



Ted Boyer
Executive Director
Department of Commerce

Michael O. Leavitt
Governor
State of Utah

S. Anthony Taggart
Director
Division of Securities

July 22, 2003

Mr. Terry D. Nelson
Foley & Lardner
Verex Plaza 150 East Gilman Street
Madison, WI 53703

Re: Tuition Plan Consortium, LLC No-Action Letter
File # B00388089

Dear Mr. Nelson:

In response to your April 21, 2003 letter, the Utah Division of Securities ("Division") has reviewed your request for a no-action letter pursuant to the authority granted by § 61-1-25 (5) of the Utah Uniform Securities Act ("Act") and § R164-25-5 of the Utah Administrative Code ("UAC"). In your request, you describe Tuition Plan Consortium's ("TPC") prepaid tuition plan through which prospective students and their families can purchase annual tuition benefits at participating private educational institutions. Your letter requests either confirmation that the Division agrees that the Tuition Plan is not a security, or in the alternative, that the Division will not recommend enforcement action under the Utah Uniform Securities Act ("Act") with respect to the offer and sale of the tuition certificates in Utah.

Based upon the facts presented in your request, the Division will not recommend any enforcement or administrative action against TPC, should the transaction proceed as outlined in your request. To avoid unnecessary restatement or summarization of the facts set forth in your request, the Division's response is attached to a photocopy of your request.

This response does not purport to express any legal conclusions regarding the applicability of statutory or regulatory provisions of federal or state securities laws to the questions presented. It merely expresses the opinion of the Division on enforcement or administrative actions.

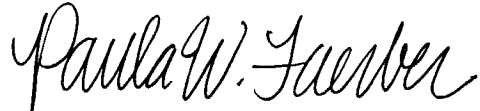
As this recommendation is based upon the representations made to the Division, any different facts or conditions of a material nature might require a different conclusion. Furthermore, this No-Action Letter relates only to the transaction described above and will have no value for future

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Mr. Terry D. Nelson
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similar transactions and does not absolve any party involved from complying with the anti-fraud provisions contained in § 61-1-1 of the Act.

Respectfully,

A handwritten signature in black ink that reads "Paula W. Faerber". The signature is written in a cursive, flowing style.

Paula W. Faerber
Staff Attorney

Enclosure

April 17, 2003

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VIA FEDERAL EXPRESS

Mr. S. Anthony Taggert, Director
Utah Department of Commerce
Division of Securities
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

Re: Tuition Plan Consortium, LLC

Dear Director Taggert:

On behalf of Tuition Plan Consortium, LLC, a Delaware limited liability company ("TPC"), and pursuant to Sec. 61-1-25(5) and Rule R164-25-5 of the Utah Uniform Securities Act (the "Act") please accept this letter as a request for confirmation that the Director of the Division of Securities, Utah Department of Commerce (the "Director") agrees with our position as stated herein or, in the alternative, will not recommend enforcement action under the Act with respect to the offer and sale to the public in your state of certificates evidencing prepaid annual tuition benefits ("Tuition Certificates") offered under the tuition prepayment plan described herein (the "Plan").

For your information, TPC recently received a "no-action" letter from the Securities and Exchange Commission ("SEC") confirming, among other things, that it would take no action if the Tuition Certificates are not registered under the federal securities laws. For a copy of the SEC no-action letter and TPC's request see *Tuition Plan Consortium LLC, SEC No-Action Letter, avail 02/04/03* (<http://www.sec.gov/divisions/investment/noaction/tuitionplan>).

I. OVERVIEW

The Plan will be a prepaid tuition plan through which prospective students and their families can purchase "annual tuition benefits" at any of the participating



private educational institutions (“Participating Institutions”)¹. The Plan offers prospective students the opportunity to lock in and prepay discounted rates of tuition at any of the Participating Institutions.

Background and Tax Treatment

The rate of tuition inflation at institutions of higher education outstrips the rate at which most families can save. Prepayment of tuition shifts the risk of future tuition inflation to the educational institutions and away from students and their families, and at the same time spreads payment of the ever-increasing cost of higher education over a longer time period, which makes it affordable to more families. The United States Congress recognized these benefits when it passed Internal Revenue Code (“IRC”) Section 529 in 1996, which permitted tax-advantaged tuition savings and prepayment plans sponsored by a state. Since then, many states have adopted prepaid tuition plans that primarily benefit students intending to attend in-state public educational institutions. Under virtually all of these plans, however, students who attend a private college or university suffer a significant loss in value of prepaid tuition benefits.²

On July 7, 2001, President Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 (the “2001 Act”). The 2001 Act, in recognition of the strong public policy of encouraging higher education, and in an effort to level the playing field for private non-profit colleges and universities, amended IRC Section 529 to permit “one or more eligible educational institutions” to establish prepaid tuition programs that have the same tax status as state-sponsored programs.

Summary of the Plan

TPC will offer and sell to the public in your state certificates evidencing prepaid tuition (“Tuition Certificates”). Purchasers will have access to a schedule of the current discounted cost of a year’s tuition and mandatory fees (an “annual tuition benefit”) at each of the Participating Institutions, and purchasers will thus be able to determine at the time of purchase how many annual tuition benefits (or fractions thereof) a Tuition Certificate of a specified amount will buy at each Participating Institution in any given year. Purchasers may receive upon request a written copy of the schedule, which will be updated periodically. Tuition Certificates represent a commitment to Tuition Certificate owners of guaranteed tuition rates, even if tuition rates rise sharply

¹ As of March 25, 2003, TPC has received contributions and indications of interest to join the Plan from 294 schools, listed on Annex A hereto. However, an institution will only become a Participating Institution upon execution of binding Plan documentation.

² For example, under the Michigan plan, a student attending a private college located in Michigan will receive payment based on the average tuition at Michigan state schools. If the student attends a private college outside of Michigan, payment is based on the lowest tuition at Michigan state schools.

before a student enrolls. The Tuition Certificates are not identified with a specific school and may be used at any Participating Institution.

The proceeds from the sale of a Tuition Certificate will be held in a “qualified trust” pursuant to IRC Section 529 (the “Program Trust”) for the exclusive benefit of the designated beneficiary under the Tuition Certificate (the “Beneficiary”), and will be invested and reinvested until the Tuition Certificate is cancelled or surrendered to a Participating Institution in payment for tuition. TPC has appointed TIAA-CREF Tuition Financing, Inc. (“TFI”), an affiliate of Teachers Insurance and Annuity Association of America (“TIAA”), to provide services as Plan manager for the administration of the Plan. It is contemplated that TPC will appoint TIAA-CREF Trust Company, FSB (the “Trust Company”), a TFI affiliate that is a federally chartered savings bank and registered investment adviser under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), as trustee to the Program Trust (the “Trustee”) and investment adviser to the Plan.

Upon enrollment of the Beneficiary at a Participating Institution, all or part of the Tuition Certificate may be surrendered to the institution as payment for the percentage of annual tuition benefit purchased. The surrendered Tuition Certificate represents two values: the percentage of tuition the student must be credited with having paid, and the amount the college will receive in payment from the Program Trust. *Regardless of the amount the college will receive from the Program Trust, the institution must credit the student with payment for the percentage of tuition originally agreed upon at the time of issuance of the Tuition Certificate.* The institution then presents the Tuition Certificate to TPC and receives in return a payment equal to the paid-in amount under the Tuition Certificate, increased or decreased by net investment gains or losses (subject to a floor and ceiling). A Tuition Certificate cannot be applied for tuition benefits until 36 months from the date of purchase, and generally will expire on the 30th anniversary of its purchase.

Transfers of ownership of Tuition Certificates will be available only under limited circumstances. In addition, in order to provide purchasers flexibility, at any time after the first anniversary of the date of purchase of a Tuition Certificate, the Tuition Certificate may be cancelled upon request, whereupon the purchaser will receive a refund of paid-in amounts, adjusted by the investment performance of the Plan, subject to a maximum return of 2% per annum and a maximum loss of 2% per annum (in each case compounded annually).

Each Participating Institution will be a non-profit, accredited, four-year post-secondary degree-granting educational institution, will be a tax-exempt public charity within IRC Sections 501(c)(3) and 509(a)(1), will be an entity described in IRC Section 170(b)(1)(A)(ii), will qualify as an “eligible educational institution” within the meaning of IRC Section 529(e)(5) and will be an “accredited investor” within the meaning of Regulation D under the Securities Act of 1933, as amended (the “Securities Act”). Each Participating Institution agrees unconditionally to honor Tuition Certificates purchased before or during the period of its participation in the Plan as payment in full

for the predetermined amount of tuition, and agrees not to discriminate in its admissions process against or in favor of any prospective student by reason of his or her participation as a Beneficiary under the Plan.

Relief Requested

We request that the Director agree with our conclusion that the Tuition Certificates are not “securities” as defined in, and are not required to be registered under, the Act; or in the alternative, will not recommend enforcement action under the Act with respect to the offer and sale of the Tuition Certificates without complying with the securities registration requirements under the Act.

II. OPERATION OF THE PLAN

1. Prepaid Tuition Annually Determined by Each Participating Institution.
For each academic year, each Participating Institution will determine the amount it will charge students for full-time tuition and mandatory fees³ and will inform TPC of such amount.

For each academic year, each Participating Institution will also determine the annual discount it will apply to its current tuition and fees for Tuition Certificates that are purchased during the program year that coincides with that academic year. TPC may establish a minimum discount rate for any year. The current cost of one year’s tuition and mandatory fees, the discount rate and the Beneficiary’s expected date of matriculation will determine the amount a purchaser would have to prepay to receive one year’s tuition and fees at a particular date in the future, regardless of what the actual cost is at that future date.

Each Participating Institution will determine its discount rate independently, taking into account such factors as it may choose, including the desirability of attracting a larger pool of applicants with a higher discount and its views as to the investment performance it expects the Program Trust to achieve. Once selected, a Participating Institution cannot change the discount rate applicable to Tuition Certificates purchased during the applicable program year. The discount will be compounded over time, so that the longer a Tuition Certificate is held, the more tuition it will buy. Because of the discount, the cost of a Tuition Certificate to cover one year’s tuition and fees at a given school will be less than the actual cost for matriculating students at that school at the time of purchase. All of this information (current tuition rates and the current discounted cost of the annual tuition benefit (showing the effects of

³ The Plan currently permits the prepayment only of tuition (i.e., educational credit hours) and mandatory fees permitted under IRC Section 529. Federal standards define which types of fees are eligible to be “mandatory fees,” but each school will determine its own mandatory fees. IRC Section 529, as amended by the 2001 Act, permits the prepayment of tuition, fees, books, supplies, equipment and, under certain circumstances, room and board.

compounding for each potential year of matriculation on the tuition costs under the Plan)) will be available to prospective purchasers of Tuition Certificates. Thus, before purchasing a Tuition Certificate, a purchaser can determine what a Tuition Certificate will pay for at any Participating Institution for any year of matriculation.

2. Sale of Tuition Certificates. A purchaser may prepay tuition and mandatory fees at any Participating Institution on behalf of a Beneficiary by purchasing a Tuition Certificate through TPC. TPC will provide purchasers with confirmation of purchase and evidence of ownership of a Tuition Certificate that specifies the amount prepaid and the designated Beneficiary under the Tuition Certificate. Beneficiaries will not receive Tuition Certificates. Tuition Certificates will be reflected in the Plan's books and records and in statements sent to Tuition Certificate owners. The Beneficiary does not commit to attend any specific institution at the time of pre-payment, and may use the prepaid amounts at any Participating Institution. It is anticipated that direct marketing of Tuition Certificates will be carried out by TFI or by its broker-dealer affiliate⁴ that is currently responsible for marketing certain state-sponsored savings plans administered by TFI or its affiliates.

3. Assets Held in the Program Trust. Prepaid tuition amounts will be deposited into the Program Trust, which, as required by IRC Section 529, will be created under state law in the U.S. for the exclusive benefit of the Beneficiaries. The Trustee will be a bank or other person who meets the trustee requirements set forth in IRC Section 408(a)(2). The assets of the Program Trust will not be commingled with other property except in a common trust fund or common investment fund as permitted by IRC Section 408(a)(5). The Program Trust's assets will not be considered to be the assets of TPC for accounting or state law purposes. For tax purposes, the Program Trust's assets will also be separate from the assets of TPC, although we expect that the Program Trust's assets and those of TPC may be reported separately on a consolidated report to the IRS since both entities comprise the IRC Section 529 program.

4. Reporting. After purchasing a Tuition Certificate for a particular Beneficiary, the owner will receive a confirmation of the transaction, and will thereafter receive quarterly statements and annual reports containing information regarding his or her account. The statements will indicate the amounts received by the Plan for the Beneficiary, and will specify the number of years' tuition and fees (or fractions thereof) that such amounts will purchase in given years of matriculation designated by the owner at up to five schools designated by the owner as "favorites". Tuition Certificate owners can change their designations of "favorite" institutions and year of matriculation for statement purposes at any time. Prior to purchase, each owner will also receive a Plan disclosure booklet, and will receive any supplements to the disclosure booklet after purchase.

⁴ Teachers Personal Investors Services, Inc., is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended and in all 50 states, the District of Columbia and the Commonwealth of Puerto Rico.

5. Unconditional Obligation to Provide Educational Services. Each Participating Institution unconditionally agrees to (i) provide the predetermined educational services to a Beneficiary upon the surrender of a Tuition Certificate after his or her admission as a student at such Participating Institution, and (ii) receive in full payment for such services only the amounts which are available to it under the Tuition Certificate. Each Participating Institution agrees not to discriminate against or in favor of any prospective student by reason of his or her participation as a Beneficiary under the Plan when considering admission and enrollment. Each Participating Institution must provide such services to any Beneficiary using a Tuition Certificate that was purchased on or before the date on which such Participating Institution ceased participating in the Plan.

6. Redemption of Certificates; Payments to Participating Institutions. Upon application and admission of a Beneficiary at a Participating Institution, the Beneficiary's Tuition Certificate (or a portion thereof) may be presented to the Participating Institution in payment of the agreed-upon percentage of tuition, and the deposited funds under the Tuition Certificate (or such portion thereof as the Beneficiary elects to redeem), increased or decreased by net investment gains or losses (less expenses described below and subject to any maximum or minimum returns set by TPC in connection with its implementation of the "stabilization fund" described below) is then paid over to the Participating Institution by the Program Trust.

7. Cancellation, Refunds and Plan Termination. A Tuition Certificate owner may cancel a Tuition Certificate at any time following the first anniversary of purchase or at any time in the event of death of the designated Beneficiary. TPC may cancel a Tuition Certificate at any time following the 30th anniversary of such Tuition Certificate's purchase, and if the Plan is terminated, at any time following the 20th anniversary of purchase as provided below.⁵ Upon cancellation or expiration of outstanding Tuition Certificates, TPC will provide a refund of unused prepaid amounts upon request, adjusted by the investment performance of the Plan, subject to a maximum return of 2% per annum and a maximum loss of 2% per annum (in each case, compounded annually) (such amount, the "Refund Amount"). An owner of a Tuition Certificate may elect to roll over the Refund Amount into another plan qualifying under IRC Section 529. An owner who does not roll over the Refund Amount within 60 days or use the Refund Amount for specified educational expenses of the Beneficiary generally will be subject to federal income tax on any earnings distributed and, except in the case of the Beneficiary's death, disability or receipt of a scholarship, subject to a 10% tax penalty on distributed earnings under IRC Section 529.

In the event TPC is dissolved, liquidated or otherwise terminated and there are outstanding Tuition Certificates, a successor qualifying under IRC Section 529 will

⁵ In addition, if at the end of the first two-year period following purchase of a Tuition Certificate the total payments made by the owner are less than \$500, the Tuition Certificate will be cancelled and the payments will be refunded to the purchaser without interest.

replace TPC as Plan administrator. Notwithstanding the foregoing, TPC and any successor Plan administrator will have the right to terminate or discontinue the Plan. In such event, a termination plan will be developed. Any such termination plan will provide that all outstanding Tuition Certificates will remain in effect and be useable for tuition credit or cancellation and refund for a period of at least 20 years from the date of purchase of each such Tuition Certificate. Notice of the termination plan will be provided immediately to all Tuition Certificate owners. If and when the outstanding Tuition Certificates expire, owners of expired Tuition Certificates will be entitled only to payment of the Refund Amount and may no longer use the Tuition Certificates for tuition credit.

8. Transfers. Tuition Certificates may not be transferred by owners except in certain limited circumstances. An involuntary transfer may occur upon the death, bankruptcy or divorce of a Tuition Certificate owner. In addition, voluntary transfers of beneficial ownership among family members may be permitted, so long as such transfers are not for value. A Tuition Certificate owner may change the designated Beneficiary of a Tuition Certificate so long as the new Beneficiary is a "member of the family" (as defined in IRC Section 529) of the old Beneficiary.

9. Services to be Provided by TFI and its Affiliates. TPC has been assisted by TFI on the development of the Plan for several years and has appointed TFI to provide certain services for the administration of the Plan. Trust services and investment management of the Program Trust assets will be provided by the Trust Company. The Tuition Certificates will be sold through TFI or one of its affiliates. TFI's responsibilities will include marketing, providing individual account maintenance and other accounting functions, collecting payments, processing withdrawals and payments, providing customer service and sales, and additional administrative services related to the Plan. Neither TFI nor the Trust Company is affiliated with TPC or any Participating Institution.

10. Investment of Program Trust Assets. Proceeds from the sale of Tuition Certificates will be held in the Program Trust and will be pooled and invested by the Trustee (or another investment manager) pending distribution to the appropriate Participating Institutions upon the admission and enrollment of Beneficiaries or refund. TPC will set overall investment objectives and guidelines for the Plan. The Trustee will, and TPC will not, make decisions regarding individual investments. TPC will regularly monitor the investment performance of the Plan and report to the Participating Institutions quarterly. TPC, by the vote of its board of directors or by vote of a majority of the Participating Institutions, may remove the Trust Company as Trustee and investment manager and hire a new Trustee and investment manager.

11. Expenses. It is currently contemplated that TPC, TFI and TFI's affiliates, together, initially will receive an annual management fee of 1.25% of Program Trust assets, to be paid out of the Program Trust. It is currently contemplated that TPC's administrative and other expenses (including salaries of employees, rent and other overhead, debt service requirements, costs of meetings of its board of directors and meetings of Participating Institutions) will be reimbursed through one or more of an

annual fee (either in a fixed amount or equal to a percentage of Program Trust assets) to be paid out of Program Trust assets, or a cost-sharing arrangement with TFI and its affiliates. Purchasers of Tuition Certificates do not pay fees or charges of any kind.

12. Stabilization Fund. TPC may establish a ceiling and floor of a set percentage (currently contemplated to be 25%) above and below the average projected annual investment return for the period that the Tuition Certificate is outstanding, with the intention of providing a more stabilized return to Participating Institutions over the life of the Plan. Excess monies (e.g., return in excess of the ceiling) may be allocated to a “stabilization fund” for use when the investment return is below the investment floor. If the net investment return is below the floor, stabilization fund payments will only be made upon redemption of Tuition Certificates to the extent that there are sufficient funds in the stabilization fund to cover the shortfall between the actual investment return and the investment floor established. In the event that any amounts remain in the stabilization fund upon dissolution of the Program Trust following the redemption or cancellation of all outstanding Tuition Certificates and payment of expenses, the Participating Institutions that have accepted Tuition Certificates redeemed for tuition payments will receive a deferred payment of tuition from the Program Trust based on the dollar amount of payments received by each Participating Institution over the life of the Plan.

13. IRC Section 529 Requirements for Prepaid Tuition Plans Satisfied. The Plan will be sponsored by eligible educational institutions (as defined in IRC Section 529) and will meet all of the requirements of qualified tuition programs set forth in IRC Section 529, summarized as follows:

(a) *Not a savings plan.* The Plan will be a prepaid tuition plan, and not a higher education savings plan, which may only be sponsored by a state⁶. Under a prepaid plan, a person may purchase tuition credits or tuition certificates on behalf of a designated beneficiary which entitle such designated beneficiary to the waiver or payment of his or her qualified higher education expenses (“Qualified Expenses”). (IRC Section 529(b)(1))

(b) *IRS ruling or determination letter.* TPC has obtained a ruling letter from the IRS stating that the Plan satisfies the applicable requirements of IRC Section 529. (IRC Section 529(b)(1))

(c) *Cash contributions.* The Plan will provide that purchases or contributions may only be made in cash or by rollover from another qualified tuition plan. (IRC Sections 529(b)(2), 529(c)(3)(C))

⁶ A savings plan does not guarantee a specified amount of tuition benefit, but instead allows participants to earn an investment return on amounts contributed and to use the entire amount, including profits, toward full-price tuition at a participating school at the time the student enrolls. Under IRC Section 529, only a state may sponsor a savings plan.

(d) *Separate accounting.* The Plan will maintain a separate accounting for each Beneficiary. (IRC Section 529(b)(3))

(e) *No investment direction.* The Plan will prohibit contributors and Beneficiaries from directing program investments, either directly or indirectly. (IRC Section 529(b)(4))

(f) *No pledging of interest as security.* The Plan will prohibit the use of any interest in the program as security for a loan. (IRC Section 529(b)(5))

(g) *Prohibition of excess contributions.* The Plan will provide safeguards to prevent contributions in excess of the amount needed to provide for the Qualified Expenses of each Beneficiary. (IRC Section 529(b)(6)) The IRS has approved state-sponsored plans that allow total contributions for a designated beneficiary up to the amount necessary to pay tuition, fees and room and board costs for seven years of undergraduate enrollment. The Plan would allow total contributions up to the amount necessary to pay for five years of Qualified Expenses⁷ at the highest cost Participating Institution.

(h) *Qualified trust.* The Plan will hold all prepaid amounts in the Program Trust, which will be a “qualified trust.” (IRC Section 529(b)(1)(B)) This means that the Program Trust will be a trust created or organized in the United States for the exclusive benefit of designated Beneficiaries and that meets the following requirements:

- (i) the Trustee will be a bank or other person who demonstrates to the satisfaction of the IRS that the person who administers the trust will meet applicable IRS requirements; and
- (ii) the Program Trust’s assets will not be commingled with other property, except in a common trust fund or common investment fund.

The Program Trust’s assets will not be considered to be the assets of TPC for accounting, state law or tax purposes, though the Program Trust’s assets and those of TPC may be reported separately on a consolidated report to the IRS.

(i) *Reporting.* The Plan will make reports to the IRS and to Beneficiaries. (IRC Section 529(d)) Those reports will provide information with respect to

⁷ The proposed IRC Section 529 regulations would permit TPC to include all Qualified Expenses at the highest cost educational institution covered by the program. Under IRC Section 529, Qualified Expenses include tuition, fees, books, supplies, and equipment required for enrollment, plus, under certain circumstances, room and board. Currently, Tuition Certificates may be redeemed only for tuition and mandatory fees. In the future, to the extent permitted by the IRS, TPC may elect to permit students to pay other costs, including room and board.

contributions, distributions and such other matters as the IRS may require and will be filed with the IRS and furnished to the Beneficiaries at such times and in such manner as the IRS may determine.

14. 2001 Act Sunset Provisions. By the terms of the 2001 Act, the amendments to IRC Section 529 will expire at the end of 2010, unless legislation continuing their effect is enacted. It is widely expected that such continuing legislation will be passed. However, in the event that the amendments do expire, it is unclear what the tax effect will be on the Plan or on Tuition Certificates sold under the Plan. In such event, outstanding Tuition Certificates will remain enforceable, Participating Institutions will continue to be obligated to accept outstanding Tuition Certificates in payment for educational services, and the owners and Beneficiaries of outstanding Tuition Certificates will retain all of their rights and obligations under the Plan. In the event that TPC adopts a termination plan, the termination plan will provide that the Participating Institutions will continue to honor outstanding Tuition Certificates until at least the 20th anniversary of the date of purchase, as provided in "Cancellation, Refunds and Plan Termination" above.

III. STRUCTURE AND OPERATION OF TPC

1. General. TPC is a Delaware limited liability company, all of the members of which will be Participating Institutions. TPC is governed by its Consortium Agreement (the "Consortium Agreement"), which sets out the rights and obligations of members with respect to their membership in TPC (as distinct from the Plan). To be eligible to participate in the Plan, a college or university must be a member of TPC. TPC has received a determination from the IRS that the Plan is a qualified tuition program under IRC Section 529. This means that the Plan will be exempt from federal income tax, and the Program Trust will not pay federal income tax on any amounts it receives (including paid-in amounts under Tuition Certificates and earnings on Program Trust investments), except with respect to any income deemed to be unrelated business taxable income, and no purchaser will pay federal income tax on amounts paid from the Program Trust upon redemption of a Tuition Certificate in payment for Qualified Expenses.

2. Membership Criteria. All Participating Institutions must be, at all times during their membership in TPC: (a) non-profit, accredited four-year degree-granting educational institutions authorized by law to provide a program of education beyond the high school level, (b) entities that qualify as tax-exempt public charities within IRC Sections 501(c)(3) and 509(a)(1), (c) "eligible educational institutions" within the meaning of IRC Section 529(e)(5), (d) entities described in IRC Section 170(b)(1)(A)(ii) and (e) "accredited investors" within the meaning of Regulation D under the Securities Act. A Participating Institution will remain a member of TPC until such time as (i) it withdraws from TPC, (ii) it is expelled from TPC for failure to meet the foregoing requirements or otherwise or (iii) TPC is dissolved.

3. Membership Units. Each Participating Institution will receive one Membership Unit in TPC. Membership Units may not be assigned, transferred or

otherwise encumbered. Each Membership Unit is entitled to one vote on all matters put to a vote of the members of TPC, which include: amendment of TPC's Consortium Agreement; merger, consolidation, liquidation or sale of substantially all of the assets of TPC; election and removal of directors; and any requirement of the members to make additional capital contributions to TPC.

4. Plan Agreement. The terms of participation in the Plan are set out in the Prepaid Tuition Plan Agreement of TPC (the "Plan Agreement"). The Plan Agreement, among other things, appoints the Plan administrator, requires the Participating Institutions to set annual tuition rates and discount rates and to accept Tuition Certificates in payment for Qualified Expenses, and describes the Program Trust.

5. Capital Contributions. As a condition of membership, each Participating Institution will have made an initial capital contribution to TPC, currently ranging from \$15,000 to \$35,000, depending on size. These amounts will be used to defray the Plan's organizational costs and expenses, including legal fees.

We are not asking you to address the offering of the Membership Units to the Participating Institutions. TPC will offer the Membership Units pursuant to Sec. 4(2) and Rule 506 of Regulation D under the Securities Act. Accordingly, the Membership Units will be "federal covered securities" pursuant to Sec. 18(b)(4)(D) under the Securities Act. It is expected that TPC will file the "notice" required for the sale of federal covered securities in your state or rely on a "self executing" exemption for such sales, where appropriate.

IV. DISCUSSION OF LEGAL ISSUES

A. Tuition Certificates are not "Securities" Within the Meaning of Sec. 61-1-13(24) of the Act

For the reasons set forth herein, we believe that the sale of Tuition Certificates under the Plan does not involve the sale of a "security" within the meaning of Sec. 61-1-13(24) of the Act and therefore that registration under the Act is not required. Rather, the interest represented by a Tuition Certificate is a right to future prepaid educational services. Because the right to receive such services is unaffected by the Program Trust's investment performance, a Tuition Certificate is not an "investment contract," a "note," an "evidence of indebtedness" or any other security.

1. Tuition Certificates are not Investment Contracts

Generally, there are three major tests for “investment contracts” that have been developed since the term first appeared in early state securities laws: (i) the *Howey*⁸ test, (ii) the risk capital test, and (iii) the combined risk capital-*Howey* test.

Howey Test

The *Howey* test is the test for investment contracts at the federal level and is recognized by a majority of the state courts as well. In *Howey*, the U.S. Supreme Court ruled that an investment contract is a transaction that contains the following elements: (i) the investment of money, (ii) in a common enterprise, (iii) with expectation of a profit and, (iv) that profit will come solely or substantially through the efforts of a promoter or third party.

We do not believe that a Tuition Certificate meets this definition because, while the purchaser of a Tuition Certificate does pay consideration for the Tuition Certificate, he or she acquires only a right to a fixed amount of future educational services. No “common enterprise” is established for the creation and sharing of “profit.” Provision of the promised educational services is not dependent upon success or failure in the investment of the prepaid tuition amount. Under the Plan, the paid-in tuition amount guarantees provision of educational services upon admission to a Participating Institution at a pre-determined price. Generally, the Beneficiary has no interest in the investment return whatsoever; the Beneficiary’s interest is to receive for consumption the future educational services which have been unconditionally promised under contract by the Participating Institutions.

The Supreme Court distinguished an “investment contract,” as defined by *Howey*, from an arrangement involving a purchase of property or services in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, at 852-53 (1975), holding that “when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.” *Forman* involved the question of whether an investment in stock of a housing cooperative corporation to obtain an apartment at the cooperative in which to live was an “investment contract”. While incidental economic benefits in the form of anticipated below market rent and other factors were associated with the stock investment, the Court found that the primary motivating factor for the investment was the desire to obtain a place to live rather than the seeking of any direct economic “profit” from the investment. The Court specifically rejected the notion that realizing cost savings would qualify as a profit.

⁸ See *SEC v. Howey Co.*, 328 U.S. 293 (1946). This case involved an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

Other important cases since Forman further support the premise that a security is not involved when the primary motivation of the purchaser is for something other than investment.

In International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979), where the issue was whether an interest in a pension fund was a security under the Securities Act, the Supreme Court ruled that the interest was not a security although the pension fund had been established with an investment or profit-making motive. The Court's decision relied predominately on the fact that the "primary" motive for a union member to acquire an interest in the plan was not investment, but to secure a job. Also, in Teague v. Bakker, 139 F. 3d 892, 1998 WL 168876 (4th Cir. Apr. 8, 1998), which involved the offering of "life time partnerships" in the PTL Ministry entitling the purchaser to annual lodging, the court ruled that the partnerships were not securities because the investors were primarily attracted by the prospect of acquiring the use of the facilities rather than receiving a financial return on an investment.

The overriding reason students and their families will purchase Tuition Certificates under the Plan is to obtain future educational services for use and consumption, and any economic benefit accruing to a participant in the Plan (for example, discounted tuition rates available to Tuition Certificate purchasers) is incidental to the primary purpose of securing educational services.

Although we understand that SEC no-action positions are not "binding" with respect to your consideration of this issue, we believe that the following SEC no-action letters, which were apparently persuasive to the SEC in arriving at its no-action position with respect to the Tuition Certificates, are on-point and worthy of your consideration.

Tuition Plans

The "use or consumption" argument has been recognized in SEC no-action positions in several situations involving prepaid tuition plans. In Quincy College (December 15, 1986), the staff of the SEC ("Staff") indicated that no enforcement action would be taken with respect to a prepaid tuition program offered by a single educational institution. In that case, the prepaid funds were paid to and held by the college, and the student was not in any way affected by the success or failure of the investment. The sole benefit available to the student was the receipt of future educational services. The Staff agreed that prepayment of tuition was motivated by a desire to obtain future services for consumption and not by a desire for profit. Similarly, in HEMAR Education Corporation of America (June 11, 1990), the Staff indicated that it would take no action with respect to a prepaid tuition plan involving multiple educational institutions. The prepaid amounts were invested through a bank in the name of the participating educational institutions and were ultimately made available to the institution that provided educational services to the student. Here again, the student was guaranteed a predetermined amount of tuition and was unaffected by the investment return on prepaid amounts, indicating that the motivating factor for prepayment of tuition was to obtain future services for consumption

and not to obtain an investment profit. In both Quincy College and Hemar, the students who did not attend a participating school were entitled to a refund of amounts prepaid, but no return on investment.

Funeral Plans

The Staff applied similar reasoning in the context of “pre-need” funeral services contracts sold pursuant to state regulatory schemes (“Funeral Plans”) in several states. See, e.g., Fleet National Bank (Sept. 5, 1990); Michigan Funeral Directors Association (September 28, 1987). Funeral Plans allow a purchaser to prepay for funeral benefits, and in most cases guarantee the availability of the specified services regardless of price at the time of need. Prepaid amounts are then pooled in a trust or escrow account and invested. The paid-in amount under such a contract, plus investment returns thereon, is paid to the chosen funeral home at the time services are rendered. The purchaser generally has a right to revoke the contract and receives upon revocation a return of principal and income earned, less expenses and fees (including, in some cases, a revocation penalty). In Fleet and MFDA, the Staff concluded that the offering and sale of pre-need funeral service contracts did not involve a security within the meaning of the Securities Act. In granting the no-action relief, the Staff noted in particular that the Funeral Plans would not be marketed to the public as an investment plan or an investment service. Nor, in MFDA, did the Staff view the interest of the participating funeral homes in Funeral Plans as a “security” under the Securities Act.

As in Quincy College and HEMAR, the provision of educational services under the Plan is unconditionally guaranteed by the Participating Institution, upon admission and enrollment, to any Beneficiary. The Participating Institution may or may not receive from the Plan distributions that cover the costs of providing such services. But with respect to the student, the Participating Institutions have an absolute contractual obligation to provide the prepaid services. The Participating Institution’s obligation exists regardless of the success or failure in the investment of the prepaid amounts and regardless of what the costs to render such services may be. Each Participating Institution bears the entire risk of loss of the investment of prepaid amounts in the Plan in respect of Beneficiaries who enroll as students at such Participating Institution.

The Plan also operates in a manner similar to the Funeral Plans, and will not be marketed to the public as an investment plan or an investment service. Although the Plan will be promoted with broad-based public advertising, all such advertising will characterize the Tuition Certificates as prepaid tuition benefits and not as an investment plan. Further, to comply with IRC Section 529, the Plan must provide for guaranteed prepayment of a definable tuition benefit and may not be a “savings plan”, the benefit of which is uncertain until funds are withdrawn and is determined by the investment performance of the amounts prepaid.

The Plan’s refund adjustment provides a far less meaningful return than that provided by the revocation provisions of the Funeral Plans in Fleet and MFDA. Although the incidental refund feature is more generous than that provided in the tuition

plan precedent discussed above, where refunds were limited to amounts paid, we believe that the refund adjustment is an incidental feature that does not change in any way the characteristics of Tuition Certificates and should not affect the determination that a Tuition Certificate is not a security. The earlier a Tuition Certificate is purchased, the greater benefit the Tuition Certificate will provide. However, because of the significant uncertainties inherent in purchasing tuition far in advance for any particular Beneficiary, some purchasers will inevitably need to seek a refund. TPC believes that the refund adjustment prevents unfairly penalizing such purchasers. The refund does not provide a reasonable basis for the expectation of "profit" on investment. (We note that the maximum refund adjustment will represent a 2% rate of return per annum, and that the refund may be coupled with a tax penalty depending on the reason for the refund.)

The distinction between prepaid tuition plans, which guarantee a fixed amount of tuition benefit, and tuition savings plans, the benefit of which depends on the investment performance of the plan, is an important feature of this analysis: Under IRC Section 529, only a state may sponsor a savings plan. Private institutions may sponsor only tuition prepayment plans. In connection with its issuance of the ruling required under IRC Section 529, the IRS has effectively made a determination that the Plan is a tuition plan, not a savings plan. Accordingly, any refund must be low enough that it does not change the essential nature of the Plan.

The expectation of a purchaser of Tuition Certificates under the Plan is to prepay educational services at a discount price. The refund feature is merely an incidental aspect of the Plan to reflect the substantial length of time between purchase and use of Tuition Certificates in the event that the purchaser determines not to pursue the original goal of prepaying tuition through the Plan. If the purchaser intended to attain profits, many more advantageous vehicles exist, including vehicles such as savings plans that provide similar tax deferral and give rise to the potential for investment returns. A Tuition Certificate only provides a reasonable economic benefit through the use and consumption of the purchased educational services. That use is the primary motivating factor in the purchase of a Tuition Certificate.

The discount feature of Tuition Certificates should also not be viewed as an opportunity for profit on the part of the purchasers. Offering a discount or rebate is a customary means by which sellers of goods and services encourage early purchase or motivate buyers to purchase big ticket items: manufacturers offer discounts for buying products early, car manufacturers may waive financing charges or offer rebates, furniture suppliers may offer interest-free extension of credit for a period. Participating Institutions, like any other seller of goods and services, may use a discount feature to interest prospective buyers in making a purchase earlier than they otherwise might. The discount does not provide any benefit unless Tuition Certificates are redeemed to purchase educational services; there is no independent benefit from the discount apart from the consumption of the services. The analysis of Forman therefore should apply, in that the primary motivation for purchasing Tuition Certificates is to obtain future educational services and not to seek an economic profit. The discount's economic benefits are merely incidental.

Risk Capital Test

The “risk capital” test which is attributed to the California State Supreme Court in Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P. 2d 906, 13 Cal. Rptr. 186 (1961), has the following elements: (i) an investment, (ii) in the risk capital of an enterprise, and (iii) an expectation of a benefit.

In Silver Hills, a group of promoters were organizing a for-profit country club and raising funds for the club’s development by selling membership units. In exchange for a membership unit and payment of monthly dues, the unit holder had the right to use the club facilities but did not acquire an interest in the club itself. The court ruled that the membership units were securities because the holders thereof were providing the risk capital necessary to develop the club’s business for a profit. The court was apparently swayed by the fact that the purchasers risked their capital so that the club could be developed and their membership rights could be realized.

In Brownie Oil Company v. Railroad Commission, 207 Wis. 88, 240 N.W. 827 (1932), the issuer sold coupon books and bonds (collectively, “contracts”), the proceeds from which were used to build gas stations and bulk plants and the profits from such entities would go to a fund that would eventually pay dividends to the holders of the contracts. The court ruled that the contracts were securities because the purchasers acquired the contracts knowing that their capital was necessary to fund the building of the entities so that they could begin operation and eventually pay into the fund resulting in a return of investment to the contract holders.

In both Silver Hills and Brownie, it appears that the courts deemed “risk capital” to be capital put up with less than a fair chance of receiving the promised return.

Unlike the capital invested by the purchasers in Silver Hills and Brownie, funds provided for the purchase of the Tuition Certificates are not “risk capital”. Such funds do not represent capital at risk for Tuition Certificate purchasers since the future educational services purchased are guaranteed by the selected Participating Institution. The guarantee by the selected Participating Institutions are obligations by such entities regardless of the risk the Participating Institution bears with respect to the performance of the assets in the Program Trust.

Combined Risk Capital – Howey Test

The combined risk capital-*Howey* test is attributed to the Hawaii Supreme Court in State v. Hawaii Market Center, Inc., 52 Haw. 642, 485 P. 2d 105 (1971) in which it combined the elements of the two other tests: (i) an offeree furnishes initial value to an offeror, (ii) a portion of the initial value is subjected to the risks of the enterprise, (iii) the furnishing of the initial value is induced by the offeror’s promises or representations that give rise to a reasonable understanding that a benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the enterprise’s

operation and, (iv) the offeree does not have the right to exercise control over the management of the enterprise.

In Hawaii Market Center, investors received certain items of discounted merchandise and a membership but not an equity interest in the scheme. The court found that part of the investor's funds were used to purchase a founder membership in the scheme and the investor's primary motivation to invest was to join in the promotional scheme. Unlike the purchasers' motivation in Hawaii Market Center, the motivation of the purchasers of the Tuition Certificates will be solely to purchase future educational services, which services are guaranteed by the selected Participating Institution. Accordingly, with the exception of the incidental refund feature, no portion of such purchaser's funds will be subject to "the risks of any enterprise".

2. Tuition Certificates are not "Notes" or "Evidence of Indebtedness"

For the reasons described herein, we believe that a Tuition Certificate does not constitute an investment security in the form of a "note" or "indebtedness". As discussed above, a purchaser of prepaid tuition under the Plan acquires an unconditional right to future educational services. Prepaid tuition involves no reasonable expectation of investment return indicative of an investment security "indebtedness". The purchaser has no unconditional right to receive a return of the principal amount paid for tuition at a fixed or determinable future date; nor is there any reasonable expectation to receive an investment return on such amount of any type. The expectation at the time of tuition prepayment is to receive the educational services purchased.

Monetary payment to the purchaser under the Plan can only occur in the context of a refund of unused amounts, adjusted by the investment performance of the Plan, subject to a maximum return of 2% per annum and a maximum loss of 2% per annum, in each case compounded annually from the date of purchase until the date of refund or at any time following the death of the designated Beneficiary. A refund right exists at all times from the first anniversary of the purchase of a Tuition Certificate until its redemption. The amount of the refund may vary over time, and, depending on how the refunded cash is used, may be coupled with a 10% tax penalty. Thus, there is no obligation of repayment at a fixed or determinable future date which is necessary to constitute a note or indebtedness.

Also, even if the Tuition Certificate were technically viewed as a "note" or "indebtedness" because of the provision for refund, we do not believe that the Tuition Certificate would constitute a "security" under the Act. In the Supreme Court decision in Reves v. Ernst & Young, 494 U.S. 56 (1990), a "family resemblance" test based on the following four factors was applied to determine when a debt obligation constitutes a "security":

(1) Was the transaction motivated by an investment purpose or by another commercial purpose?

The purchase of a Tuition Certificate is motivated by a desire to acquire educational services and not to obtain an investment return based on the limited refund feature of the arrangement. As discussed above, a refund adjustment of, at the most, a 2% rate of return per annum, potentially coupled with a tax penalty, does not provide a basis for a reasonable expectation of profit to an investor.

(2) Was the distribution used in offering and selling the contract indicative of investment or speculation?

Prepayment of tuition under the Plan will not involve distribution similar to sales of investment securities, since it will not be offered for sale based on commission or other similar arrangements through investment dealers. The primary methods of distribution will be direct mail and advertising similar to state-sponsored prepaid tuition plans. Marketing materials will disclose the existence of the refund feature, but will not indicate that a purchase of Tuition Certificates is an investment opportunity. Tuition Certificates will be marketed as a means to prepay tuition.

(3) Does the investing public generally perceive the transaction as an investment opportunity?

In recent years several state-sponsored prepaid tuition plans have been offered for public purchase. The investing public has not treated prepaid tuition contracts as an investment opportunity. These contracts are not freely transferable nor can they provide reasonable economic benefit except through the use and consumption of the purchased educational services. Refunds under existing state-sponsored prepaid tuition plans have typically involved significant earnings penalties which preclude investor interest from developing in such contracts. The 10% excise tax required under IRC Section 529, coupled with the lack of meaningful investment return on Tuition Certificates upon refund, would have the same effect.

(4) Is there a parallel regulatory scheme which significantly reduces the risk of prepaid tuition contracts making protection of the securities laws unnecessary?

Prepaid tuition contracts are economically viable only if the prepayment does not give rise to taxable investment income. Tax exemption for these plans has been extended by Congress in IRC Section 529 only in specific circumstances which render the prepayments unacceptable as investment securities. For example, (a) the tax-free benefit is not freely transferable among Beneficiaries, (b) the plans cannot involve self-directed accounts, (c) any earnings upon refund are generally subject to an additional 10% tax, unless the refund is used to pay Qualified Expenses (unless made after death or disability of the Beneficiary or as a result of a scholarship), (d) contributed amounts cannot exceed amounts necessary for Qualified Expenses and (e) educational institutions may not sponsor tuition savings plans whose goal is to generate an investment return; rather, they are limited to sponsoring prepaid tuition plans, which guarantee a fixed amount of services and put all investment risk and reward on the Participating Institutions.

The IRS is statutorily authorized to exercise oversight over the Plan. The Plan has received a ruling from the IRS regarding its qualification under IRC Section 529 and will operate within the parameters of IRC Section 529. In addition, the IRS has indicated that it will require the Plan to make annual filings with the IRS,⁹ and the IRS will have the authority to audit the Plan for compliance with IRC Section 529. Thus, we believe there is no need for further regulation of these contracts under the federal or state securities laws.¹⁰

For the reasons stated above, we respectfully request that you concur with our conclusion (as did the SEC under the Securities Act) that registration of the Tuition Certificates under the securities act of your state is not required and/or not necessary for the protection of public investors in your state.

Should you have any questions or comments regarding this request, please feel free to contact the undersigned at (608) 258-4215, or Ann Recob at (608) 258-4279. We respectfully request the opportunity for a conference in advance of any adverse determination. Please acknowledge receipt of this filing by date-stamping the enclosed additional copy of this letter and returning it in the enclosed pre-addressed, stamped envelope.

A check in the amount of \$120 representing your fee for this request is enclosed. In addition, TPC offers the following:

1. We hereby certify on behalf of TPC that to their knowledge and belief, the transaction described in this request is not directly or indirectly the subject of any pending or final judicial, SRO or administrative proceeding.

2. We hereby certify on behalf of TPC that the transaction described in this request has not been commenced.

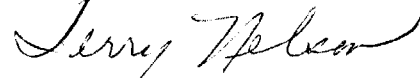
⁹ The forms have not yet been finalized, but we expect them to be similar to the existing Form 990 for IRC Section 501(c)(3) entities. These forms are expected to be publicly available after filing.

¹⁰ In Teamsters v. Daniel, 439 U.S. 551 (1979), the Supreme Court recognized that regulation of pension obligations by the IRC, which set the substantive terms of the plans and their funding and eligibility requirements, indicated a Congressional intent to regulate pension plans in this manner and not under the securities laws.

Mr. S. Anthony Taggart
April 17, 2003
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Thank you for your consideration of these matters.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Terry Nelson".

Terry D. Nelson

Enclosures

cc: Michael A. Indenbaum, Esq.
Abby L. Ingber, Esq.