**U.S. Department of Labor** **Employee Benefits Security Administration**
**Washington, D.C. 20210**

**May 11, 2005**

2005-11A
ERISA SEC.
406(b) and 408(b)(2)

Chris Hastings
Financial Network
200 South 6th Street
Brainerd, MN 56401

Dear Mr. Hastings:

This is in response to your request for an advisory opinion under the Employee Retirement Income Security Act (ERISA). In particular, you request an opinion that you would not engage in a transaction prohibited by section 406 of ERISA by becoming the "servicing representative" to the MidMinnesota Federal Credit Union 401(k) Plan (the Plan) and receiving compensation for the services you would provide to the Plan.[1]

You represent that you are an independent contractor / registered representative of Financial Network Investment Corporation (FNIC), a broker-dealer. Pursuant to a contractual agreement between FNIC and the MidMinnesota Federal Credit Union (Credit Union), FNIC, through you, operates on the premises of the Credit Union to offer securities and insurance products for sale to members of the Credit Union. You further represent that you are not an employee of the Credit Union, receive no compensation from the Credit Union, and are not a participant in the Plan. Under the agreement, the Credit Union receives a portion of the commissions that you generate on the sale of securities and / or insurance products to Credit Union members.

The Plan is a participant-directed individual account plan that is intended to comply with the requirements of section 404(c)(1) of ERISA and the regulation thereunder, 29 CFR § 2550.404c-1. The Credit Union, operating through an executive committee, determines what investment options to make available to participants of the Plan for the investment of assets in their individual accounts.

You propose to enter into an agreement with the Plan under which you would be the servicing representative for the Plan. You represent that you will provide no investment management or investment advisory services to the Plan or its participants. Your sole role will be to act as the registered representative of FNIC, in which capacity you will execute trades in mutual funds and insurance products at the direction of Plan participants. You would receive compensation for services provided to the Plan. To

[1] Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Internal Revenue Code (the Code) has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA should be taken as referring also to the corresponding sections of the Code.

ensure that the Credit Union will not receive any portion of the commissions generated by the sale of securities and/or insurance products to the Plan, you represent that you will establish a separate representative number for the Plan, under which all Plan transactions will be executed.

Under section 3(21)(A) of ERISA, a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Regulation 29 C.F.R. 2510-3.21(c) defines "investment advice" as that term is used in section 3(21). Under that regulation, a person will be deemed to be rendering investment advice if such person renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property and such person either directly or indirectly has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or renders any such advice on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments. In addition, in Interpretive Bulletin 96-1, the Department clarifies that providing information defined as "investment education" in the Bulletin will not be considered "investment advice" that would give rise to fiduciary status and potential liability under ERISA for investment decisions of plan participants and beneficiaries.[2]

Under section 3(14)(B) of ERISA, a person who provides services to a plan is a party in interest with respect to that plan.

Section 406(a) of ERISA prohibits various types of transactions between a plan and persons who are parties in interest with respect to the plan. In particular, section 406(a)(1)(C) prohibits a fiduciary from engaging in a transaction if the fiduciary knows or should know that the transaction is a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest. Section 406(b) of ERISA prohibits a fiduciary with respect to a plan from dealing with assets of the plan in his own interest

[2] 29 CFR § 2509.96-1(b)(1) and (d)

or for his own account, acting on behalf of or representing a party dealing with the plan in a transaction involving the assets of the plan, or receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

Section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) any contract or reasonable arrangement with a party in interest, including a fiduciary, for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore. Regulations issued by the Department clarify the terms "necessary service" (29 CFR §2550.408b-2(b)), "reasonable contract or arrangement" (29 CFR §2550.408b-2(c)) and "reasonable compensation" (29 CFR §2550.408b-2(d) and 2550.408c-2) as used in section 408(b)(2). As a general matter, whether the requirements of that section are met in each case involves questions which are inherently factual in nature. Pursuant to section 5.01 of ERISA Procedure 76-1, the Department ordinarily does not issue opinions on such matters.

With respect to the prohibitions contained in section 406(b), the regulation under section 408(b)(2) of ERISA (29 CFR §2550.408b-2(a)) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services that is exempt under section 408(b)(2).

As explained in regulation 29 CFR §2550.408b-2(e)(1), the prohibitions of section 406(b) are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility that makes them fiduciaries when they have interests that may conflict with the interests of the plans for which they act. Thus, a fiduciary may not use the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay an additional fee to such fiduciary, or to a person in which he has an interest that may affect the exercise of his best judgment as a fiduciary, to provide a service. However, regulation 29 CFR §2550.408b-2(e)(2) provides that a fiduciary does not engage in an act described in section 406(b)(1) of ERISA if the fiduciary does not use any of the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest that may affect the exercise of his judgment as a fiduciary.

Accordingly, it is the opinion of the Department that your provision of trade execution services to Plan participants would be exempt from the prohibitions of section 406(a) of ERISA if all the terms and conditions of section 408(b)(2) are satisfied.

You represent that you will merely execute trades in mutual funds and insurance products at the direction of Plan participants, and will not provide investment

management or investment advisory services to the Plan or its participants. Based on these representations, it is the opinion of the Department that you will not become a fiduciary of the Plan solely as a result of executing trades at the direction of Plan participants. We note, however, that if, in the course of your relationship with the Plan and its participants, you provide investment advice to the Plan or any of its participants, you may become a fiduciary.[3]

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Louis Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

[3] Section 404(c)(1) of ERISA and 29 CFR § 2550.404c-1 provide generally that, with respect to an individual account plan that permits a participant or beneficiary to exercise control over the assets in her account, if a participant or beneficiary exercises control over the assets in her account, such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and no person who otherwise is a fiduciary shall be liable for any loss, or by reason of any breach, that is the direct and necessary result of the participant's or beneficiary's exercise of control. As explained in paragraph (d)(2)(iii) of the regulation, the individual investment decisions of an investment manager who is designated by a participant or beneficiary are not the direct and necessary results of the designation. Accordingly, if the designated investment manager causes losses to the participant or beneficiary's account by reason of imprudent investment decisions, the investment manager would not be relieved of liability by section 404(c)(1).