an insurer. Nonetheless, the Attorney General concluded that 'section 28006 applies to this case although the system is exempt from the licensing provisions of section 28300 and the beneficial interests are not considered securities under the Corporate Securities Act.' (Emphasis added.)

Former Corporations Code Section 28006 was repealed January 1, 1971, two years after the effective date of the CSL.

We believe that a review of the history of California's predecessor Securities Law demonstrates the longstanding exemption for beneficial interests in trusts intended to provide health type benefits to former employees upon retirement. Marsh & Volk, the principal draftsmen of the CSL, in their seminal treatise discuss the provisions of the predecessor statute and the Commissioner's various interpretations of the exemptive provisions. They state:

> The Department of Corporations took the position that the issuance of securities to a profit-sharing plan was covered by the statute, whether or not such securities were sold, unless exempted. Under that statute, the only exemption was the one contained in former Section 28006 of the Retirement Systems Law. That law provided that "a beneficial interest issued by a retirement system shall be exempt from the provisions of the Corporate Securities Law," [citation omitted] and a retirement system was defined as a 'trust formed for the purpose of providing benefits on account of

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[2] (Former Corporations Code Section 25307 provided that "The Attorney General shall render to the commissioner opinions upon all questions of law, relating to the construction or interpretation of any law under his jurisdiction …").

> members retiring by age or length or service or both [citation omitted].
>
> As a result of these provisions, the position taken by the Department of Corporations was that any stock or other securities contributed to a pension or profit-sharing trust by the issuer required a permit even though the beneficial interests in the trust did not." Marsh & Volk, Practice under the California Securities Law, Rev. Ed, 4.06[1][b].

The enactment of the present CSL, effective January 1, 1969 did not alter this longstanding treatment of beneficial interests in a trust providing benefits to employees upon retirement. Although former Corporations Code Section 28006 was repealed as a part of the repeal of the Retirement Systems Law, effective January 1, 1971, there is nothing to indicate and no basis to conclude that beneficial interests in employee trusts intended to provide specified health benefits to former employees are per se required to be qualified. In fact, under the CSL, such trusts are exempt/excluded from the qualification requirements if one of two provisions can be met. Corporations Code Section 25100(n) exempts any beneficial interests in an employee's pension, profit-sharing, stock, bonus or similar benefit plan which meets the requirements for qualification under Section 401 of the Federal Internal Revenue Code. This basis was proposed by McQuireWood and we believe correctly rejected by the Commissioner. But, the issuer may also seek to avail itself of the exclusion from the definition of a security provided by Corporations Code Section 25019 and it is upon this basis that we request a ruling. [3]

As discussed above, Corporations Code Section 25019 provides that "security" does not include "any beneficial interest in any voluntary inter vivos trust, which is not created for the purpose of carrying on any business or solely for the purpose of voting." Most of the Commissioner's opinions on the availability of this section focused on the meaning of "carrying on any business." Prior to 1998, the Commissioner had not yet publicly expressed a definition of the meaning of this phrase and the early opinions applied varying theories to determine whether an inter vivos trust was engaged in business, e.g., transitory nature of the trust and limited powers of the trustee.

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[3] In Commissioner's Opinion Nos. 90/1C and 78/15C, the Commissioner noted that the fact that a Plan is not qualified under Section 401 of the Internal Revenue Code and thus the exemption afforded from qualification afforded by Corporations Code Section 25100(n) is not available does not preclude reliance on the exclusion from the definition of a security provided by Corporations Code Section 25019.

A. Carrying on Any Business

1. Interpretive Opinion 70/162, December 22, 1970

In this Opinion (employee payroll deductions were deposited with a trustee for the purpose of purchasing company shares on the open market), the Commissioner emphasized the short period that funds would be held in trust. The Commissioner concluded "that such trust . . . is so incidental and transitory in character that it cannot be considered to have been created for the purpose of carrying on a business.

2. Commissioner's Opinion No. 90/1C, March 19, 1990.

This Opinion also involved an Employee Stock Purchase Plan where employee-payroll deductions were deposited with a trustee to be used to purchase the Company's stock. The Plan was not qualified under Section 401 of the Internal Revenue Code. The Commissioner opined "that the trust created by the Plan has not been created for the purpose of carrying on any business or solely for the purpose of voting as those terms are used under Section 25019, and, therefore, falls within the exclusion from the definition of 'security' provided by paragraph (1). Accordingly, the beneficial interests in the Plan are not 'securities' as defined by Section 25019 of the Law." The Commissioner noted that "the Company, as trustee, has limited power and authority. For example, the Company, as trustee, has no discretionary power to act on behalf of the participating employees. The powers are only ministerial . . . ."

3. Interpretive Opinion 69/41, May 2, 1969.

In this case, a trust was created to provide insurance benefits to employees. The Declaration provided for the purchase by the trustee of a master group life insurance policy and a selection of a broker-dealer to service the Equity Purchase Program under the trust. The cost of the policy was to be borne by the employers to the extent of a fixed face amount of term insurance on the lives of employees employed by the employer. Employees could agree to paycheck withholding if they desired to purchase and pay for the additional costs of ordinary life insurance or if they desired to join the Equity Purchase Program. For the latter purpose, employees were required to enter into participation agreements with the selected broker-dealer and individually designate the mutual funds qualified for sale in California. The Commissioner, focusing on the limited functions of the trustee, concluded that the trust is not engaged in carrying on any business and, therefore, the beneficial interests in the trust are not securities within the meaning of Section 25019. In determining that the trustee had limited functions, the Commissioner observed:

(i) "The trustee has no investment discretion;"

(ii) "His functions are substantially those of a holding and paying agent;" and

(iii) "Even as regards the handling of funds, the trust instrument establishes procedures, which in many events bypass the trustee and substitute contacts, communications, and transactions of insurance companies and broker-dealers directly with the holders of the beneficial interests of the trust."

The Commissioner also stated, "To the extent that the trust is not altogether a passive one, the trustee acts as a conduit only for the handling of paycheck withholds with little, if any, of the decision making discretion, which is characteristic of a trust engaged in business.

4. Commissioner's Opinion No. 78/15C, July 14, 1978

This opinion followed Commissioner's Opinion 69/41 and provided additional salient comments. Involved here was a multiple employer trust. It was conceded that the Plan did not meet the requirements under Section 401 of the Internal Revenue Code, and therefore the exemption provided by Corporations Code Section 25100(n) was not available. Under the trust agreement, the Company proposed to act as an agent for employers who desire to establish separate plans of insurance for their employees. Under the plans of insurance, life, medical and disability benefits were provided to eligible employees of each employer by insurance companies. The principal obligation of the Trustee under the Trust Agreement was to hold the contributions by the employers in trust and to pay the premiums on the policies of insurance. The Trustee was empowered under the Trust Agreement to appoint an Administrator whose responsibilities included making applications for the policies, (b) calculation of premiums, (c) maintenance of records, and (d) locating several employers to constitute a single group, thereby making available to all employers lower group insurance rates.

The Commissioner concluded:

> The functions of the Trustee in the instant case are strictly limited by the trust agreement as was the case in Com. Op. 69/41 . . . Under these circumstances . . . it is our opinion that the beneficial interests in the MET to be formed . . . are beneficial interests in a voluntary inter vivos trust which is not created for the purpose of carrying on any business, and therefore, are not 'securities' within the meaning of Section 25019, and not subject to the qualification requirement of Section 25110 of the Law.

With respect to the Pepperdine VEBA Trusts, the powers of the trustee are substantially restricted, in manners substantially similar to the restrictions to which the trustee in Interpretive Opinion 69/41, Commissioner's Opinion 78/15C and Commissioner's Opinion 90/1C were subject. For example:

1. The trustee of the Pepperdine VEBA Trusts has no investment discretion. Individual participants direct the investment of the funds held in and or allocated to their accounts. See Interpretive Opinion 69/41; see Commissioner's Opinion 90/1C.

2. The Emeriti Program establishes procedures, which eliminate decision-making authority of the trustee and substitutes arrangements with the insurer and investment company, which were established by Emeriti. (Emeriti selected Fidelity and Aetna to provide services to the trusts.) Emeriti has also selected a third party administrator ("TPA") to provide administrative support to maintain the Program in compliance with the Internal Revenue Code and ERISA. Compare Interpretive Opinion No. 69/41 where the Commissioner stated, "The trust instrument establishes procedures which in many events bypass the trustee and substitutes contacts, communications, and transactions of insurance companies and broker-dealers directly with the holders of the beneficial interests of the trust."

3. The trustee of the Pepperdine VEBA Trusts primarily performs certain ministerial, recordkeeping and administrative functions. See page 1 of the Employee After-Tax Contribution VEBA Trust Agreement. See Commissioner's Opinion No. 90/1C. Here the Commissioner stated, ". . . the Company, as trustee, has limited power and authority . . . The powers are only ministerial, such as maintaining separate accounts for each participating employee. . . ."

4. In addition to limited ministerial functions, the trustee of the Pepperdine VEBA Trusts are substantially those of a holding and paying agent. As stated in Section 7 of the Employee After-Tax Contribution VEBA Trust Agreement, the "Trustee is directed and authorized . . . (a) to hold, invest and reinvest the Trust Fund in accordance with the provisions of this Agreement . . . (b) to pay monies from the Trust Fund to, or on order of, the Administrator in accordance with Section 13; and (c) to pay the expenses of the Plan and Trust." In this regard, see Interpretive Opinion 69/41. Here, the Commissioner stated: "In the instant case, the functions of the trust are strictly limited by the trust agreement. The trustee has no investment discretion. His functions are substantially those of a holding and paying agent." Also, see Commissioner's Opinion 78/15C. The Commissioner stated: ". . . the principal obligation of the Trustee under the trust agreement is to hold the contributions by the employers in trust and to pay the premiums on the policies of insurance."

Consistent with the Commissioner's rationale in Commissioner's Opinion 69/41, 78/15C and Commissioner's Opinion 90/1C, we believe that the Commissioner should find that the functions of the trustee in the Pepperdine VEBA Trusts are extremely limited and, therefore, the trust is a passive holder of funds and not engaged in carrying on any business. Of course, once this finding is made, the Commissioner should conclude that the beneficial interests in the Pepperdine VEBA trusts are not securities within the meaning of the Corporations Code § 25019 and not subject to the qualification requirements of the CSL.

Moreover, it is no longer necessary for the Commissioner to rely on the analyses used in Commissioner's Opinions 69/41 and 78/15C to determine whether a trust is carrying on a business. In 1998, the Commissioner issued Commissioner's Opinion 98/1C defining "engaged in business" and thereby setting the meaning of the almost identical phrase "carrying on any business. In that Opinion, the Commissioner states:

> The CSL does not define what is meant by the term 'engage in the business,' nor are there any cases, which interpret the phrase 'engage in the business' in the context of the CSL.
>
> However, in a broad sense, business means an occupation or trade engaged in for the purpose for obtaining a livelihood or profit or gain. Mansfield v. Hyde, 112 Cal.App.2nd 133, 137 (1952). 'Engaged in the business' generally implies a '. . . business activity of a frequent or continuous matter,' (Advance Transformer Co. v. Superior Court, 44 Cal.App.3_. 127, 134 (1974).

The Pepperdine VEBA Trusts are not engaged in an occupation, trade, or endeavor for the purpose of obtaining a livelihood, profit or gain. The sole purpose of the Pepperdine University VEBA Trusts is to provide funds to pay for health insurance premiums and other qualifying medical expenses for former employees, their spouses and dependents upon their retirement. As structured, Pepperdine University will establish two VEBA Trusts, one to receive and hold contributions made to the Plan by Pepperdine University and the other to receive and hold contributions by individual participants. Each VEBA Trust will maintain a separate account for the assets of each participant. Earning and losses will accrue on the account balances within each VEBA Trust. All funds in the VEBA Trusts will be used only for medical benefits (paid from the participant's account in each VEBA Trust) during the life of the participants and all other beneficiaries. No part of the earnings on contribution will inure to the benefit of any individual or private person except through payment of welfare benefit.

B. The Pepperdine VEBA Trusts Are Not Formed for the purpose of Voting.

The Pepperdine VEBA trusts also avoid the other factor, which would eliminate the availability of the exclusion from the definition of security for inter vivos trusts. They are not formed for the purpose of voting.

Based on the foregoing, we request that the Commissioner issue an interpretive opinion that the offer or sale of beneficial interest in the Pepperdine University VEBA Trusts are not securities within the meaning of Corporations Code Section 25019 and therefore such beneficial interests are not required to be qualified pursuant to the provisions of the CSL. If you have any questions or need additional information, please do not hesitate to contact the undersigned.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
Enclosures: Appendix
cc: Mr. James Moore
Jay Adams Knight, Esq.

456124.3

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LOS ANGELES
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SAN FRANCISCO
SANTA BARBARA
WESTLAKE VILLAGE

March 13, 2006

Timothy L. Le Bas
Deputy Commissioner and General Counsel
Office of Law and Legislation
Department of Corporations
1515 "K" Street, Suite 200
Sacramento, California 95814-4052

Re: Employer-Contribution VEBA Trust and Employee After Tax Contribution VEBA Trust For Pepperdine University

Dear Mr. LeBas:

We regret the necessity of having to contact you regarding the status of the above request for Interpretive Opinion filed on behalf of Pepperdine University, however, it is close to two and a half months since the request was filed. During our last contact with Ms. Laura Riddell on February 27, 2006, she advised me that she had not yet completed her review of the filing. We understand that many variables affect the processing time for a filing, however, if counsel's review has not yet been completed and if your procedures allow it, we would request that a "priority for processing" be assigned to this matter.

Your assistance is most appreciated.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
cc: Mr. James Moore

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FILE NO. 73709.015

March 21, 2004

VIA FEDERAL EXPRESS

Timothy L. LeBas, Esq.
Deputy Commissioner and General Counsel
Office of Law and Legislation
Department of Corporations
1515 "K" Street, Suite 200
Sacramento, California 95814-4052

Re: Employer-Contribution VEBA Trust and Employee After Tax Contribution VEBA Trust For Pepperdine University

Dear Mr. LeBas:

This letter is a follow up to our telephone conversation of March 20, 2006, and amends and supplements our letter dated January 4, 2006, requesting an Interpretive Opinion on behalf of Pepperdine University. Based on further discussions with our client, we have determined that the enabling documents for the VEBA Trusts were executed in August 2005, and thereafter an approximate 30 employees were admitted into the program.[1]

[1] On October 28, 2005, Pepperdine University received from Emeriti a package for submission (including exhibits and a check for the filing fee) to California to satisfy California's registration requirements for the Emeriti program. This package was submitted to us for our review by Pepperdine University. Upon completion of our review, we concluded that interests in the VEBA Trusts were excluded from the definition of a security by *Corporations Code* §25109 and suggested to our client that it should first seek an Interpretive Opinion prior to filing the application for a permit. It is apparent to us that our client was not aware and had not previously been advised by Emeriti or its representatives that it should not have proceeded with implementation of the VEBA Trusts in August 2005 without a permit or satisfaction as to the availability of an exemption.

We are aware of the Department's policy of refusing to issue an Interpretive Opinion where the securities, which are the subject of the opinion request, have been sold. In this case, however, there remain securities to be issued in the future to other employees under the program, and Pepperdine University desires the statutory protection provided by an Interpretive Opinion for future sales only. Therefore, the pending request for an Interpretive Opinion is hereby amended to apply only to sales in the future, i.e., subsequent to the date of this letter. We have been authorized by Pepperdine University to represent on its behalf that all sales of interests in the program have ceased, and no further sales will be made until after the receipt of the Department's response to the request for Interpretive Opinion.

As I indicated in our telephone conversation, I believe that a public purpose would be served by the issuance of an Interpretive Opinion on the applicability of the Corporate Securities Law to VEBA Trusts such as those discussed in our letter of January 4, 2006. We are aware of other colleges, which are considering adopting the "Emeriti" program. In fact, this firm has been retained by another university to help it with the adoption of the Emeriti program. We understand that it has not executed any documents or collected any funds. Moreover, as I mentioned to you, the staff in the Department of Corporations' San Francisco office has already concluded that it is not necessary to obtain a permit for the offer of sales of interests in a VEBA Trust, relying on Commissioner's Opinions 75/16C and 75/30C. In that circumstance, counsel for the Department advised Kalamazoo College, which had applied for a permit to sell interests in its VEBA Trust, that it should consider withdrawing its application for a permit. I am enclosing a copy of Corporations Counsel Rafael Lirag's letter dated December 1, 2005.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
Enclosure: Rafael Lirag's 12/1/05 letter to Mr. Ponto
cc: Mr. James Moore
Jay Adams Knight, Esq.

470499.1

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73709.015

March 27, 2006

Timothy L. LeBas, Esq.
Deputy Commissioner and General Counsel
Office of Law and Legislation
Department of Corporations, State of California
1515 "K" Street, Suite 200
Sacramento, CA 95814-4052

Re: Employer-Contribution VEBA Trust and Employee After Tax Contribution VEBA Trust for Pepperdine University

Dear Mr. LeBas:

Willie Barnes has asked me to forward the enclosed copy of the approval of the United States Securities and Exchange Commission of the Emeriti Program. Note that although Pepperdine is adopting this exact same program, the SEC approval is a blanket approval of the program and not one specific to Pepperdine University.

****

IRS Circular 230 Disclosure: To insure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under federal tax law or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

****

Very truly yours,

Jay Adams Knight
for MUSICK, PEELER & GARRETT LLP

JAK:dcd

cc: Willie Barnes, Esq.

471785.1

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

April 7, 2005

Mail Stop 4-2

David H. Pankey, Counsel
Steven D. Kittrell, Counsel
McGuire Woods LLP
1050 Connecticut Avenue, NW #1200
Washington, D.C. 20036

Re: Emeriti Consortium for Retirement Health Solutions

Dear Mr. Pankey:

In regard to your letter of April 5, 2005, our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

David Lynn
Chief Counsel

Response of the Office of Chief Counsel
Division of Corporation Finance

April 7, 2005

Response of the Office of Chief Counsel
Division of Investment Management

Re: Emeriti Consortium for Retirement Health Solutions
Incoming letter dated April 5, 2005

Based on the facts presented, the views of the Division of Corporation Finance and the Division of Investment Management (the "Divisions") are set forth below. Capitalized terms have the same meanings set forth in your letter.

The Division of Corporation Finance will not recommend enforcement action if, in reliance upon your opinions that registration is not required, an Employee-Contribution VEBA offers and sells Participation Interests in the manner described in your letter without compliance with the registration provisions of the 1933 Act and without registration of the Participation Interests under the Exchange Act.

Based on all of the facts and representations in your letter, the Division of Investment Management will not recommend enforcement action to the Commission under Section 7 of the 1940 Act against an Employee-Contribution VEBA if the Employee-Contribution VEBA does not register as an investment company under the 1940 Act.

Your letter represents that Fidelity states that FMTC is a bank within the meaning of the Exchange Act. The Division of Market Regulation has asked us to advise you that the staff has previously declined to answer whether a non-depository trust company is a bank under Section 3(a)(6) of the Exchange Act. See Hawaiian Trust Company, Ltd. (June 7, 1991).

These positions are based on the representations made to the Divisions in your letter. Any different facts or conditions might require the Divisions to reach a different conclusion. Further, this response expresses the Divisions' positions on enforcement action only and does not express any legal conclusions on the questions presented.

For the Division of Corporation Finance,

Anne M. Krauskopf
Senior Special Counsel
Division of Corporation Finance

For the Division of Investment Management,

Susan M. Olson
Senior Counsel
Division of Investment Management

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McGUIREWOODS

April 5, 2005

Office of the Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Office of the Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: Emeriti Consortium for Retirement Health Solutions—Request for No-Action Relief in Respect of the Investment Company Act of 1940, as Amended, the Securities Act of 1933, as Amended, and Section 12(g) of the Securities Exchange Act of 1934, as Amended

Ladies and Gentlemen:

On behalf of our client, the Emeriti Consortium for Retirement Health Solutions (the "Consortium"), we seek assurance that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") will not recommend enforcement action to the Commission if an Employee-Contribution VEBA under a Plan (as further described herein) does not register as an investment company under the Investment Company Act of 1940, as amended (the "1940 Act") and participation interests in an Employee-Contribution VEBA under a Plan ("Participation Interests") are offered and sold without registration under the Securities Act of 1933, as amended (the "1933 Act"), or the Securities Exchange Act of 1934, as amended (the "Exchange Act").

I. The Facts

General Design of the Program

The program described below (the "Program") is a tax-advantaged method of providing retiree health benefits to former faculty, staff, administrators and employees ("participants") of colleges, universities, and other higher education-related tax-exempt organizations (collectively hereinafter called "Colleges"), all of which are not-for-profit entities which are tax exempt under Section 501(c)(3) or another section of the Internal Revenue Code of 1986, as amended (the "Code").[1]

The Program contains three intertwined components: an employee welfare benefit plan providing medical benefits for former employees and their spouses and dependents, trust-based funding mechanisms to receive plan contributions from sponsoring employers and participating employees, and an educational program to assist employees with integrated planning for post-age 65 health needs in retirement. To participate in the Program, each College will adopt its own retiree medical plan ("Plan") which will be funded through two trusts, one of which is the Employee-Contribution VEBA. The Plan and trusts will be based upon model documents. Each of the trusts will qualify under Code Section 501(c)(9) as a voluntary employees' beneficiary association trust ("VEBA").[2]

The Consortium

The Consortium will oversee the operation of the Program. The Consortium will provide the model documents, provide the educational program, and otherwise design, control, and oversee the operation of the Program.

The Consortium is an Illinois non-member, non-stock, not-for-profit corporation. The Consortium has a small number of full time employees, a board of directors of distinguished individuals associated with higher education, and an advisory council primarily composed of representatives of Colleges which participate or may participate in the Program. Upon termination of the Consortium, any remaining assets of the Consortium are required to be distributed to one or more charitable organizations.[3]

The Consortium will function principally as a service provider to the Plans. The Consortium will retain outside vendors, including one or more insurers (the "Insurer") and a third-party administrator (the "TPA"), to provide the necessary administrative support to maintain the Program in compliance with the requirements of the Code and ERISA[4] for

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[1] The Consortium, the Andrew W. Mellon Foundation, and the William and Flora Hewlett Foundation may also participate at the inception of the Program. A list of the institutions that initially may choose to participate in the Program is attached to this letter.

[2] A trust can be a tax-exempt VEBA under Code Section 501(c)(9) if it meets certain qualification requirements. The principal requirements are: (1) a VEBA must provide only for the payment of life, sick, accident or other similar permissible benefits; (2) eligibility for membership in a VEBA is limited to individuals with an employment-related common bond; and (3) no part of the net earnings of a VEBA may inure to any individual other than through the payment of permissible benefits. In operation, a VEBA must also comply with nondiscrimination requirements under Code Section 505 as to benefits provided under the VEBA. A trust will not be treated as a VEBA unless a timely application for recognition of its tax-exempt status is made to and approved by the Internal Revenue Service.

[3] As a non-profit organization, the Consortium must distribute all of its assets upon dissolution to another tax-exempt organization. To avoid any appearance of conflicts of interest, none of the Colleges which participate in the Program will be eligible to receive such a distribution.

[4] Employee Retirement Income Security Act of 1974, as amended.

plans of this type, including investment management and satisfaction of the reporting and disclosure requirements of ERISA. As of the date of this letter the Insurer is initially expected to be Aetna Life Insurance Company ("Aetna") and the TPA is initially expected to be Fidelity Investment Institutional Operations Company, Inc. together with one or more of its affiliates (collectively "Fidelity").[5] Insurance coverage will be offered only in states in which the Insurer has a certificate of authority or an arrangement with a licensed carrier.[6]

The Consortium has chosen the investment alternatives from registered mutual funds offered by Fidelity.[7] (It is possible that at a later time the investment alternatives offered through the Program will be offered by an entity other than Fidelity. However, all investment alternatives that are offered through the Program will be registered under the 1940 Act and the shares will be registered under the 1933 Act.)

The Consortium will be an ERISA fiduciary of the Plan for purposes of providing a model investment policy and selecting and monitoring the Insurer, the TPA, a COBRA[8] administrator (initially expected to be Aetna), a company to provide group-term life insurance (initially expected to be The Hartford), and any other service providers. The Colleges as sponsors, named fiduciaries, and administrators of the Plans will also be ERISA fiduciaries of the Plans. The trustee may be an ERISA fiduciary of the Plans.[9]

Colleges may become members of the Program by entering into an agreement with the Consortium and adopting the model plan provided by the Consortium. The Consortium's operating expenses, along with other Program expenses, will be paid by

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[5] It is currently contemplated that Fidelity Management Trust Company ("FMTC"), a Massachusetts trust company which Fidelity states is a "bank" as that term is defined in the Exchange Act, will serve as trustee of the VEBAs; Fidelity Investments Institutional Operations Company, Inc. ("FIIOC"), a registered transfer agent, will provide administrative and recordkeeping services; and Fidelity Investments Institutional Services Company, Inc., a registered broker-dealer and investment adviser, will provide marketing services. In addition to providing recordkeeping and administrative services, FIIOC will act as either transfer agent or sub-transfer agent for each of the Fidelity mutual funds offered as an investment alternative. Participants will change their investment elections and exchange between the underlying mutual funds by notifying FIIOC. On behalf of the trustee, FIIOC will process transactions for shares of the funds directly on the books of the funds and adjust participant account balances to reflect participant directions. In doing so, orders will not be netted or aggregated across Plans or within a Plan.

[6] The insurance products may vary among states based on state regulatory requirements.

[7] The Consortium will not otherwise have investment discretion. The Consortium intends to register as an investment adviser, either federally or on a state-by-state basis. If any investment vehicle other than a registered mutual fund or a fixed annuity is offered, the Consortium will submit another no-action request.

[8] Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

[9] See infra note 25.

enrollment fees and annual Program membership fees based on the number of employees covered by the Plans.[10]

General Structure of the VEBAs

Each College will establish two VEBAs, one to receive and hold contributions made to the Plan by the College, and the other to receive and hold contributions made by individual participants. Each VEBA will be approved as tax-exempt by the Internal Revenue Service. We understand that (i) neither Colleges nor their employees will receive compensation that is contingent upon or determined as a percentage of contributions made, investments selected or other transactions effected in participants' accounts under a Plan; and (ii) the TPA (not the Colleges or the Consortium) will perform all services relating to the receipt of participant investment instructions and the processing of transactions in participants' accounts under a Plan.

The College will make contributions to an employer-contribution VEBA to fund its portion of the College's Plan. Participating employees and former employees of each College may make voluntary after-tax contributions to an employee-contribution VEBA trust ("Employee-Contribution VEBA").[11] Each VEBA will maintain a separate account for the assets of each participant. Employee and employer contributions will not pass through the Consortium. Rather, contributions will be under the control of the trustee, which will be unaffiliated with the Consortium or any of the Consortium's employees.

Earnings and losses will accrue on the account balances within each VEBA. Each Plan and its associated VEBAs will be designed such that: (i) initial eligibility and continued participation is limited to employees and former employees (and their spouses and dependents only as beneficiaries of the employee) of the College; (ii) earnings on contributions to the VEBAs will not inure to the benefit of any individual or private shareholder except through payment of welfare benefits; (iii) all funds in the VEBAs will be used only for medical benefits (paid from the participant's account in each VEBA) during the lives of the participant and all other beneficiaries; and (iv) at the election of the College, forfeitures in the employer-contribution VEBA can be used to pay life-insurance premiums. The life insurance would provide a fixed amount of life-insurance coverage for all participants in the employer-contribution VEBA and the coverage would not be related to a participant's account balance or whether there is a forfeiture of the participant's account.

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[10] We understand that, to the extent that a VEBA is not based on the model documents provided by the Consortium or does not continue to be maintained pursuant to the Program, any relief granted in response to this request would not be available to that VEBA.

[11] A College could, but would not be required to, provide for voluntary employee contributions as part of its Plan. A College could not provide for voluntary employee contributions unless its Plan also provides for employer contributions and it has at least fifty eligible participants. It is anticipated that most Colleges would provide for voluntary employee contributions. A College may allow participants to make voluntary employee contributions at an earlier age than the age at which the College will begin making employer contributions for all eligible employees.

Following the participant's retirement, the balances in the individual accounts held for each participant in a College's Plan will be available to pay for health-insurance premiums and other qualifying medical expenses. A portion of each benefit payment (i.e., premium payments or reimbursement of qualifying medical expenses) will be drawn from each of the participant's VEBA accounts on a pro-rata basis based on total assets in each of the accounts As explained below, any funds in an individual participant's account in each VEBA not used for medical benefits will be forfeited.

The only compensation the Consortium will receive in exchange for its activities under the Program will be from the Colleges and/or participants (not the TPA). The Colleges will pay a one-time initial enrollment fee after they sign the membership agreements, which fee is in exchange for access to the Program and the model documents, for initial and ongoing participant educational services, and for such other administrative services as the Consortium is obligated to provide. In addition, participants are charged a fixed monthly fee for administrative and ongoing participant educational services. Colleges may elect to pay this fixed monthly fee in whole or in part on participants' behalf. If Colleges elect for participants to pay a portion of this fee, the Colleges will direct the TPA to debit the participant portion from the participant's accounts. If there is no balance in any of the participant's accounts, the fee can be paid by ACH transfer.[12] The Colleges will be billed directly for their portions of this fee, if any. Neither of these fees is connected to the amounts contributed to a Plan by Colleges or participants, transactions in participants' accounts, the investment selections made by Colleges or participants or the amount of compensation received by the TPA for services and investments provided under the Plans. Moreover, neither the Consortium nor any of its employees will receive any compensation from or serve as agents of the TPA or any other entity with respect to services performed in connection with the Program.

The TPA charges a quarterly per-participant fee that is paid from participants' accounts in exchange for services provided to the Plans. The TPA will be the entity solely responsible for processing investment transactions for participants, and all appropriate documents will clearly reflect this. All documents relating to the processing of investment transactions for participants will be created by the TPA. Participants who wish to make transactions in their accounts will either access the TPA's webpage or automated phone system or contact a live TPA phone representative.[13] The TPA will be

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[12] Under an ACH transfer, a participant authorizes a direct transfer from the participant's personal funds in a designated bank account. The transfer is made automatically by the TPA or insurer in the amount authorized by the participant.

[13] Participants make transactions in their accounts as follows. Participants may click on a hyperlink to the TPA's webpage which is posted on the Consortium's webpage. By clicking on this hyperlink, participants are transferred to the separate TPA webpage, which will be clearly labeled as such. Once they have accessed the TPA's webpage, participants can call up their account summaries and place instructions for the TPA to process transactions in their accounts. Participants may also navigate directly to the TPA's webpage without using the hyperlink posted on the Consortium's webpage. Participants may also inquire about their accounts by dialing a toll-free phone number (the last seven digits of which will spell-out the Consortium's name) set up specifically for them. Dialing the phone number takes the participants to a pre-recorded menu. One of the menu options will connect the participant to a live TPA phone representative who will identify him or herself as such. At this point participants can make inquiries about their accounts or place instructions for the TPA to process transactions for their accounts. (Participants can also

solely responsible for effectuating all such transaction requests. The Consortium will not receive transaction requests or instructions from participants or route requests or instructions from participants to the TPA.

The Insurer charges monthly premiums when insurance coverage is in force that are paid from the participant's accounts or by ACH transfer.

Insurance and Administrative Arrangements

The Consortium intends to enter into agreements with the Insurer to insure the medical aspects of the Program and provide for medical claims administration; and with the TPA to provide trust, administrative, investment and other services. Expenses incurred by the individual Plans will be paid directly to these and any other vendors.

The health care benefits will be provided primarily through a post-age 65 group insurance policy integrating with and supplementing Medicare coverage. Coverage may vary from state to state based on state regulatory requirements. Participants will have two choices of how to receive health care. First, upon enrollment in Medicare on or after age 65, a participant may make a one-time election to participate in the Insurer's insurance coverage which is being offered in the Participant's state. If a participant elects to participate in the insurance coverage, the funds in the participant's accounts in the VEBAs are used to pay the premiums for the coverage. It is currently contemplated that this insurance will be provided through a policy issued to a trust maintained by the Insurer. Participants are not required to participate in the Insurer's coverage. Second, after retirement, participants may use the funds in their accounts to get reimbursement for other qualifying medical expenses, and to pay for premiums for health insurance coverage from vendors other than the Insurer.[14] The decision to participate in the

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call the TPA directly without using the toll-free phone number and can direct investments through an automated TPA phone system.) Another menu option will transfer the participant to a live representative of the Insurer. Participants cannot contact the Consortium directly by using this toll-free phone number. There will be a separate phone number for contacting the Consortium. The Consortium's webpage address and the toll-free phone number will also appear in a box in the upper right hand corner of the activity notices which the participants will receive from the TPA. (For the method by which prospectuses, prospectus supplements, updated prospectuses, semi-annual and annual reports, and proxy statements for the mutual funds will be delivered to participants, see infra note 20.) The TPA will be solely responsible for receiving participant instructions and processing transactions in their accounts. The Consortium's roles in this regard will be limited to providing the hyperlink to the TPA webpage on its own webpage and coordinating the toll-free phone platform which participants can use to connect to a TPA phone representative.

[14] Reimbursement of medical expenses (but not access to the Insurer's coverage) will be available before retirement only in the case of a terminal illness of a participant or eligible beneficiary or if the participant or eligible beneficiary incurs catastrophic uninsured medical expenses in excess of $15,000 in a year. For this purpose, expenses are incurred in respect to a "terminal illness" if they are incurred (A) within one year prior to the date of the individual's death; or (B) within one year prior to, or at any time following, the date of certification by the individual's physician that the individual has suffered an illness or injury expected to result in such individual's death within five (5) years of the date of certification. For administrative convenience, participants who terminate employment before age 60 with a small aggregate balance in their accounts ($5,000 or less) are also eligible for immediate reimbursement of medical expenses.

insurance coverage offered by the Insurer does not preclude the participant's use of funds in his or her accounts for reimbursement of qualifying medical expenses. For example, if the insurance imposes a deductible for a qualifying medical expense, the participant could be reimbursed for the deductible from his or her accounts.

Individual participants will be permitted to direct the investment of the funds held in their accounts among mutual funds available through the Program. Amounts will be invested in, and redeemed from, a registered mutual fund when the amount or the redemption order is received by the TPA, in accordance with the requirements of Rule 22c-1 under the 1940 Act.[15] It is currently contemplated that the fund choices initially will be nine life-cycle funds (mutual funds that are specifically designed for different retirement dates), an income fund, and a money-market fund. The number and kind of funds available under the Plans may change before the Program's effective date and may vary over time, but each fund will be a registered mutual fund and all Plans will offer the same funds or a subset of the same funds.

After retirement, a participant will also have the choice of purchasing one or more fixed annuity contracts to be held in the participant's accounts in the VEBA. Such annuity contracts will pay a guaranteed stream of income into the participant's accounts for the purpose of funding the health care benefits available under the College's Plan. It is currently contemplated that the annuities will be offered by an affiliate of the TPA.

Employer Contributions

Under each Plan, the College will make employer contributions to the employer-contribution VEBA. The amounts received will be allocated to individual accounts for Plan participants. The Plans will require the participant to direct the investment of employer contributions allocated to a participant's account. Colleges can elect to have employer contributions vest according to different vesting schedules.

Based on actuarial projections, the Consortium anticipates that the account balance in the employer-contribution VEBA will be exhausted before the death of the participant and his or her spouse or other covered dependents.[16] In some cases, such as premature death, however, a residual account balance may remain at the death of the last covered individual. All residual amounts will be retained in the employer-contribution VEBA in a single forfeiture account. The balance in the forfeiture account can be used to reduce future employer contributions, allocated among the accounts of other participants in the VEBA or used to pay life-insurance premiums if the College has elected to provide an ancillary life-insurance benefit in the employer-contribution VEBA as described above.

Voluntary Employee Contributions

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[15] The College will be subject to the requirements of ERISA that participant contributions be submitted to the Plan "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets." 29 CFR § 2510.3-102(a).

[16] Medical benefits may also be payable to the qualifying domestic partner of the participant, if elected in the Plan.

Each College may structure its Plan to permit employees to make voluntary contributions on an after-tax basis to a separate Employee-Contribution VEBA. Voluntary employee contributions will be fully vested. Consistent with the tax rules for participation in VEBAs, former employees who have an account balance in the Employee-Contribution VEBA at termination of employment and retirees may make voluntary after-tax contributions into the Employee-Contribution VEBA after termination of employment.

The Employee-Contribution VEBA will have an account for each participant. Participants will direct the investment of the amounts in this account.

The Consortium has the authority under each College's Plan to impose annual and lifetime limits on employee contributions with the goal that no residual is likely to remain at the death of the last individual with rights under an account. Any actual remaining residual will be forfeited and reallocated to the accounts of other participants in the Employee-Contribution VEBA.

The Optional Plan and Trust

Each College will have the choice under the Program to establish a separate retiree health plan (the "Optional Plan"). The Optional Plan would be used only to provide fully insured medical benefits and not for the reimbursement of medical expenses. It is currently contemplated that the insurance coverage available under the Optional Plan would be offered by the insurer under the same policies as used for the Plans and would provide essentially the same coverage options and terms. It is possible that other terms or insurance provided by a different insurer might be available at a later time.

The College would specify which employees or categories of employees would be eligible to participate in the Optional Plan. All employees are potentially eligible, but it is expected that a College would use the Optional Plan to provide insured benefits to key employees, tenured faculty, and selected faculty and administrators.[17] All employees eligible to participate in the Optional Plan would also be eligible to participate in the employer-contribution VEBA and the Employee-Contribution VEBA under the Plan, except that a College may specify that key employees eligible to participate in the Optional Plan are not eligible to participate in the employer-contribution VEBA under the Plan.

Each participant in the Optional Plan would have a notional account in his or her name in the Optional Plan with respect to amounts credited by the College for his or her benefit. Each participant would direct the "deemed" investment of his or her credited balance in the Optional Plan among the same investment alternatives and in the same manner as under the Plans. The College would be directly responsible for the payment of insurance premiums up to the full balance of each participant's notional account. If an

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[17] Under Code Section 416, a key employee is an officer earning more than $135,000 annually (adjusted for inflation).

employee is eligible under the Optional Plan and has no balance in the VEBAs, the employee would be able to pay insurance premiums through ACH transfers.[18]

The College could establish one or more grantor trusts (the "Optional Trust"), which would not be VEBAs, to offset the College's liabilities incurred under the Optional Plan. It is contemplated that FMTC would initially serve as the trustee of the Optional Trust and that FIIOC would handle the recordkeeping for the notional accounts in the Optional Plan in the same manner as the VEBA trusts under the Plan. However, the Optional Trust trustee may be unassociated with the TPA. The Optional Trust would be funded solely by College contributions. Employees would not be permitted to make contributions into the Optional Trust. The College, and not the participants, would have the power to direct the trustee with respect to investment of assets held in the Optional Trust, although the College could elect to use participant "deemed" investment elections in the notional accounts as the basis for determining what investment directions it gives to the trustee. As a grantor trust, the Optional Trust would be dedicated to offsetting the College's Optional Plan liabilities, but the assets of the Optional Trust would remain subject to the claims of creditors of the College. The College would be free to satisfy its obligations under the Optional Plan from sources other than the Optional Trust and, if the College decides to terminate the Optional Plan for any reason other than the College's insolvency, the assets of the Optional Trust would revert to the College.

Participant Account Statements and Activity Notices

Activity notices ("Notices") reflecting certain participant-initiated activity will be distributed directly to participants. Notices would be generated after certain events, including, but not limited to, a participant's reallocation of his or her Plan assets between available investment alternatives. A Notice generated as a result of such a reallocation would be dated as of the date of the transaction and would show the identity and price of the mutual fund shares involved in the transaction. Certain events, including the contribution of funds into or the disbursement of funds out of an account, would not generate a Notice. Participants transacting through the internet will have the ability to affirmatively select whether to receive Notices either electronically or through the mail. Participants who transact through a phone representative or the automated phone system will receive a paper Notice through the mail.

Account statements will be distributed to participants once a year through the mail. The annual account statement will show all activity in the participant's account(s) during that period. The statement will include summary information about such things as fees charged against the account as well as contributions into and disbursements from the account. The statement will also include details about each transaction in the account, including a descriptor that identifies the type of transaction, the date of the event, the amount involved, the fund(s) involved, and the net asset value of the fund(s) on the date of the event. At the present time, a copy of the statement will not be available online. However, a participant can obtain the information provided on the statement, albeit in a different format, via the TPA's website or by speaking to a TPA phone representative. It is contemplated that at a later time it may be feasible for

[18] The same ACH transfer mechanism applies to the Employee-Contribution VEBA in similar circumstances. See supra note 12 and accompanying text.

participants to affirmatively elect to receive electronic statements in place of paper by consenting to electronic delivery of these documents.

Prospectuses, Prospectus Supplements, Annual Prospectus Updates, Semi-Annual and Annual Reports

As part of the enrollment kit, a participant will be provided with the prospectus for each of the mutual funds offered under a Plan. A participant will also receive a mutual-fund prospectus upon first allocating a portion of his or her account balance to a particular mutual fund, provided that, during the preceding 30 days, a copy of the prospectus has not already been sent to the participant (for example, in response to a request for information about a particular fund) and the participant does not represent to the TPA that he or she has previously received a copy of the prospectus. A participant can also request a prospectus at any time by calling a phone representative. Participants will receive prospectus supplements, updated prospectuses, mutual-fund semi-annual and annual reports as well as any proxy statements for so long as they maintain their allocation in that fund.[19] Participants will also have access to a website where current versions of some of these documents are available at any time. Participants can also request current copies of these documents by calling a phone representative.[20] In accordance with the Plan, the TPA will pass through to participants all proxy voting for the mutual-funds shares held in the employer-contribution VEBA and the Employee-Contribution VEBA, but not in the Optional Plan.

The Summary Plan Description

Because the Plans will be subject to ERISA, each participant will receive a summary plan description ("SPD"). A copy of the current version of the SPD is attached to this request. There will be a separate SPD for the Optional Plan. Under ERISA, the SPD is required to be updated annually for any significant change by means of a summary of material modifications. A new SPD is required every 5 years if there have been changes or every 10 years if there have not been changes.

The SPD for the Plan will contain information about eligibility and participation in the Plan, employer contributions and employee after-tax contributions, as well as the investment of accounts and the fees associated with an account and various other

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[19] While participants are not shareholders of the funds, they will nevertheless receive these documents in accordance with the standards that would otherwise apply under applicable federal securities laws governing delivery of such documents to shareholders, including form and timing of delivery. Each mutual fund's statement of additional information will be available to participants upon request.

[20] Fidelity states that, at present, participants will not have the ability to consent to receive copies of these documents relating to the Program electronically in place of paper. You have requested, and Fidelity states that it has agreed, that it will consult with the Staff and resolve any comments regarding the electronic consent process as it relates to the delivery of these Program documents prior to making them available electronically. In agreeing to do so, however, Fidelity states that it does not concede such consultation would otherwise be required, or that the issues involved in the solicitation of electronic consent fall within the scope of the requested relief presented for consideration by this letter.

matters. The SPD for the Optional Plan will be similar in terms of scope of coverage in so far as the Optional Plan provides similar benefits. However, the SPD for the Optional Plan will make it clear that employee contributions and reimbursement benefits are not permitted under the Optional Plan.

The SPD for the Plan, the Consortium website and other applicable documents will contain a legend to the effect that interests in the Employee-Contribution VEBA have not been registered under the 1933 Act and that the Employee-Contribution VEBA has not been registered under the 1940 Act.

Other Information

A Plan participant will have the right to receive a copy of the Plan on request. An Optional Plan participant will have the right to receive a copy of the Optional Plan on request.

Each Plan and Optional Plan will file a Form 5500 annually with the Internal Revenue Service ("IRS") and Department of Labor ("DOL"). Each participant will receive a summary annual report that summarizes the financial information from the Form 5500. A Plan or Optional Plan participant will have the right to receive a copy of the Form 5500 on request.

Each VEBA will file a Form 990 annually with the IRS. Each participant will have the right to receive a copy of the Form 990 on request.

After the death of a participant, the same information will be available in the same manner to any beneficiary who is entitled to benefits under the Plan or the Optional Plan.

ERISA Requirements

Each College's Plan and Optional Plan will be an "employee welfare benefit plan" under ERISA, because it will be established and maintained by an employer (the College) for the purpose of providing medical benefits to former employees and their spouses and dependents.[21] The Program and the Colleges' Plans and Optional Plans must comply with the provisions of ERISA, including those ERISA requirements pertaining to fiduciary obligations, reporting, and disclosure. Certain ERISA obligations will be carried out by the Consortium through outside vendors, including ERISA's reporting, disclosure, and investment policy requirements. However, ultimate responsibility for compliance with ERISA will remain with the Colleges.

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[21] Under ERISA, a plan is an "employee welfare benefit plan" when it is a "plan, fund or program ... established or maintained by an employer ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, [or] ... death." ERISA Section 3(1).

Plans established by certain Colleges that are established or maintained by religious organizations may be exempt from ERISA and some provisions of the Code.[22] The Program will provide each Plan and Optional Plan with the same reports and disclosure that would be provided if ERISA applied. To participate in the Program, a College would be required to make an election that its Plan and Optional Plan are subject to ERISA. Although the legal effect of such an election is unsettled, the Program intends to treat each Plan and Optional Plan as if they are subject to ERISA, including the remedy provisions of ERISA as discussed below.

ERISA and Securities' Law Remedies

The Plans are employee welfare benefit plans subject to ERISA. ERISA provides a comprehensive regulatory scheme for the regulation of employee welfare benefit plans. The scope of ERISA extends broadly to cover fiduciaries and other parties in interest (such as service providers) with respect to ERISA plans.[23] In addition, various important remedies under the federal securities laws may also be applicable to the Plans, including the antifraud provisions of the 1933 Act and the Exchange Act.

ERISA Section 502(a)(2) allows a participant, fiduciary or beneficiary to bring suit against a fiduciary for breach of fiduciary duty under ERISA Section 409. ERISA Section 502(a)(3) allows a participant, fiduciary or beneficiary to bring suit to enjoin any act that violates ERISA or obtain equitable relief to redress a violation of ERISA. The fiduciaries of the Plans include the College as the sponsor, named fiduciary, and administrator of the Plan; and the Consortium to the extent that it is delegated duties of the administrator of the Plan.[24] The Plan's trustee may also be an ERISA fiduciary of the Plan.[25] Certain remedies may also be available against parties in interest, such as the TPA and the

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[22] ERISA defines a "church plan" to be a welfare benefit or retirement plan established and maintained for its employees, or their beneficiaries, by a tax-exempt church or convention or association of churches. ERISA Section 3(33)(A). A church plan includes a plan maintained by an organization, whose principal purpose or function is the administration or funding of a plan for the provision of welfare benefits (or for both welfare and retirement benefits) for the employees of a church or a convention or association of churches, if that organization is controlled by or associated with a church or a convention or association of churches. ERISA Section 3(33)(C). A church plan is not subject to coverage under ERISA unless the plan has made an irrevocable election under Code Section 410(d) to be subject to the requirements. ERISA Section 4(b)(2).

[23] ERISA Section 3(14) defines party in interest to include a person providing services to a plan.

[24] For the specific purposes for which the Consortium will be designated as an ERISA fiduciary, see The Consortium, supra p. 3.

[25] The liability of a directed trustee under ERISA is an unsettled area of the law. The DOL has recently taken the position that a directed trustee has certain fiduciary duties with respect to publicly traded employer securities held in a retirement plan, but those duties are significantly narrower than the duties of a discretionary trustee. See DOL Field Assistance Bulletin 2004-3. Courts have taken a variety of positions on the fiduciary status of a directed trustee. Compare, e.g., In Re WorldCom, Inc. ERISA Litigation (2005, SDNY) 2005 WL 221263, with In Re Enron Corporation Securities, Derivative & "ERISA" Litigation (2003, SDTX) 2003 WL 22245394.

Consortium. Any recovery would go to the Plan and participants' accounts, not to individual participants directly.

The offering of shares of the investment alternatives will be registered under the 1933 Act. Potential remedies under the 1933 Act include (1) Section 11, which provides a rescission remedy for securities sold under a registration statement where there is a material misstatement or omission; and (2) Section 12(a)(2), which provides a rescission-type remedy for securities sold under a prospectus which contains a material misstatement or as to which there is an omission of a material fact. The shares in the investment alternatives are subject to Rule 10b-5 under the Exchange Act, which makes it unlawful to employ any device to defraud, to make any untrue statement of a material fact or to engage in any transaction that operates as a fraud in the offer or sale of any security and which provides for recovery of damages. Other securities-law remedies may be available under the Exchange Act, such as Rule 14a-9, or under the 1940 Act, such as Section 36(b). In most jurisdictions and most circumstances, under ERISA, remedies with respect to the investment alternatives could only be pursued by the Plan on behalf of all affected participants.[26]

Subject to the grant of the relief requested herein, Participation Interests are securities that will not be registered under the 1933 Act and thus would not be subject to the Section 11 remedy. The Participation Interests will be subject to the antifraud provisions of the federal securities laws.[27]

II. Discussion

The principal aspect of the Program that has resulted in this submission is the application of the 1933 Act to the Participation Interests and the application of the 1940 Act to the Employee-Contribution VEBAs.

The Plans will be employee welfare benefit plans. The Staff has previously taken the position that participation interests in some employee welfare benefit or similar plans

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[26] Two federal circuits (the Second and Third) permit participants to sue a mutual-fund company derivatively on behalf of the plan if the participants first prove that the trustee breached its fiduciary duties in failing to sue the mutual fund. See, e.g., Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912 (2d Cir. 1989); McMahon v. McDowell, 794 F.2d 100 (3d Cir. 1986); Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984). The Eleventh Circuit, however, has held that participant derivative suits are impermissible under ERISA. See Moore v. American Federation of Television and Radio Artists, 216 F.3d 1236 (11th Cir. 2000).

[27] With respect to Section 12(a)(2) of the 1933 Act, it is possible that it could be asserted in certain circumstances that the offering of the Participation Interests could be subject to the Section 12(a)(2) remedy. The United States Supreme Court has held that, in the context of Section 12(a)(2), the word "prospectus" is a term of art referring to a document that describes a "public offering of securities by an issuer or controlling shareholder." Gustafson v. Alloyd Co., 513 U.S. 561, 584 (1995). Under this definition, it is possible that in certain circumstances the SPD for a Plan could be asserted to be a "prospectus" and the Participation Interests to have been sold in a "public offering" for purposes of Section 12(a)(2).

do not create a security that needs to be registered.[28] The Staff has also issued several letters with respect to registration of welfare benefit plans (and plan participation interests) funded by VEBAs.[29] Where relief comparable to the relief requested herein was granted, these letters did not involve defined contribution-type plans.

The Plans are different from most welfare benefit plans and the arrangements discussed in these no action letters. These differences are primarily a result of the defined contribution nature of the Plans and the self-directed investment of contributions in registered mutual funds. Therefore, it is unclear whether the Staff's prior positions would apply to the Participation Interests and the Employee-Contribution VEBA under a Plan.

However, each of these characteristics which might differentiate the Plan from most other welfare benefit plans is identical to a characteristic commonly found in a Code Section 403(b) plan. Accordingly, we are of the opinion that the Employee-Contribution VEBAs and Participation Interests are sufficiently like Code Section 403(b) plans and participation interests in 403(b) plans that the Staff's prior position about 403(b) plans should apply to the Employee-Contribution VEBAs and the Participation Interests.

A. The Participation Interests And The Employee-Contribution VEBAs Are Like 403(b) Plans And The Staff's Treatment Of 403(b) Plans Should Be Followed In This Case.

In our opinion, the SEC's approach to Code Section 403(b) plans provides compelling support for the requested relief. Code Section 403(b) permits public school systems and charitable organizations to enter into deferred compensation arrangements with their employees that are funded through the purchase of annuity contracts or

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[28] See Commission Release 33-6281 at n.1 (Jan. 15, 1981) ("As used in this release, the term 'employee benefit plan' means a pension, profit sharing, bonus, thrift, savings or similar plan. Thus, it generally would include plans described in Section 3(2) of [ERISA]. The term does not include welfare and similar plans such as those described in Section 3(1) of ERISA, which do not involve any expectation of financial return on the part of participating employees.").

[29] Rapid American Corp. (Dec. 1, 1971) (defined benefit-type insured program for long term disability benefits); Carling Brewing Co., Inc. (July 12, 1974) (defined benefit-type program for long term disability and death benefits); Total Health Care Services Corp. (Oct. 7, 1976) (defined benefit program for life, sick, accident, and similar benefits); Great Northern Administrators, Inc. (Mar. 31, 1978) (defined benefit program for life, sick, accident, and similar benefits); Del E. Webb Corp. (Apr. 21, 1978) (apparently defined benefit program); Bank of Hawaii (June 22, 1981) (defined benefit life-insurance program); UMP, Unlimited and Union Member Action Trust (Apr. 26, 1976) (strike benefits plus the ability in certain circumstances to recoup contributions plus or minus the ratable share of investment gains or losses plus expenses—relief denied); Consolidated Edison Employees Mutual Aid Society (Feb. 12, 1973) (deferred compensation paid in annual installments adjusted as if the deferred amounts had been invested in mutual funds as variable annuities contracts—relief denied). Cf. National Business Services, Inc. (Feb. 18, 1975); Centerre Trust Co. (Nov. 12, 1984) (use of common trust fund for collective investment of VEBA assets).

mutual-fund shares for the covered employees which are held in trusts or custodial accounts. Variable annuity contracts are securities, as are mutual-fund shares, and both are therefore subject to the registration and antifraud provisions of the 1933 Act. Participation interests in Code Section 403(b) plans that are both voluntary and contributory on the part of participating employees would involve securities for the reasons outlined in SEC Release 33-6188. As a matter of administrative practice, however, the Staff does not require such interests to be registered. The antifraud provisions, however, continue to apply to the offer and sale of interests in these types of plans. Release 33-6188, at Section II.A.5(c).

The Staff's position with respect to Code Section 403(b) plans appears to be related in large part to the fact that registered mutual funds are the investment alternatives used. ERISA first authorized the use of mutual funds in a custodial account for a 403(b) plan. Previously, a 403(b) plan had to be under an annuity contract. Shortly after the enactment of ERISA, the Staff took a no-action position regarding 403(b) plans invested in mutual funds:

> ". . . this Division would not recommend any action to the Commission if Section 403(b) accounts funded solely by specific mutual fund shares or Section 408 plans funded solely with specific mutual fund shares are offered and sold to the public without registration under the Securities Act. In addition, this Division has been advised by the Division of Investment Management Regulation that, in the circumstances described in your letter and summarized above, that Division would not recommend any action to the Commission if such 403(b) plans and Section 408 plans funded solely with specific mutual funds shares are created without registration under the Investment Company Act of 1940, provided that no custodian or trustee has investment discretion with respect to the plan." Investment Company Institute (Oct. 21, 1974).[30]

This position was confirmed following a 1979 amendment to Code Section 403(b). Investment Company Institute (May 23, 1979).

We have located only one no-action letter issued to an individual 403(b) plan sponsor. This letter was issued in 1979 to the Cleveland Clinic Foundation (Aug. 12, 1979). In that letter, the Staff noted as significant:

- the custodial account existed to satisfy Code Section 403(b);
- the account provided only custodial services and no investment discretion other than the selection of a broker;
- investors would not have access to an investment which is not available outside of the custodial account; and
- the custodian would exercise no investment discretion.

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[30] The Section 408 plans referenced in the Investment Company Institute letter are individual retirement accounts which are established under Code Section 408, see infra Section B.

The Staff's position on 403(b) plans should be followed in the case of the Participation Interests and the Employee-Contribution VEBAs. The following essential features of a Plan are identical to or substantially similar to a typical 403(b) plan:

- 403(b) plans are defined contribution (rather than defined benefit) plans. In a defined contribution plan, a separate account is established for each participant and the account balance determines the extent of their benefits. By contrast, a defined benefit plan provides a set amount of benefits and no individual accounts are maintained. The Plans will have a VEBA for employer contributions and a separate Employee-Contribution VEBA to hold employee contributions if the Plan sponsor chooses to permit them. Both employer and employee contributions will be held in individual accounts for each participant.

- 403(b) plans usually have self-directed investments. Participants will be able to direct the investment of amounts in the participant's account in both the employer-contribution VEBA and the Employee-Contribution VEBA.

- In most circumstances, funds are contributed to 403(b) plans over a period of years during an employee's earning years. Funds are intended to be contributed to the Employee-Contribution VEBA and employer-contribution VEBA over much of the participant's working career.

- A 403(b) plan is an employer-sponsored plan primarily intended to provide benefits to retirees.[31] Funds accumulated under the Employee-Contribution VEBA and employer-contribution VEBA are intended to be used for healthcare costs in retirement and accordingly will be used only after retirement, except for medical emergencies. See supra note 14.

- 403(b) plans provide funds for general use during retirement and the Employee-Contribution VEBA and employer-contribution VEBA are intended to provide funds that can be used primarily for qualified medical expenses during retirement. See supra note 14.

The Employee-Contribution VEBAs and the Participation Interests share a number of other common features with 403(b) plans. These commonalities provide support for parallel treatment of the Participant Interests and Employee-Contribution VEBAs with 403(b) plans. The common features include the following:

- Both the Plans and 403(b) plans are primarily available to colleges, universities, and other tax-exempt organizations under Code Section 501(c)(3).

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[31] Amounts in a 403(b) plan may be withdrawn at any time, but are generally subject to a penalty tax for withdrawals before age 59 ½.

- Both are subject to ERISA essentially to the same extent. The DOL has regulatory authority over them; and employers, as plan sponsors and fiduciaries, have oversight responsibilities.[32]

- Both are governed by a plan document that defines who can participate, what the available investment alternatives chosen by the employer are, and how much can be contributed (the plan documents used in the Plan will be based upon a common set of form documents and therefore will be more uniform or "standardized" than 403(b) plans generally).

- Both are internally operated through individual participant accounts, whether a trust is used (for the Plan and for some 403(b) plans) or a custodial account is used (for some 403(b) plans).

- In both, the trust or custodial accounts are tax-exempt vehicles.

- Trustees and custodians for both are typically banks or other financial institutions.

- The trustee of a Plan who is directed by participating employees with respect to those employees' investment decisions will have similar duties and obligations towards a Plan and its participants as a trustee or custodian has toward a 403(b) plan and its participants. In both cases, the trustees or custodians are responsible for safeguarding plan assets, are empowered to accept contributions and pay distributions and accept participant investment direction, and invest in accordance with those directions.

- Trustees and custodians act at the direction of the employer (in the event of plan level matters such as changes to the available investment alternatives chosen by the employer) or the participant with respect to the participant's investment decisions.

- Available investments are limited to registered mutual funds and fixed annuities by design for the Plan and are the same for 403(b) plans by statute with the addition of variable annuities.

The Participation Interests and Employee-Contribution VEBAs involve the same essential characteristic that led to the Staff's position on 403(b) plans: underlying investment alternatives in the Employee-Contribution VEBAs are registered mutual funds.[33] In addition, the criteria which were noted by the Staff as important in the Cleveland Clinic Foundation letter are satisfied here: the VEBAs exist to satisfy tax requirements, the accounts provide only custodial service, participants are not granted

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[32] However, Plans and 403(b) plans sponsored by certain Colleges which Colleges are established or maintained by religious organizations may be exempt from ERISA and some provisions of the Code. See ERISA Requirements, supra p. 11.

[33] After retirement, a participant will also have the choice of purchasing one or more fixed annuity contracts to be held in the participant's accounts in the VEBA.

access to investments to which they would not otherwise have access, and the TPA does not exercise investment discretion on behalf of participants.

The differences between the Participation Interests and Employee-Contribution VEBAs, on the one hand, and 403(b) plans on the other do not justify a different result from the Staff position for 403(b) plans. Primarily, the nature of the Plans as welfare benefit plans makes them even less susceptible to abuse than 403(b) plans. In 403(b) plans, the participants have general use of the funds upon retirement. In the Plans, participants can only use the funds in their accounts for welfare benefits.[34] A 403(b) plan typically uses a custodial account while the Plans use a trust to hold plan assets, similar to a 401(k) plan. Additionally, the Plans will be subject to the reporting and disclosure requirements of ERISA[35] while a 403(b) plan may or may not be subject to these requirements. For example, a 403(b) annuity plan is not subject to ERISA reporting and disclosure rules if it is funded solely by voluntary employee contributions and the employer has a limited administrative role.[36] The participants in the Plans would be benefited by these additional requirements. Accordingly, this situation presents a compelling case for the Staff to extend to Participation Interests and the Employee-Contribution VEBAs the administrative relief accorded to 403(b) plans and not to require registration of the Participation Interests and Employee-Contribution VEBAs under the 1933 Act or 1940 Act respectively.

B. The Participation Interests And Employee-Contribution VEBAs Are Like Employer-Sponsored IRAs And The Staff's Treatment Of These IRAs Should Be Followed In This Case.

The Staff's position on employer-sponsored individual retirement accounts ("IRAs") provides further support for the requested no action relief. Under that position, so long as mutual funds are offered pursuant to current prospectuses with appropriate disclosures about the IRAs, no separate registration of the IRA plan is necessary.[37] The Staff position covers employer-sponsored master-trust or prototype plan arrangements for IRAs.[38] As with the Plan, an employer can establish an IRA plan with a single trust with a separate IRA account in the trust for each individual participant. Investment

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[34] Importantly, distributions from 403(b) accounts are taxable; distributions from a Plan or Optional Plan are not, provided they are used to pay for qualified medical expenses.

[35] See supra note 22 concerning plans of certain religious entities.

[36] A 403(b) plan generally is not subject to ERISA if (1) it is funded solely by salary reduction contributions; (2) employee participation is completely voluntary; (3) all rights under the annuity contract or custodial account are enforceable solely by the employee; (4) the sole involvement of the employer is limited to permitting providers to publicize their products, summarizing information about proposed funding media, collecting and remitting salary reductions, holding a group annuity contract, or limiting funding media to a reasonable choice; and (5) the employer receives no consideration or compensation other than to cover its expenses. 29 CFR § 2510.3-2(f).

[37] Release 33-6188 at § 2(a)(4) (Feb. 1, 1980).

[38] Id.

discretion is normally vested in each account holder. Participants usually are afforded several investment alternatives. The Participation Interests and the Employee-Contribution VEBAs are similar to employer-sponsored IRA plans and participation interests in such plans in the following significant ways:

- Both the Plans and the employer-sponsored IRAs are governed by a plan document that defines who can participate, what the available investment alternatives chosen by the employer are, and how much can be contributed.

- Both are organized with trusts to hold assets.

- In both, the trusts are tax exempt vehicles.

For these purposes, the Participation Interests and the Employee-Contribution VEBAs are so similar to employer-sponsored master trust IRAs that the same no-action position should apply to both.

C. Public Policy Is Not Served By Requiring Registration Of The Participation Interests Or Employee-Contribution VEBAs.

Public policy interests would not be served by requiring registration of the Participation Interests or the Employee-Contribution VEBAs for the following reasons.

Prior to a participant's retirement, all investment alternatives under the Employee-Contribution VEBAs will be mutual funds. Each of these funds will be registered under the 1933 Act and the 1940 Act. As a result, extensive disclosure will be made available to the participants about each of the mutual funds which will be offered as part of the Plan and each of these funds will be subject to the substantive regulatory provisions of the 1933 Act and the 1940 Act. An explanation of the information to be provided to participants is contained above. All participants will be sent the prospectus documents and other information by the TPA in connection with their investment choices. In addition, each of these funds will be managed by an investment adviser or investment advisers which are registered under and subject to the Investment Advisers Act of 1940, as amended. At retirement, a participant may continue investing in the mutual funds or may purchase annuities as described above.

In addition, the Plans are welfare benefit plans subject to all applicable ERISA provisions.[39] The participants will receive extensive information about the Plan in which they participate. As an ERISA welfare benefit plan, a Plan will provide each participant with an SPD that explains all of the important provisions of the Plan. Each year, a participant also will receive a summary annual report on the Plan's financial status. Under ERISA, a participant may request and receive a copy of the Plan, including the trusts, and the Plan's annual report on Form 5500. A participant will receive annual statements of the value of the participant's accounts in the Plan, including the Employee-Contribution VEBA.

[39] Plans established by certain Colleges that are established and maintained by religious organizations may be exempt from ERISA and some provisions of the Code. See ERISA Requirements, *supra* p. 11.

In addition, a College that is established or maintained by a religious organization and which is exempt from ERISA and some provisions of the Code would be required (i) to provide the same disclosure and reports that would be provided if ERISA applied and (ii) to make an election that its Plan is subject to ERISA.[40]

For these reasons, requiring registration of the Participation Interests under the 1933 Act or requiring registration of the Employee-Contribution VEBAs under the 1940 Act would not provide any significantly greater level of protection to the participants. Requiring registration of the Participation Interests and Employee-Contribution VEBAs would only increase the cost of the Program to participants, without any meaningful additional protection to those participants. Therefore, public policy considerations should not require registration.

D. The Participation Interests Should Not Be Required To Be Registered Under The Exchange Act.

The Consortium does not know how many assets each Employee-Contribution VEBA will hold and how many participants will hold Participation Interests under each Employee-Contribution VEBA. But even if the value of an Employee-Contribution VEBA's assets and the number of participants holding Participation Interests were to meet the threshold requirements of Section 12(g) of the Exchange Act, we are of the opinion that registration of any such Participation Interests under the Exchange Act should not be required.

Participants can use the funds in their Plan accounts solely for welfare benefits. The Participation Interests will not be transferable (except in the event of a participant's death, in which case the participant's account can be accessed by his or her spouse (or qualifying domestic partner) and/or certain dependent relatives, or in the case of a qualified domestic relations order under Code Section 414(p)). Any remaining residual will be forfeited and reallocated to the accounts of other participants in the Employee-Contribution VEBA. The Participation Interests will not be listed on any exchange or publicly or privately traded. Since the Participation Interests are personal rights of the participants and their beneficiaries, and since the right to make voluntary contributions arises only in connection with an employment relationship with one of the Colleges, there will be no public investors or public trading interest or market in any of the Participation Interests. Furthermore, participants who are eligible to make voluntary contributions will already receive extensive disclosures about the Program and their investments (including SPDs, Notices, account statements, mutual fund prospectuses, mutual fund prospectus supplements, updated mutual fund prospectuses, semi-annual and annual mutual fund reports, and mutual fund proxy statements) as discussed in Section I above.

For these reasons, in our opinion nonregistration of the Participation Interests under the Exchange Act would comport with the policy and intent of the Exchange Act.

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[40] We understand that any relief granted pursuant to this request would not be applicable to such a College's Employee-Contribution VEBA if its election to be subject to ERISA is determined to be invalid.

In accordance with Release No. 33-6269 (available December 5, 1980), seven additional copies of this letter are enclosed. Please feel free to contact David H. Pankey at 202-857-1716 or Steven D. Kittrell at 202-857-1701 if you have any questions or comments concerning this request. We would be pleased to meet with the Staff to explain the Program and our analysis in more detail and to answer any questions which the Staff might have about these matters. We request a conference with the Staff to discuss this request if the Staff does not agree with the analysis contained in this request letter and in advance of any adverse determination.

David H. Pankey
McGuireWoods LLP
1050 Connecticut Ave, NW #1200
Washington, DC 20036
Counsel for Emeriti Consortium For Retirement Health Solutions

Steven D. Kittrell
McGuireWoods LLP
1050 Connecticut Ave, NW #1200
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Counsel for Emeriti Consortium for Retirement Health Solutions

Enclosures:

Prospective Member Institutions

Summary Plan Description

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WESTLAKE VILLAGE

FILE NO. 73709.015

April 5, 2006

VIA FEDERAL EXPRESS

Ivan Griswold
Legal and Legislative Assistant
Office of Law and Legislation
California Department of Corporations
Business, Transportation and Housing Agency
1515 K Street, Suite 200
Sacramento, California 95814

RECEIVED
APR 0 2006
DEPT. OF
OFFICE OF LAW

Re: Employer Contribution VEBA Trust and Employee After-Tax Contribution VEBA Trust for Pepperdine University

Dear Mr. Griswold:

This responds to your letter dated April 3, 2006 requesting additional information on the request for interpretive opinion filed on behalf of Pepperdine University. In order to facilitate your review, we set forth your questions followed by our responses.

1. **Please discuss whether the trustee (Fidelity Trust Management Company) will be able to exert influence over the management of the trust assets since the investments offered are all Fidelity mutual funds.**

Response: The answer to this question is no, and we believe this response is apparent from the respective After-Tax Contribution VEBA Trust Agreement and Employer Contribution VEBA Trust Agreement. The Trustee has limited powers, which are set forth in the trust agreement. The Trustee has no investment discretion. Individual participants direct the investment of the funds held in or allocated to their Employee After-Tax Contribution VEBA Trust Agreement and Employer Contribution VEBA Trusts. Please refer to Sections 7, 8, 9, 10 and 11 of the Trust Agreements.

Section 7. Duties and Authority of Trustee.

The Trustee is directed and authorized, as hereinafter provided: (a) to hold, invest and reinvest the Trust Fund in accordance with the provisions of this Agreement, including but not limited to, Schedule A attached hereto . . .

Section 8. Standard of Conduct Subject to the Other Provisions of this Agreement.

. . . The trustee shall discharge its duties with respect to the Trust solely as a directed trustee under ERISA . . . and shall act . . . (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . (Underlining added.)

Section 9. Directions.

The employer, as administrator, shall provide to the trustee such data, documents, policies, interpretations, rules, practices and procedures . . . with respect to the Plan and/or services required or requested to enable the trustee to perform the services in accordance with Schedule A . . .

Section 10. Selection of Investment Options.

The assets of the Trust shall be invested by the Trustee in the investment options selected by the Named Fiduciary (Pepperdine University) from those investment options set forth in Schedule A attached hereto. The Trustee shall have no responsibility for the selection of the investment options or the allocation of trust assets in the investment options, and the Trustee shall not offer or provide investment advice to any person in connection with the selection or allocation of such investment options. Each participant shall direct the Trustee in such time and manner as the Trustee may require, as to how trust assets in his or her account shall be allocated from time to time among the investment options. (Underlining added.)

Section 11. Mutual Funds.

. . .

(b) Execution of Purchases and Sales. The trustee shall execute the purchase and sale of mutual fund shares . . . if such purchase(s) and sale(s) are based on a proper Direction under the plan from the participant.

2. Please discuss whether the fact that trust assets will be continuously invested in mutual funds for a considerable amount of time is consistent with the structures and functions of the trusts in the cited Commissioner's Opinions.

Response: Continuous investments "in mutual funds for a considerable amount of time" is not a factor discussed in any of the Commissioner's opinions cited in our January 4, 2006 letter. As we discussed in that letter, the factors considered by the Commissioner in the cited Opinions, which led the Commissioner to conclude that beneficial interests in the referenced trusts were not securities can be summarized as follows:

(a) The trustee has no investment discretion. Interpretive Opinion No. 69/41.

(b) The functions of the Trustee are strictly limited by the Trust Agreement. Commissioner's Opinion No. 78/15C.

(c) The trust instrument establishes procedures, which in many events bypass the trustee and substitutes contacts, communications, and transactions of insurance companies and broker-dealers directly with the holders of the beneficial interests of the trusts. Interpretive Opinion No. 69/41.

(d) The trustee has limited power and authority. The trustee has no discretionary power to act on behalf of the participating employees. Commissioner's Opinion No. 90/1C.

(e) The functions of the trustee are substantially those of a holding and paying agent. Interpretive Opinion No. 69/41.

We should note that one of the opinions cited in our letter is Interpretive Opinion No. 69/41. Here, the facts involved two components, insurance benefits and an Equity Purchase Program, which provided for the purchase of mutual funds. Importantly, continuous mutual funds investments over any length of time was not a factor in the analysis. As we noted in our letter, in this opinion, "The Commissioner, focusing on the limited functions of the trustee, concluded that the trust is not engaged in carrying on any business, and, therefore, the beneficial interests in the trust are not securities within the meaning of Section 25019." Moreover, we have not discovered any other opinion of the Commissioner interpreting Corporations Code § 25019, which indicates that a factor he considers is "the fact that trustee assets will be continuously invested in mutual funds for a considerable amount of time." In any event, in our view, such a factor is irrelevant to an analysis of the Pepperdine VEBA Trusts because the Trustee has limited power and authority and no investment discretion.

With respect to the Pepperdine University VEBA Trusts, we believe that we have demonstrated that "the powers of the trustee are substantially restricted, in manners substantially similar to the restrictions to which the trustee in Interpretive Opinion 69/41, Commissioner's Opinion 78/15C and Commissioner' Opinion 90/1C were subject." These are the reasons why we believe that the Pepperdine VEBA Trusts cannot be distinguished from the trusts in the cited Commissioner's Opinions where the Commissioner concluded that beneficial interests in those trusts were not securities. See pages 10-11 of our letter.

3. On page 10 of your letter dated January 4, 2006, you state that Emeriti Program has selected a third party administrator to provide administrative support and thus the trust instrument establishes further procedures that bypass the trustee. Please provide the name of this third party administrator (TPA).

Response: The TPA is Fidelity Investment Institutional Operations Company, Inc. In addition, Fidelity has subcontracted the medical reimbursement claims administration to FBD Consulting, Inc., a company not affiliated with Fidelity.

4. Please discuss whether the fact that both the TPA and the investment company, may be Fidelity related companies affects the determination of whether the trustee's functions have actually been delegated to third parties.

Response: We are puzzled by your comment No. 4. We assume that you are not inferring impropriety on the part of any of the parties to the VEBA Trusts. Comment No. 4 is also confusing in that it seems to assume a fact, which does not exist, namely, that the Trustee's functions have been delegated to third parties.

The powers of the Trustee, which are specific and quite limited, are set forth in Section 12 of each Trust Agreement. Moreover, Section 29 of the Trust Agreement provides that "This agreement and any of its rights and obligations hereunder may not be assigned by any party without the prior consent of the other party(ies), and such consent may be withheld in any party's sole discretion." There is no evidence that any of those powers has been delegated to third parties. If you have any evidence, which contradicts our statement, we welcome the opportunity to review this evidence and provide appropriate supplemental responses.

With respect to comment Nos. 1 and 4 of your letter, was it your intent to suggest or infer that Fidelity Management Trust Company and one or more of its affiliates in the business of the VEBA Trust create impermissible conflicts of interest, over-reaching and, perhaps, unfairness to the employee participants? Intended or not, any such inferences would be unwarranted. It should be remembered that the VEBA Trusts are employee welfare plans subject to ERISA (Employee Retirement Income Security Act of 1974, as amended). See, e.g., Sections 1(v), 3, 8 and 22 of the Trust Agreement. ERISA provides a comprehensive regulatory scheme for the regulation of employee welfare benefits plans. Pepperdine University, as sponsor, named fiduciaries and administrators of the VEBA Trust, are ERISA fiduciaries. Each of the Trustees of the VEBA Trusts is also an ERISA fiduciary. ERISA Section 502(a)(2) allows a participant, fiduciary or beneficiary to bring suit against a fiduciary for breach of fiduciary duty under ERISA Section 409. ERISA Section 502(a)(3) allows a participant, fiduciary or beneficiary to bring suit to enjoin any act that violates ERISA or obtains equitable relief to address a violation of ERISA.

We note the final paragraph of your letter, which states, "Please understand that additional questions may be forthcoming based on your responses to the information submitted." As you know, this request for Interpretive Opinion has been pending for more than three months. By a copy of this letter to Timothy L. Le Bas, Deputy Commissioner and General Counsel, we are requesting an opportunity to meet with him, you and other persons as appropriate to provide us an opportunity to respond to any further questions, which may arise and bring this matter to a conclusion.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
cc: Timothy L. Le Bas, Esq.
Deputy Commissioner and General Counsel, Office of Law and Legislation
California Department of Corporations
Laura Riddell, Esq., California Department of Corporations
Mr. James Moore, Chief Human Resources Officer
Pepperdine University

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FILE NO. 73709.015

April 5, 2006

VIA FEDERAL EXPRESS

Timothy L. Le Bas
Deputy Commissioner and General Counsel
Office of Law and Legislation
Department of Corporations
1515 "K" Street, Suite 200
Sacramento, California 95814-4052

RECEIVED
APR 0 2006
DEPT. OF CORPORATIONS
OFFICE OF LAW AND LEGISLATION

Re: Employer Contribution VEBA Trust and Employee After-Tax Contribution VEBA Trust for Pepperdine University

Dear Mr. Le Bas:

Enclosed is a copy of our letter dated April 5, 2006 responding to Ivan Griswold's letter dated April 3, 2006. If any further questions remain, we request a meeting with you and, of course, the staff to discuss and resolve any remaining issues.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
Enclosure
cc: Mr. James Moore, Chief Human Resources Officer
Pepperdine University

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April 5, 2006

VIA FEDERAL EXPRESS

Ivan Griswold
Legal and Legislative Assistant
Office of Law and Legislation
California Department of Corporations
Business, Transportation and Housing Agency
1515 K Street, Suite 200
Sacramento, California 95814

Re: Employer Contribution VEBA Trust and Employee <u>After-Tax Contribution VEBA Trust for Pepperdine University</u>

Dear Mr. Griswold:

This responds to your letter dated April 3, 2006 requesting additional information on the request for interpretive opinion filed on behalf of Pepperdine University. In order to facilitate your review, we set forth your questions followed by our responses.

1. Please discuss whether the trustee (Fidelity Trust Management Company) will be able to exert influence over the management of the trust assets since the investments offered are all Fidelity mutual funds.

Response: The answer to this question is no, and we believe this response is apparent from the respective After-Tax Contribution VEBA Trust Agreement and Employer Contribution VEBA Trust Agreement. The Trustee has limited powers, which are set forth in the trust agreement. The Trustee has no investment discretion. Individual participants direct the investment of the funds held in or allocated to their Employee After-Tax Contribution VEBA Trust Agreement and Employer Contribution VEBA Trusts. Please refer to Sections 7, 8, 9, 10 and 11 of the Trust Agreements.

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April 11, 2006

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Timothy Le Bas, Esq.
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Office of Law and Legislation
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1515 K Street, Suite 200
Sacramento, California 95814

Re: Employer Contribution VEBA Trust and Employee After-Tax Contribution VEBA Trust for Pepperdine University

Dear Mr. Le Bas:

Thank you for the prompt response to our letter dated April 5, 2006. This will respond further to our telephone conversation with you and Ivan Griswold on April 6, 2006. It is apparent that the staff still has a concern with the involvement of the Fidelity Management Trust Company, the trustee, and other affiliate companies of "Fidelity." In this regard, you asked us to make certain representations, including a representation that the trustee does not control or exercise influence over the management of the Fidelity sponsored mutual funds, the investment vehicles, which participating employees direct the trustee to make investments for their accounts. As explained below, although we are responding to the staff's concern, we believe that this inquiry is irrelevant to the subject matter of our request for an Interpretive Opinion. The only issue presented by the request for Interpretive Opinion is whether the beneficial interests in the VEBA Trusts are beneficial interest in a voluntary inter vivos trust, which is not created for the purpose of carrying on any business and, therefore, are excluded from the definition of a security by *Corporations Code* § 25019. This additional inquiry appears to be more of a "merit" or "fairness" inquiry.[1]

---

[1] It appears to us that the staff's inquiry is the type of inquiry that could be raised if Pepperdine University has applied for a permit authorizing the offer or sale of the beneficial interest in the VEBA Trusts. Such applications are reviewed under the "fair, just and equitable standard" of *Corporations Code* § 25140 and if the Commissioner cannot make the requisite finding, he may deny the application

Commissioner's Opinions 69/41 and 78/15C clearly enunciate the criteria applied by the Commissioner in determining whether an inter vivos trust of the type described in our request is excluded from the definition of a security pursuant to *Corporations Code* § 25019. We set forth those criteria in our letter dated January 4, 2006 and again in our letter dated April 5, 2006 to Mr. Griswold. As stated in Commissioner's Opinion 69/41, the functions of a trustee are strictly limited by the trust instrument, the trustee has no investment discretion; his functions are substantially those of a holding company. In this opinion, the Commissioner also stated "To the extent that the trust is not all together a passive one, the trustee acts as a conduit solely for the handling of paycheck withholds with little if any of the decision making decision which is characteristic of a trustee engaged in business." Therefore, the Commissioner concluded that the trust is not engaged in carrying on any business and "the beneficial interests in the instant trust are not securities within the meaning of Section 25019 and subject to the qualification requirements of the Corporate Securities Law of 1968." The Commissioner reached the same conclusion in Commissioner's Opinion 78/15C, citing Interpretive Opinion 69/41. We believe that we have demonstrated that the trustees of the VEBA Trusts meet those requirements. Here, the trustee holds the employer's and employees' contributions to the plan. The employer, Pepperdine University, selects a short list of investment options from which the employee may use. Pepperdine University has selected various mutual funds offered by Fidelity, all of which are set forth in Schedule A to the Trust Agreement. Each employee by written instructions directs the trustee to purchase for his/her account a specific mutual fund from those identified in Schedule A. The only other duties of the trustee are ministerial in nature. We believe the inquiry could have ended with those findings and the staff could have concluded that the VEBA Trusts are not engaged in business and, therefore, the beneficial interests in those trusts are excluded from the definition of a security. Moreover, and based on the information available to us, it does not appear that the Commissioner raised this type of "merit" or "fairness" in the several Commissioner's Opinions cited in our letter of January 4, 2006. [2] As you can tell from our comments, we are puzzled as to why the additional "merit" or "fairness" inquiry has been raised. Nevertheless, our additional response is set forth below.

---

for qualification. As you know, of course, issuance of an Interpretive Opinion does not require a finding of fairness.

[2] In Commissioner's Opinion 90/1C, the trustee of the company's Employee Stock Purchase Plan was the company and the shares purchased by the employees were shares of the company purchased either on the company's internal secondary market maintained by its wholly owned broker dealer subsidiary or purchased from the company itself out of authorized but unissued shares. I filed that Interpretive Opinion request and, to my knowledge, I do not recall that the Commissioner inquired into the relationship between the company and its affiliated broker-dealer or the fact that the shares offered to participating employees were shares of the trustee. In Commissioner's Opinion 78/15C, involving a multiple employer trust established by the "company," the trustee was a national bank. According to the facts of the opinion, the trustee was empowered under the Trust Agreement to appoint an administrator with various responsibilities and it was contemplated that the company or another

We have already discussed the staff's question as to whether the trustee has investment discretion with respect to the investment of employees. Pepperdine University, the employer, selects the mutual funds available to employees. The employee directs the trustee to purchase the particular mutual funds for his account. The trustee has no investment discretion.

The Department's remaining concern is whether the trustee has control over or influences the management of the mutual funds, which the employees purchase. According to Mr. Griswold's letter dated April 3, 2006, this concern appears precipitated by the fact that "the investments offered are all Fidelity mutual funds." As we stated in our second telephone conversation on April 7, 2006, we do not believe that this is a factor relevant to determining whether the VEBA Trusts are engaged in any business, a finding necessary to determine whether beneficial interests in these trusts are excluded from the definition of a security. In fact, as we note above in Commissioner's Opinion 78/15C, cited in our January 4, 2006 letter, the Commissioner concluded that the beneficial interest in that trust were excluded from the definition of a security. Here, the trustee was the company and all of the shares offered for purchase by participating employees were shares of the trustee. Of course, if the Department is concerned with available remedies to participants, the VEBA Trusts, as discussed in our April 5, 2006 letter, are employee welfare benefits subject to ERISA. Other important protections are provided by the Investment Company Act of 1940 ("'40 Act").

With respect to the Fidelity offered mutual funds selected by Pepperdine University, we have been advised that all of these mutual funds are registered with the Securities Exchange Commission and are regulated under the'40 Act. As you know, of course, the '40 Act imposes stringent requirements on affiliations or interests of directors, officers and employees. First, many of the provisions of the '40 Act are intended to prevent or inhibit outright fraud. See, *e.g.*, Section 9. Secondly, Section 10 of the '40 Act places strict limitations on the composition of the board of directors of a registered investment company. No less than 40% of most boards must consist of persons who are not officers, directors, employees or other "interested persons" of the investment company, its investment advisors, or its principal underwriters. Note, too, the broad definition of "interested persons" in Section 2 a 19 (including, among others, any affiliated person of an investment company). Section 15 contains important safeguards for the execution of contracts between the investment company and its investment advisor and principal underwriter. Finally, certain subsections in Section 17 prohibit various conflicts of interest transactions between an investment company and its investment advisor, principal underwriter or other affiliated persons.

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business entity owned by the principals of the company would be appointed administrator. There is nothing in that opinion to indicate that the Commissioner analyzed the relationship of the company or its lack of independence as administrator in concluding that the beneficial interests in the trust were beneficial interests in a voluntary inter vivos trust, which is not created for the purpose of carrying on any business.

We continue to believe that the staff's inquiry is irrelevant to the question of whether the trustee has investment discretion or whether the VEBA Trusts are engaged in any business. Nonetheless, if the required representation is necessary for continued review of our Interpretive Opinion request, we have been authorized to represent to the Department that the trustee is not the investment advisor of and does not control the management of any of the mutual funds, which have been selected by Pepperdine University, and listed in Schedule A to the Trust Agreement. We have also been advised that EMERITI is a registered investment advisor.

Also, we want to take this opportunity to confirm our telephone conversation with Mr. Griswold on April 10, 2006. He asked us to comment on Interpretive Opinion 70/162 and Commissioner's Opinion 90/1C where the Commissioner based his conclusion on the fact that the trust was "incidental and transitory in character," and Commissioner's Opinions 69/41 and 78/15C where the basis for the opinions is the limited powers of the trustees. We stated that in our view the four opinions reflect two different bases for the Commissioner's conclusions that certain inter vivos trusts are excluded from the definition of a security pursuant to *Corporations Code* § 25019. Both Opinions 70/162 and 90/1C involved employees stock purchase plans where the trustee purchased the securities for the account of participating employees, takes title in his/its name and, after a short period, in these two cases, six months or one year, delivers the securities to the employees, the beneficial owners of the securities. On the other hand, Opinions 69/41 and 78/15C involved different facts. The trusts were formed to provide specified insurance/investment or health and medical benefits to participating employees. In this second set of Interpretive Opinions, the focus of the Commissioner is on the limited powers of the trustees. The VEBA Trusts fall under the second rationale. The different rationale underlying the two sets of Interpretive Opinions are not inconsistent. They represent two different bases, which the Commissioner has used to support his conclusion that these two different type inter vivos are not engaged in any business and, therefore, are not securities within the meaning of *Corporations Code* § 25019.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
cc: Ivan Griswold, Legal and Legislative Assistant
Laura Riddell, Esq., California Department of Corporations
Mr. James Moore, Chief Human Resources Officer
Pepperdine University

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With respect to the Fidelity offered mutual funds selected by Pepperdine University, we have been advised that all of these mutual funds are registered with the Securities Exchange Commission and are regulated under the'40 Act. As you know, of course, the '40 Act imposes stringent requirements on affiliations or interests of directors, officers and employees. First, many of the provisions of the '40 Act are intended to prevent or inhibit outright fraud. See, *e.g.*, Section 9. Secondly, Section 10 of the '40 Act places strict limitations on the composition of the board of directors of a registered investment company. No less than 40% of most boards must consist of persons who are not officers, directors, employees or other "interested persons" of the investment company, its investment advisors, or its principal underwriters. Note, too, the broad definition of "interested persons" in Section 2 a 19 (including, among others, any affiliated person of an investment company). Section 15 contains important safeguards for the execution of contracts between the investment company and its investment advisor and principal underwriter. Finally, certain subsections in Section 17 prohibit various conflicts of interest transactions between an investment company and its investment advisor, principal underwriter or other affiliated persons.

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business entity owned by the principals of the company would be appointed administrator. There is nothing in that opinion to indicate that the Commissioner analyzed the relationship of the company or its lack of independence as administrator in concluding that the beneficial interests in the trust were beneficial interests in a voluntary inter vivos trust, which is not created for the purpose of carrying on any business.

We continue to believe that the staff's inquiry is irrelevant to the question of whether the trustee has investment discretion or whether the VEBA Trusts are engaged in any business. Nonetheless, if the required representation is necessary for continued review of our Interpretive Opinion request, we have been authorized to represent to the Department that the trustee is not the investment advisor of and does not control the management of any of the mutual funds, which have been selected by Pepperdine University, and listed in Schedule A to the Trust Agreement. We have also been advised that EMERITI is a registered investment advisor.

Also, we want to take this opportunity to confirm our telephone conversation with Mr. Griswold on April 10, 2006. He asked us to comment on Interpretive Opinion 70/162 and Commissioner's Opinion 90/1C where the Commissioner based his conclusion on the fact that the trust was "incidental and transitory in character," and Commissioner's Opinions 69/41 and 78/15C where the basis for the opinions is the limited powers of the trustees. We stated that in our view the four opinions reflect two different bases for the Commissioner's conclusions that certain inter vivos trusts are excluded from the definition of a security pursuant to *Corporations Code* § 25019. Both Opinions 70/162 and 90/1C involved employees stock purchase plans where the trustee purchased the securities for the account of participating employees, takes title in his/its name and, after a short period, in these two cases, six months or one year, delivers the securities to the employees, the beneficial owners of the securities. On the other hand, Opinions 69/41 and 78/15C involved different facts. The trusts were formed to provide specified insurance/investment or health and medical benefits to participating employees. In this second set of Interpretive Opinions, the focus of the Commissioner is on the limited powers of the trustees. The VEBA Trusts fall under the second rationale. The different rationale underlying the two sets of Interpretive Opinions are not inconsistent. They represent two different bases, which the Commissioner has used to support his conclusion that these two different type inter vivos are not engaged in any business and, therefore, are not securities within the meaning of *Corporations Code* § 25019.

Very truly yours,

Willie R. Barnes
for MUSICK, PEELER & GARRETT LLP

WRB:vm
cc: Ivan Griswold, Legal and Legislative Assistant
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