

(f) Not less frequently than quarterly, the independent fiduciary will perform periodic reviews to ensure that the services offered by the Service Providers remain appropriate for the Service Providers and that the fees charged by the Service Providers represent reasonable compensation for such services;

(g) Not less frequently than annually, the Service Providers will provide a written report to the board of directors of the Fund describing in detail the services provided to the Plans, the Employers, the IRAs, and the Thrift Plan, a detailed accounting of the fees received for such services, and an estimate as to the amount of fees the Service Providers expect to receive during the following year from such Plans and Employers;

(h) Not less frequently than annually, the independent fiduciary will conduct a detailed review of approximately 10 percent of all transactions completed by the Service Providers which will include a reasonable cross-section of all services performed; such transactions will be reviewed for compliance with the terms and conditions of this exemption;

(i) The financial statements of the Service Providers will be audited each year by an independent certified public accountant, and such audited statements will be reviewed by the independent fiduciary;

(j) The independent fiduciary shall have the authority to prohibit the Service Providers from performing services that such fiduciary deems inappropriate and not in the best interests of the Service Providers and the Fund;

(k) Each Service Provider contract with an Employer, an IRA, the Thrift Plan or a Plan will be subject to termination without penalty by any of the parties to the contract for any reason upon reasonable written notice;

(l) Trustco will act solely as a directed trustee and will not:

(1) Have any investment discretion with respect to the assets being held in trust,

(2) Engage in any securities lending transactions, and/or

(3) Provide any cash management services; and

(m) A majority of the Board of Directors of the Thrift Plan will at all times be independent of, and separate from, the Board of Directors of the Fund, the Board of Directors of Pentegra, and the Board of Directors of Trustco, and, with respect to the selection of Trustco and/or Pentegra as provider(s) of services to the Thrift Plan:

(1) Such majority members alone will give prior approval upon determining that such services are necessary and the associated fees charged are reasonable; and

(2) Any member of the Board of Directors of the Thrift Plan contemporaneously participating as a member of the Board of Directors of Pentegra (Trustco) will remove himself or herself from all consideration by the Thrift Plan regarding the provision of services by Trustco (Pentegra) to the Thrift Plan and will not otherwise exercise, with respect to such provision(s) of services, any of the authority, control or responsibility which makes him or her a fiduciary.

#### *Section II. Recordkeeping*

(1) The independent fiduciary and the Fund will maintain, or cause to be maintained, for a period of 6 years, the records necessary to enable the persons described in paragraph (2) of this section to determine whether the conditions of this exemption have been met, except that: (a) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the independent fiduciary and the Fund, or their agents, the records are lost or destroyed before the end of the six year period; and (b) no party in interest other than the independent fiduciary and the Board of Directors of the Fund shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (2) below.

(2)(a) Except as provided in section (b) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (1) of this section shall be unconditionally available at their customary location during normal business hours by:

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

(2) Any employer participating in the Fund and/or Thrift Plan or any duly authorized employee or representative of such employer;

(3) Any participant or beneficiary of the Fund, Thrift Plan, or Plan or any duly authorized representative of such participant or beneficiary; and

(4) Any individual;

(b) None of the persons described above in subparagraphs (a)(2) and (a)(3) of this paragraph (2) shall be authorized to examine trade secrets of the

independent fiduciary or the Fund, or their affiliates, or commercial or financial information which is privileged or confidential.

(3) For purposes of this section, references to the Fund shall also include the Service Providers.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the application change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption and PTE 95-31 which are cited above.

**Ivan L. Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. L-11348]

#### Notice of Proposed Individual Exemption Involving Kaiser Aluminum Corporation and Its Subsidiaries (Together, Kaiser) Located in Foothill Ranch, CA

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed individual exemption.

This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act or ERISA).<sup>1</sup> If granted, the proposed exemption would permit, effective July 6, 2006, (1) the

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<sup>1</sup> Because the VEBAs are not qualified under section 401 of the Internal Revenue Code of 1986, as amended (the Code) there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, there is jurisdiction under Title I of the Act.

acquisition by the VEBA for Retirees of Kaiser Aluminum (the Hourly VEBA) and by the Kaiser Aluminum Salaried Retirees VEBA (the Salaried VEBA; together, the VEBAs) of certain publicly traded common stock issued by Kaiser (the Stock or the Shares), through an in-kind contribution to the VEBAs by Kaiser of such Stock, for the purpose of prefunding VEBA welfare benefits; (2) the holding by the VEBAs of such Stock acquired pursuant to the contribution; and (3) the management of the Shares, including their voting and disposition, by an independent fiduciary (the Independent Fiduciary) designated to represent the interests of each VEBA with respect to the transactions. The proposed exemption, if granted, would affect the VEBAs and their participants and beneficiaries.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of July 6, 2006.

**DATES:** Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department by November 21, 2006.

**ADDRESS:** All written comments and requests for a public hearing concerning the proposed exemption should be sent to the Office of Exemptions

Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D-11348. Alternatively, interested persons are invited to submit comments or hearing requests to the Department by e-mail to [chuksorji.blessed@dol.gov](mailto:chuksorji.blessed@dol.gov) or by facsimile at (202) 219-0204.

The application pertaining to the proposed exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Blessed Chuksorji, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8567. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This document contains a notice of proposed individual exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of the Act. The proposed exemption has been requested in an application filed by Kaiser pursuant to section 408(a) of the Act, and in accordance with the procedures set forth in 29 CFR part

2570, Subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is being issued solely by the Department.

### Summary of Facts and Representations

#### The Applicant

1. Kaiser is a U.S. manufacturer and distributor of fabricated aluminum products. Kaiser's fabricated products business, which operates 11 facilities, is a leading producer of rolled, extruded, drawn and forged aluminum products, serving market segments with a variety of transportation and industrial end uses. Kaiser has approximately 2,300 employees in the United States, of which approximately 1,134 are represented by the (USW)<sup>2</sup> and other unions (collectively, the Unions). As of June 30, 2006, Kaiser had total assets of \$1,579,900,000. Kaiser maintains its headquarters in Foothill Ranch, California.

#### The Bankruptcy Proceedings and Kaiser's Negotiations

2. On February 12, 2002, Kaiser and certain affiliates filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code (the Bankruptcy Code). Additional affiliates filed for similar relief on March 15, 2002 and its remaining domestic affiliates filed on January 14, 2003. The Chapter 11 cases were consolidated for procedural purposes only, and were administered jointly in the United States District Court for the District of Delaware (the Bankruptcy Court). On July 6, 2006, Kaiser emerged from bankruptcy.<sup>3</sup>

3. Kaiser explains that its ability to emerge from bankruptcy was dependent on the achievement of a number of interrelated agreements among its creditors, lenders, interested government agencies, and employees. Kaiser indicates that the negotiation of modifications to the collective bargaining agreements with the Unions was important to its successful reorganization. A key issue in these

<sup>2</sup> The USW is the result of a merger that took effect April 12, 2005, between the Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CLC (PACE) and the United Steelworkers of America AFL-CIO-CLC (USWA). The resulting union is known as the USW.

<sup>3</sup> Following its emergence from bankruptcy, Kaiser retains a 49% interest in Anglesey, a United Kingdom corporation that owns and operates an aluminum smelter in Holyhead, Wales.

negotiations was the extent to which Kaiser could restructure retiree benefit obligations in order to emerge as a viable entity. As a result, Kaiser began negotiations with the International Association of Machinists and Aerospace Workers (IAM), the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), the International Chemical Workers Union Council—United Food & Commercial Workers (ICWU), PACE, the USW (collectively, Unions) and a committee of five former Kaiser executives (the Salaried Committee) appointed pursuant to the Bankruptcy Code as authorized representatives of current and future salaried retirees.

These series of negotiations culminated in agreements to terminate existing retiree welfare arrangements and establish the VEBAs described herein. Kaiser, the Unions, and the respective Veba Committees recognized that terminating the existing retiree welfare arrangements and establishing the VEBAs was the only viable alternative for funding future welfare benefits for current and certain future retirees. Therefore, all legacy retiree welfare benefit obligations were discharged as of May 31, 2004, in connection with the Bankruptcy Court order issued on June 1, 2004.

#### The Hourly Veba

4. Pursuant to the Hourly Settlement Agreement, Kaiser and the Unions created the Board of Trustees of the Hourly Veba (the Hourly Board)<sup>4</sup> to implement new retiree medical arrangements through the establishment of the Hourly Trust, which in turn funds benefits provided under the Hourly Plan. Together, the Hourly Trust and the Hourly Plan comprise the Hourly Veba,<sup>5</sup> which was established as of June 1, 2004 through a series of court orders. National City Bank, located in Pittsburgh, Pennsylvania, serves as the Hourly Veba's trustee (the Hourly Trustee).

<sup>4</sup> Kaiser explains that the Hourly Board was established pursuant to the Hourly Settlement Agreement and consists of four individuals, two appointed by Kaiser and two appointed by the USW. The members serve until death, incapacity, resignation or removal by unanimous vote of the remaining members as set forth in the Hourly Trust Agreement, Section 9.3. In addition, both Kaiser and the USW have the power to remove and replace the Hourly Board members it appoints at any time.

<sup>5</sup> Kaiser represents that the Hourly Veba was negotiated to provide medical benefits for current and future retirees who had worked under union-negotiated collective bargaining agreements and who previously had been entitled to medical coverage under plans maintained by Kaiser that were terminated during the bankruptcy proceedings.

The Hourly VEBA is sponsored by the Hourly Board. The Hourly Board is also the Hourly VEBA's named fiduciary and plan administrator. In this regard, the Hourly Board determines the benefits to be provided under the Hourly Plan, including, without limitation, which participants are eligible to receive benefits, in what form, and in what amount, and the contributions (if any) that the participants are required to make to help defray the cost of their coverage. In addition, the Hourly Board may retain independent professional service providers that it deems necessary and appropriate to administer the Hourly VEBA. The Hourly Board receives no compensation from the Hourly VEBA. Kaiser's obligation to contribute to the Hourly VEBA will terminate in 2012. As of July 31, 2006, the Hourly VEBA had 7,120 participants. Also, as of July 31, 2006, the Hourly VEBA had assets of \$102,338,684.35.

#### *The Salaried VEBA*

5. In January 2004, Kaiser and the Salaried Committee<sup>6</sup> reached and entered into the Salaried Settlement Agreement, which provided for the creation of the Salaried VEBA. The Salaried Committee chose to form a separate VEBA for the benefit of eligible salaried retirees in order for them to receive partial recompense from Kaiser for the termination of their retiree benefits, rather than to participate in a single VEBA with the Unions. The Salaried VEBA is comprised of a trust, the Salaried Trust, and a plan, the Salaried Plan. The Salaried Trust is the funding vehicle for the Salaried Plan and together, these form the Salaried VEBA.

On May 31, 2004, the Salaried Trust was formed under a Trust Agreement entered into between the Salaried Board, consisting of three salaried retired employees of Kaiser and Union Bank of California, N.A., the Salaried Trustee. On this same date, the Salaried Board adopted the Salaried Plan. The Salaried Trust was formed to hold and distribute trust fund assets in the form of retiree benefits to eligible salaried retirees of Kaiser and their spouses and dependents. The Salaried Plan was formed for the purpose of providing retiree benefits. The Salaried Board is the named fiduciary for the Salaried VEBA. Kaiser states that the Salaried VEBA is intended to qualify as a medical reimbursement plan within the

meaning of section 105 of the Code and an employee welfare benefit plan within the meaning of section of 3(1) of the Act. The Salaried Board is both the sponsor and administrator of the Salaried VEBA. Kaiser is obligated to make certain cash contributions to the Salaried Trust and to pay a certain portion of the Salaried VEBA's administrative costs.<sup>7</sup>

The Salaried Trustee receives all cash contributions on behalf of the Salaried Trust. In turn, the Salaried Trustee, at the direction of the Salaried Board, invests the proceeds, disburses funds to cover the creation and administrative costs of both the Salaried Trust and the Salaried Plan, and disburses funds to pay benefits, if and when the benefits are distributed under the Salaried Plan. Kaiser explains that the Salaried Board has engaged a professional employee benefits plan administrator to carry out a majority of the tasks associated with the day-to-day administration of the Salaried Plan.

As of December 31, 2005, the Salaried VEBA had 4,117 participants. As of August 23, 2006, the Salaried VEBA had \$77,901,362.49 in assets.

#### *Funding Arrangements for the VEBAs*

6. Under the terms of the Hourly Settlement Agreement and the Salaried Settlement Agreement, Kaiser agreed to fund the Hourly Trust and the Salaried Trust, which would, in turn, fund benefits provided by the Hourly Plan and the Salaried Plan through (a) in-kind contributions of Stock, (b) cash contributions in fixed amounts, and (c) profit sharing pool contributions.

(a)(1) *Contribution of Stock to the Hourly VEBA.* On July 7, 2006, Kaiser issued 8,809,000 shares of its common stock to the Hourly Trust.<sup>8</sup> This Stock contribution represented 44% of Kaiser's fully diluted common equity. The Shares contributed to the Hourly Trust are subject to provisions in the Stock Transfer Restriction Agreement and the Registration Rights Agreement, each of which is discussed below.

<sup>7</sup> Under the Salaried Settlement Agreement, Kaiser states it is obligated to reimburse one-half of the Salaried VEBA's administrative expenses, not to exceed \$36,250.

<sup>8</sup> The Hourly VEBA was entitled to receive 11,439,900 Shares (representing a 57.2% ownership interest in Kaiser) but sold, pursuant to procedures approved by the Bankruptcy Court, rights to 2,630,000 of such Shares to unrelated third parties in pre-emergence sales. For purposes of the percentage limitations contained in the Stock Transfer Restriction Agreement described below, and unless Kaiser later agrees otherwise or the IRS rules that these pre-emergence sales do not count as sales on or after the Effective Date for purposes of preserving net operating loss carryovers, the pre-emergence sales are treated as if they occurred on or after the Effective Date.

The Stock Transfer Restriction Agreement, which was executed by and between Kaiser and the Hourly Trustee and assented to and acknowledged by the Hourly Independent Fiduciary, provides that, during the ten-year period commencing on the Effective Date (i.e., July 6, 2006), the Hourly Trustee is prohibited from disposing of any of the Shares, unless at the time of the disposition, the number of Shares to be included in the transfer, together with all such Shares included in other transfers by the Hourly Trust that have occurred during the 12 months preceding the transfer, is not more than 15% of the total number of Shares received by the Hourly Trust pursuant to the Plan of Reorganization (except, at the outset, larger amounts of Shares may be permitted to be sold in specified transactions). However, Kaiser's Board of Directors may, but is not required to, allow dispositions by the Hourly Trustee that would otherwise violate this restriction.

The principal purpose of the Stock Transfer Restriction Agreement is to assure that Kaiser's net operating loss carryovers (the NOLs) will continue to be available to Kaiser without limitation following its emergence from bankruptcy. The NOLs will enable Kaiser to operate without an excessive tax burden for a number of years.<sup>9</sup> In order to preserve the full value of the NOLs, Kaiser must not undergo another change of ownership following the Effective Date while the NOLs are still available for use by Kaiser.

The Registration Rights Agreement, which was executed by and between Kaiser and the Hourly Trustee and assented to and acknowledged by the Independent Fiduciary for the Hourly VEBA (the Hourly Independent Fiduciary) on the Effective Date, provides generally that, during the period commencing on July 6, 2006 and ending March 31, 2007, the Hourly Trustee may request (and shall request if the Hourly Independent Fiduciary directs) that Kaiser effect a registration under the Securities Exchange Act of 1933 to permit the resale of a portion of the Shares held by the Hourly Trustee in an underwritten public offering meeting specified requirements and that, at any time following March 31, 2007, the Hourly Trustee may request (and shall request if the Hourly Independent Fiduciary directs) that Kaiser effect a registration to permit the

<sup>9</sup> In the Disclosure Statement related to Kaiser's Plan of Reorganization, the present value of the estimated tax savings from the NOLs was estimated at approximately \$65 million to \$85 million.

<sup>6</sup> The Salaried Committee was dissolved effective July 6, 2006. Its members consisted of five former executives of Kaiser who served without compensation.

resale of the Shares held by the Hourly Trust on a continuous basis.

(a)(2) *Contribution of Stock to the Salaried VEBA.* On July 6, 2006, Kaiser issued 999,867 shares of its common stock to the Salaried Trust.<sup>10</sup> This Stock contribution represented slightly less than 5% of Kaiser's fully diluted common equity.

(b) *Cash Contributions.* After an initial one-time contribution to the Trusts of \$1.2 million in cash in June 2004 and continuing until its emergence from bankruptcy, Kaiser contributed cash to the Trusts at the rate of \$1.9 million per month, with the initial and monthly cash contributions to the Trusts aggregating \$48.7 million as of the Effective Date. These cash contributions were credited against \$36 million in cash due to the Trusts on the Effective Date and will be credited against the first approximately \$12.7 million of variable cash contributions that Kaiser is obligated to make to the Trusts from the profit sharing pool described below.

Of the \$48.7 million of cash contributions made to the Trusts prior to the Effective Date, \$41.0 million was contributed to the Hourly Trust and \$7.7 million was contributed to the Salaried Trust. In addition, Kaiser made a one-time contribution to the Hourly Trust of \$1 million in cash on March 31, 2005; such cash contribution has not been and will not be credited against any of Kaiser's obligations to contribute additional cash to the Hourly Trust. Any variable cash contributions from the profit sharing pool described below will be made 85.5% to the Hourly Trust and 14.5% to the Salaried Trust.

(c) *Profit Sharing Pool.* Following the Effective Date, Kaiser established a profit sharing pool (the Pool) and, subject to the \$12.7 million credit described above, is required to distribute the Pool, if any, for a fiscal year on the earlier of 120 days following the end of the fiscal year or 15 days after Kaiser files the Annual Report on Form 10-K for the fiscal year with the SEC (or, if no such report is required to be filed, within 15 days of the delivery of the independent auditor's opinion of Kaiser's annual financial statements for the fiscal year). The Pool, if any, for a fiscal year will be 10% of the first \$20 million of adjusted pre-tax profit, plus 20% of adjusted pre-tax profit in excess of \$20 million, provided that the Pool will not exceed \$20 million and the Pool will be limited (with no carryover

to future years) to the extent that the Pool would cause Kaiser's liquidity to be less than \$50 million. As indicated above, the Pool, if any, will be distributed 85.5% to the Hourly Trust and 14.5% to the Salaried Trust.

#### *The Stock Valuation*

7. Based on a valuation analysis performed by Lazard Frerès & Co., LLC (Lazard), an independent financial adviser and an investment banker located in New York, New York, Kaiser's reorganized value (the Reorganized Value) was estimated to be approximately \$395 million to \$470 million, with a midpoint of approximately \$430 million as of September 30, 2005.

The Reorganized Value consisted of the theoretical enterprise value of Kaiser, plus excess cash and other non-operating cash flows and assets. Lazard estimated the Reorganized Value as of September 30, 2005, under the assumption that the Reorganized Value would not change materially through the assumed Effective Date of December 31, 2005.

The imputed reorganized equity value (the Equity Value) of Kaiser, which took into account estimated debt balances and other obligations as of the assumed Effective Date, was estimated to range from approximately \$340 million to \$415 million, with a midpoint of approximately \$380 million. Based on the imputed range on this Effective Date, the Equity Value per share of the Stock was estimated to be approximately \$17.00 to \$20.75, with a midpoint of approximately \$19.00.

Thus, the estimated Equity Value of the 11,439,900 Shares of Kaiser common stock that were originally to be contributed to the Hourly VEBA before the pre-emergence sales had an estimated value of between \$194.5 million and \$237.4 million, with a midpoint of \$217.4 million. With respect to the Salaried VEBA, the 1,940,000 Shares of Kaiser common stock that were originally to be contributed to such VEBA before the pre-emergence sales had an estimated value of between \$33 million and \$40.3 million, with a midpoint of \$36.9 million.

In preparing its estimate of the Reorganized Value of Kaiser, Lazard: (a) Reviewed historical financial information concerning Kaiser; (b) reviewed internal financial and operating data regarding Kaiser and financial projections relating to Kaiser's business and prospects; and (c) met with certain members of the senior management of Kaiser to discuss Kaiser's operations and future

prospects. Although Lazard conducted a review and analysis of Kaiser's businesses, operating assets and liabilities, and business plans, Lazard assumed and relied on the accuracy and completeness of the information furnished to it by Kaiser and by other firms retained by Kaiser as well as publicly-available information.

In preparing its valuation analysis of Kaiser, Lazard analyzed the enterprise values of public companies that it deemed to be generally comparable to the operating businesses of Kaiser. In addition, Lazard utilized a discounted cash flow approach in which it computed the present value of Kaiser's free cash flows and terminal value. Further, Lazard analyzed the financial terms of certain acquisitions of companies that it believed were comparable to the operating businesses of Kaiser.

#### *Administrative Exemptive Relief*

8. Accordingly, Kaiser requests an administrative exemption from the Department with respect to: (1) The past contribution and the acquisition by the VEBAs of the Shares; (2) the holding by the VEBAs of such Shares acquired pursuant to the contributions; and (3) the management of the Shares by an Independent Fiduciary. Kaiser explains that the contribution of the Shares to the Hourly and Salaried Trusts would violate sections 406(a)(1)(E), 406(a)(2), and 407(a) of the Act.

Section 406(a)(1)(E) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect "acquisition, on behalf of the plan, of any employer security \* \* \* in violation of Section 407(a)." Section 406(a)(2) of the Act prohibits a fiduciary who has authority or discretionary control of plan assets to permit the plan to hold any employer security if he knows or should know that holding such security violates

Section 407(a). Section 407(a)(1) of the Act states that a plan may not acquire or hold any employer security which is not a qualifying employer security. Section 407(a)(2) of the Act states that a plan may not acquire any qualifying employer security, if immediately after such acquisition the aggregate fair market value of the employer securities held by the plan exceeds 10% of the fair market value of the assets of the plan.

Section 407(d)(5) of the Act defines the term "qualifying employer security" to mean an employer security which is a stock, a marketable obligation, or an interest in certain publicly traded partnerships. After December 17, 1987,

<sup>10</sup> The Salaried VEBA was entitled to receive 1,940,000 Shares (representing a 9.7% ownership interest in Kaiser) but sold, pursuant to procedures approved by the Bankruptcy Court, rights to 940,233 of such Shares to unrelated third parties in pre-emergence sales.

in the case of a plan, other than an eligible individual account plan, an employer security will be considered a qualifying employer security only if such employer security satisfies the requirements of section 407(f)(1) of the Act. Section 407(f)(1) of the Act states that stock satisfies the requirements of this paragraph if, immediately following the acquisition of such stock no more than 25% of the aggregate amount of the same class issued and outstanding at the time of acquisition is held by the plan, and at least 50% of the aggregate amount of such stock is held by persons independent of the issuer.

In this regard, Kaiser represents that the Stock held by the Trusts would not comply with the requirements of section 407(f)(1) of the Act, because at least 50% of the Shares would not be held by persons "independent of Kaiser," and, in the case of the Hourly Trust, more than 25% of the Shares issued and outstanding would be held by the Hourly Trust immediately after their acquisition. In addition, even if the Shares constituted qualifying employer securities as provided in section 407(d)(5) of the Act, Kaiser states that the contribution of the Shares would cause each of the Trusts to exceed the 10% assets limitation under section 407(a)(2) of the Act.

If granted, the exemption would be effective as of July 6, 2006.

#### Rationale for Exemptive Relief

9. Without an administrative exemption, Kaiser states that it would have contributed the maximum number of Shares allowable under sections 406 and 407 of the Act to the VEBAs, which in turn could retain the Shares for the purpose of providing retiree welfare benefits. Kaiser explains that because of the 10% asset limitation imposed by section 407(a)(2), it is likely that very few Shares would be contributed to the Trusts. In this event, Kaiser represents that it would have been necessary to develop a new agreement or an alternative means of utilizing the Shares for the exclusive benefit of participants and beneficiaries of the Trusts. As a result, Kaiser explains that this would have unwound the Agreements already reached with the Unions, the Hourly Board and the Salaried Committee. Kaiser represents that the chain of events that this would set into effect would have jeopardized Kaiser's ability to reorganize and would have rendered Kaiser unable to make any contributions to fund health benefits for its retirees.

Lastly, Kaiser states that the Trustees would have had no choice but to amend the Trusts to provide for a distribution of Shares to the beneficiaries of both

Trusts. Kaiser notes that this would be extremely difficult to accomplish in the case of the uncertain number of future retirees whose eligibility for future benefits depends upon the length of credited service with Kaiser at the time they eventually retire or terminate their employment. Furthermore, Kaiser states that if the Shares were distributed in kind, each covered retiree would have received a relatively small number of Shares, which would be fully taxable upon receipt. Kaiser explains that retirees would likely sell at least some of the Shares upon receipt to cover their tax liability. If this occurred, Kaiser indicates that the resultant selling pressure would likely adversely affect the market, so that the sale price for the Shares would be less than their economic value. Finally, Kaiser explains that individual retirees would not be able to manage the Shares and replicate for themselves the benefits provided for under the terms of the VEBAs.<sup>11</sup>

#### Independent Fiduciary for the Hourly VEBA

10. (a) *Duties and Responsibilities.* Pursuant to the Plan of Reorganization, on October 6, 2005, the Hourly Board entered into the Hourly Independent Fiduciary Agreement with IFS of Washington, DC, to serve as the Hourly VEBA's Independent Fiduciary. (The Department's views on the duties of the Independent Fiduciary are presented in Representation 12). IFS is a wholly owned Delaware corporation with no subsidiaries or affiliates. IFS engages in structuring and monitoring pension and welfare fund investment programs and fiduciary decision-making on behalf of such funds. IFS represents that it is independent from Kaiser, the USW, the Hourly Board and the Hourly Trustee. Prior to its retention by the Hourly Board to serve as the Hourly Independent Fiduciary, IFS states that it had no previous relationship with Kaiser or any of its benefit plans or with any of the other parties who will have fiduciary responsibilities to the Hourly Plan in connection with the transactions described herein. IFS is engaged, and has been in the past engaged, to provide investment consulting services to employee benefit plans covering members of one or more of the Unions. However, IFS states that none of these engagements has or had any relationship to the covered transactions.

Under the terms of the Hourly Independent Fiduciary Agreement, IFS'

duties with respect to the Stock contribution include or have included: (a) Conducting a due diligence review of the transactions for which exemptive relief has been requested; (b) negotiating additional or different terms on behalf of the Hourly VEBA, as appropriate, in connection with Kaiser's application for exemptive relief; (c) determining whether the Hourly VEBA should participate in the transactions; (d) furnishing the Department a statement outlining such determinations and the rationale; (e) effecting the transactions by directing National City Bank, the institutional trustee, to accept and maintain the Shares on behalf of the Hourly VEBA in accordance with the relevant terms of the Plan of Reorganization, issued by the Bankruptcy Court; (f) arranging for periodic valuations of the Shares that have been contributed to the Hourly VEBA, including the selection and retention of (i) the valuation firm to perform such services, or (ii) upon IFS' advice to the Hourly Trustees, a financial advisory firm (which may be the same firm as the valuation firm) to evaluate the merits of a merger, acquisition, or tender offer affecting the value of such Shares; (g) directing the Hourly Trustee to demand that Kaiser prepare and file with the SEC a "shelf" registration statement covering the resale of the Shares or to permit the Hourly VEBA to sell the Shares without registration pursuant to Rule 144 under the 1933 Securities Act or otherwise; and (h) managing the Shares that have been contributed to the Hourly VEBA, including the authority to direct the Hourly Trustee as to the voting of the Shares and as to the effecting of any purchase, sale, exchange, or liquidation of the Shares.

(b) *Views about the Transactions.* IFS believes that the transactions were in the best interests of the Hourly VEBA's participants and beneficiaries and protective of their interests because a retiree welfare plan that is funded primarily with company stock is preferable to a plan that is unfunded and preferable to no plan at all. IFS states its determination on whether to acquire the Shares was consistent with its fiduciary obligations since management of the Shares would be in its sole discretion.

Since being hired as the Hourly Independent Fiduciary, IFS states that it has been instrumental in several changes in the terms of the Plan and the VEBA Trust that protect the interest of the Hourly Plan's participants. Among these are clarifications to the Registration Rights Agreement regarding the circumstances under which Kaiser

<sup>11</sup> The Department expresses no opinion on the application of ERISA's prohibited transaction restrictions to the alternate uses of the Shares as described above.

would be required to accede to IFS' demand for an underwritten offering, and amendments to the Summary Plan Description and the VEBA Trust Agreement to clarify that the Plan's benefit obligation would be conditioned on available cash and that no fiduciary or other person would be required to liquidate any plan asset to generate cash. In IFS' view, both of these changes would reduce the likelihood that the Shares would be liquidated at an inopportune time in terms of price or market effect. In addition, IFS states that it sought and obtained approval from the Hourly Board to hire professionals that might be needed in the execution of IFS' responsibilities. Finally, IFS anticipates that it would implement a program to liquidate the Hourly Plan's holdings of the Shares over time to generate cash for the payment of benefits under the Hourly Plan and to diversify the Hourly Plan's investment assets.

(c) *Pricing of the Hourly VEBA's Shares.* IFS retained an independent corporate valuator, Empire Valuation Consultants (Empire), to advise IFS in valuing the Shares that were to be contributed. In this regard, Empire analyzed Lazard's estimate and on April 12, 2006, completed a preliminary analysis of Kaiser's financial information in light of the current and projected economic and industry climates, using the discounted cash flow method and the guideline company method, to reach an estimate of the fair market value of Kaiser (and thereby of the Shares that were to be contributed to the Hourly VEBA). This preliminary analysis was updated in a valuation report prepared by Empire on August 18, 2006<sup>12</sup> to reflect the fair market value of the Stock owned by the Hourly VEBA. The Hourly VEBA received its 8,809,000 Shares as of July 7, 2006. Empire placed the fair market value of such Stock at \$36.50 per Share as of July 7, 2006. The update also took into account the restrictions on marketability under the Stock Transfer Restriction Agreement and other benefits or detriments placed on the Hourly VEBA's Shares. In the interim, the market-driven sales of pre-emergence Shares described above provided a benchmark for assessing the value of the Shares to which the Hourly VEBA was eventually entitled on July 7, 2006.

IFS, with its advisers, continued to monitor Kaiser's financial status to determine whether additional steps

<sup>12</sup> Kaiser represents that the Stock was not listed on the Effective Date. Kaiser explains that the Stock did not begin to trade until the next day, July 7, 2006.

were needed to value the Shares as of the Effective Date. Thus, on July 7, 2006, the Stock was listed on the NASDAQ exchange at an opening value of \$45.00 per share.<sup>13</sup> At such time as IFS concludes that a sufficient market exists for the Shares, it is anticipated that the NASDAQ trading price will constitute a helpful reference point for determining the fair market value of the Shares held by the Hourly VEBA. However, while the Hourly VEBA continues to hold Shares constituting a large proportion of the Stock, IFS may determine to apply a control premium, blockage discount, marketability or liquidity discount (owing to the restrictions in the Stock Transfer Restriction Agreement) or other appropriate adjustments to the NASDAQ trading price of the Shares.

(c) *Views on the Stock Transfer Restriction Agreement and the Registration Rights Agreement.* IFS explains that although the Stock Transfer Restriction Agreement and the Registration Rights Agreement circumscribe its discretion, the limitations imposed therein are designed to help assure an orderly market for the Shares and to prevent the loss of Kaiser's NOLs. IFS explains that preserving these tax credits would ease the tax burden on Kaiser thereby enhancing Kaiser's ability to meet its cash obligations, including its obligations to the Hourly Plan, and enhancing the value of Kaiser whose Shares the Hourly Plan would own.

Concerning the Stock Transfer Restriction Agreement, IFS explains that, generally, during the ten-year period commencing on the Effective Date, the Hourly VEBA is prohibited from disposing of the Shares unless at the time of disposition, the number of such Shares to be included in the transfer, together with all such Shares included in other transfers that occurred during the 12 months preceding the transfer, is not more than 15% of the total number of Shares received by the Hourly Trust. Notwithstanding this general rule, however, IFS notes that the Hourly VEBA may sell as much as 30% of its Shares in the first year after the Effective Date, as long as it does not sell more than 45% of its Shares during the three-year period beginning on such Effective Date.<sup>14</sup>

IFS acknowledges that the maximum restriction period of ten years, pursuant to the Stock Transfer Restriction Agreement, is a long duration. However,

<sup>13</sup> On July 7, 2006, the last reported sales price for the Kaiser common stock on the NASDAQ Global Market was \$42.20.

<sup>14</sup> IFS represents that the Hourly VEBA may sell more than 15% in any year if the Kaiser Board consents.

IFS explains that the overall restriction scheme is on par with other previously granted individual exemptions and is less restrictive in some respects, due to the sales permitted.<sup>15</sup> For example, after the first few years, IFS notes that the Hourly VEBA would have had a substantial opportunity to sell the Stock on the open market. If prudent to do so, IFS further explains that the Hourly VEBA may sell 100% of its Stock in just over six years. More significantly, IFS points out that the NOLs will be forfeited if, in any rolling three-year period, a change of ownership occurs with respect to 50% or more of Kaiser's Stock.

With respect to the Registration Rights Agreement, IFS explains that between July 6, 2006 and March 31, 2007, it may direct the Hourly Trustee to demand that Kaiser effect a registration to permit the sale of a portion of the Shares held by the Hourly VEBA. At any time after March 31, 2007, IFS states it may direct the Hourly VEBA Trustee to demand that Kaiser effect a shelf registration, to permit the sale of shares on a continuous basis. IFS further represents that all expenses associated with effecting a demand or shelf registration, including piggy-back rights, will be borne by Kaiser.<sup>16</sup>

IFS states that the terms of the Registration Rights Agreement are comparable to the terms found in previously granted exemptions. For example, IFS explains that the Hourly VEBA will not need to wait five years before making a demand registration for an underwritten offering. In addition, IFS states that the Hourly VEBA will not have responsibility for the costs of effecting a demand registration. IFS further represents that the Hourly VEBA may demand a shelf registration (after the first year) that will allow it to market the Stock as rapidly as possible under the Stock Transfer Restriction Agreement. Under these circumstances, Kaiser will be responsible for paying

<sup>15</sup> For instance, IFS cites Navistar International Transportation Corporation (PTE 93-69, 58 FR 51105 (September 30, 1993)) where the Navistar plan could sell no shares at all for five years. Additionally, IFS states that in Wheeling-Pittsburgh Steel Corporation (PTE 2005-04, 70 FR 5703 (February 2, 2005)) the plan could sell no shares for two years, although the company consented to a sale near the end of the restriction period. In both cases, IFS explains that the plans after the first few years had to have essentially the same number of shares that initially had been contributed to their plans.

<sup>16</sup> The Department notes that a shelf registration is a registration of a new issue, which can be prepared up to two years in advance, so that the issue can be offered as soon as funds are needed or market conditions are available.

Piggy-back rights are the rights of an investor to register and sell his/her unregistered stock in the event that the company conducts an offering.

registration expenses, while the Hourly VEBA will be responsible for paying underwriting commissions and other selling fees.

Finally, IFS states that the Hourly VEBA may participate on a piggy-back basis if Kaiser proposes to file a registration statement, whether or not for its own account. IFS explains that if the marketability of Kaiser's offering is affected, the number of Hourly VEBA shares that may be included is generally limited.

#### *Independent Fiduciary for the Salaried VEBA*

11. (a) *Duties and Responsibilities.* Pursuant to the Plan of Reorganization, on September 6, 2005, the Salaried Board for the Salaried VEBA entered into an agreement (the Salaried Independent Fiduciary Agreement) with FCI of Washington, DC to serve as the Salaried VEBA's Independent Fiduciary. The Salaried Board determined that it was appropriate and desirable to retain the services of FCI to exercise the Salaried Trust's responsibilities and control over all matters concerning the Shares including, without limitation, control over the acquisition, holding, management and disposition of the Shares.

FCI, a Delaware corporation, explains that it is a pension consultant and investment adviser registered under the Investment Advisers Act of 1940. FCI primarily acts as an investment manager and independent fiduciary for employee benefit plans covered by the Act. FCI states that it is independent from Kaiser, the USW, the Salaried Board and the Salaried Trustee. FCI is wholly owned by eight of its employees and has no affiliates or subsidiaries. FCI explains that prior to its engagement by the Salaried Board, FCI had no previous relationship with Kaiser or any of its benefit plans or with any of the other parties who will have fiduciary responsibility to the Salaried VEBA in connection with the proposed exemptive relief from the Department.

Pursuant to the Salaried Independent Fiduciary Agreement, FCI agreed to: (a) Represent the Salaried Trust in discussions with the DOL concerning administrative exemptive relief and any administrative requirements imposed by the Department as a condition for exemptive relief; (b) issue a determination of whether the Stock contribution would be in the best interest of the Salaried VEBA and its current and future participants and beneficiaries; (c) provide documentation to the Department or satisfaction of such other conditions as may be required in connection with obtaining the requested

administrative relief; (d) manage the Shares on an ongoing basis subject to the terms and conditions of the Salaried Trust Agreement, the Salaried Independent Fiduciary Agreement, and the Department's administrative relief; (e) determine, in its sole discretion, whether and when to sell the Shares, and in what amounts, and upon such terms and conditions that would be in the best interests of the Salaried Plan and its current and future participants and beneficiaries, but subject to the restrictions contained in the Certificate of Incorporation;<sup>17</sup> and (f) vote the Shares in person or by proxy in such manner as the Independent Fiduciary deems to be in the best interests of the Salaried Plan and its current and future participants and beneficiaries on all matters brought before the holders of Kaiser common stock for a vote.

FCI states that it would represent the interests of the Salaried VEBA and its participants and beneficiaries for the duration of the administrative relief granted for acquiring and holding of the Stock and would take all necessary actions on behalf of the Plan in accordance with the terms of the Salaried Independent Fiduciary Agreement. FCI anticipates that the Salaried VEBA would implement a program to liquidate its holdings of the Shares over time with the objectives of generating cash for the payment of benefits under the Salaried VEBA and diversifying the Salaried VEBA's investment assets. Because the Shares would be freely tradable, FCI indicates that it would value the Shares at the market price. In the event the Shares are thinly-traded, FCI states that it would retain an independent firm to provide a valuation. Such valuations would then be based on either of three methodologies: (a) Comparable companies, (b) comparable transactions, or (c) discounted cash flow.

(b) *Views about the Transactions.* FCI believes that the transactions would be in the best interests of the Salaried VEBA and protective of the participants and beneficiaries of such VEBA because a retiree welfare plan that is funded primarily with Kaiser Stock is preferable to a plan that is unfunded, and preferable to no plan at all. FCI notes that Kaiser and the Salaried Committee bargained at arm's length over the extent to which Kaiser would continue its pre-

bankruptcy retiree welfare programs and the nature of the post-bankruptcy retiree welfare plans. Ultimately, FCI explains that the bargaining parties agreed that the pre-bankruptcy programs would be terminated and replaced with the Hourly VEBA and the Salaried VEBA. With respect to the Salaried VEBA, FCI further explains that Kaiser agreed to make certain cash contributions to the Salaried VEBA and to contribute a substantial number of Shares.

In addition, FCI represents that the Plan of Reorganization provides for the hiring of an independent fiduciary for the purpose of determining whether to acquire the Shares, and assuming the independent fiduciary's decision is to acquire the Shares, to manage the Shares. FCI explains that it was hired by the Salaried Board to perform these fiduciary services and that its determination to acquire the Shares would be consistent with section 404 of the Act.

FCI further represents that management of the Shares would be in its sole discretion, subject to the terms of the Salaried Trust, the Salaried Plan, the Salaried Independent Fiduciary Agreement, and the Certificate of Incorporation. FCI recognizes that while the Certificate of Incorporation limits its discretion, it explains that in its experience the limitations imposed by the Certificate of Incorporation are typical of the terms of similar transactions between unrelated parties acting at arm's length under similar circumstances to preserve the value of the NOLs of a company emerging from bankruptcy. Moreover, FCI states that preserving the NOLs would materially ease the tax burden on Kaiser following its emergence from bankruptcy, thereby enhancing Kaiser's ability to meet its cash contribution obligations, including its obligations to the Salaried VEBA. FCI explains this would enhance the value of Kaiser whose Shares the Salaried VEBA would then own.

Finally, FCI represents that administrative relief from the prohibited transaction provisions of the Act is critical to the operation of the Salaried VEBA. If the relief sought is not granted, the consequences for the Salaried VEBA's participants and beneficiaries would likely be adverse, and would have required Kaiser to distribute the Shares directly to the Salaried Plan participants and beneficiaries, thereby frustrating the benefit objectives of the Salaried VEBA and forcing the participants and beneficiaries to face adverse tax consequences.

(c) *Pricing of the Salaried VEBA's Shares.* FCI represents that the Shares received by the Salaried VEBA were

<sup>17</sup> The Salaried VEBA, like all Kaiser shareholders, will be prohibited from selling directly to a 5% shareholder (or one who would become a 5% shareholder as a result of the sale) unless Kaiser consents to the sale. This restriction, which is contained in the Certificate of Incorporation, is intended to preserve Kaiser's NOLs.

freely tradable when received on July 13, 2006, so no appraisal was necessary. The Salaried VEBA trustees were able to sell a sufficient amount of the Salaried VEBA's Shares during certain pre-emergence sales so the Salaried VEBA received less than 5 percent of the outstanding Stock and was therefore no longer subject to the NOL restrictions by the time the Stock was distributed. The Salaried VEBA received its 999,867 Shares on July 13, 2006. Union Bank of California, the custodian for the Salaried VEBA, booked the Shares at a total value of \$44,244,114.75 (or \$44.25 per Share) on the NASDAQ. FCI states that it sold 10,000 Shares on the open market that day at an average price of \$44.23 per Share.

#### *Duties of the Independent Fiduciary*

12. The Department notes that the appointment of Independent Fiduciaries to represent the interests of the Hourly and Salaried VEBAs with respect to the covered transactions described in this exemption request is a material factor in its determination to propose exemptive relief. The Department believes that it would be helpful to provide general information regarding its views on the responsibilities of an independent fiduciary in connection with the in kind contribution of property to an employee benefit plan.

As noted in the Department's Interpretive Bulletin, 29 CFR 2509.94-3(d) (59 FR 66736, December 28, 1994), apart from consideration of the prohibited transaction provisions, plan fiduciaries must determine that acceptance of an in kind contribution is consistent with the general standards of fiduciary conduct under the Act. It is the view of the Department that acceptance of an in kind contribution is a fiduciary action subject to section 404 of the Act. In this regard, section 404(a)(1)(A) and (B) of the Act requires that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses, and 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. In addition, section 404(a)(1)(C) of the Act requires that fiduciaries diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Accordingly, the fiduciaries of a plan must act "prudently," "solely in

the interest" of the plan's participants and beneficiaries, and with a view to the need to diversify plan assets when deciding whether to accept an in kind contribution. If accepting an in kind contribution is not "prudent," or not "solely in the interest" of the participants and beneficiaries of the plan, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if the contribution in kind does not constitute a prohibited transaction under section 406 of the Act.

13. In summary, Kaiser represents that the transactions have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) An Independent Fiduciary has represented and will separately represent each VEBA and its participants and beneficiaries for all purposes with respect to the Shares and has determined or will determine that each such transaction is in the interests of the VEBA it represents.

(b) The Independent Fiduciary for the Hourly VEBA has discharged or will discharge its duties consistent with the terms of the Hourly Trust, the Stock Transfer Restriction Agreement, the Certificate of Incorporation, the Registration Rights Agreement, the Hourly Independent Fiduciary Agreement, and successors to these documents.

(c) The Independent Fiduciary for the Salaried VEBA has discharged or will discharge its duties consistent with the terms of the Salaried Trust, the Certificate of Incorporation, the Salaried Independent Fiduciary Agreement, and successors to these documents.

(d) The Independent Fiduciaries have negotiated and approved or will negotiate and approve on behalf of their respective VEBAs any transactions between the VEBA and Kaiser involving the Shares that may be necessary in connection with the transactions (including but not limited to registration of the Shares contributed to the Hourly Trust).

(e) The VEBAs have not incurred or will not incur any fees, costs or other charges (other than those described in the Hourly and Salaried Trusts, the Independent Fiduciary Agreements, the Hourly Settlement Agreement, and the Salaried Settlement Agreement) as a result of any of the transactions described herein.

(f) The terms of the transactions have been and will be no less favorable to the VEBAs than terms negotiated at arm's length under similar circumstances between unrelated third parties.

(g) The Hourly Board and the Salaried Board have maintained and will maintain for a period of six years from the date any Shares are contributed to the VEBAs, the records necessary to enable certain persons, such as the Salaried Board, VEBA participants, Kaiser or any authorized employee or representative of the Department, to see whether the conditions of this exemption have been met.

#### **Notice to Interested Persons**

Notice of the proposed exemption will be provided to all interested persons by first class mail within 8 days of approval by the Department. Such notice will include a copy of the notice of proposed exemption, as well as a supplemental statement or "Summary Notice," as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on the proposed exemption and/or to request a hearing. Comments and hearing requests with respect to the notice of proposed exemption are due within 29 days of the date of approval of the notice of pendency by the Department.

#### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act;

(2) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b)(3) of the Act;

(3) Before an exemption can be granted under section 408(a) of the Act, the Department must find that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act, including statutory or administrative exemptions. Furthermore, the fact that a transaction

is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

#### **Written Comments and Hearing Requests**

All interested persons are invited to submit written comments and/or requests for a public hearing on the pending exemption to the address above, within the time frame set forth above, after the approval of this notice of pendency. All comments and hearing requests will be made a part of the record. Comments and hearing requests should state the reasons for the writer's interest in the proposed exemption. Comments and hearing requests received will also be available for public inspection with the referenced application at the address set forth above.

#### **Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990), as follows:

##### *Section I. Covered Transactions*

If the exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) of the Act shall not apply, effective July 6, 2006, to: (1) the acquisition by the VEBA for Retirees of Kaiser Aluminum (the Hourly VEBA) and by the Kaiser Aluminum Salaried Retirees VEBA (the Salaried VEBA; together, the VEBA) of certain publicly traded common stock issued by Kaiser (the Stock or the Shares), through an in-kind contribution to the VEBA by Kaiser of such Stock, for the purpose of prefunding VEBA welfare benefits; (2) the holding by the VEBA of such Stock acquired pursuant to the contributions; and (3) the management of the Shares, including their voting and disposition, by an independent fiduciary (the Independent Fiduciary) designated to represent the interests of each VEBA with respect to the transactions.

##### *Section II. Conditions*

This proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following conditions:

(a) An Independent Fiduciary has been appointed to separately represent each VEBA and its participants and

beneficiaries for all purposes related to the contributions for the duration of each VEBA's holding of the Shares and will have sole responsibility relating to the acquisition, holding, disposition, ongoing management, and voting of the Stock. The Independent Fiduciary has determined or will determine, before taking any actions regarding the Shares, that each such action or transaction is in the interests of the VEBA it represents.

(b) The Independent Fiduciary for the Hourly VEBA has discharged or will discharge its duties consistent with the terms of the Hourly Trust Agreement, the Stock Transfer Restriction Agreement, the Certificate of Incorporation, the Registration Rights Agreement, the Hourly Independent Fiduciary Agreement, and successors to these documents.

(c) The Independent Fiduciary for the Salaried VEBA has discharged or will discharge its duties consistent with the terms of the Trust Agreement between the Salaried Board of Trustees (the Salaried Board) and the Salaried Trustee (the Salaried Trust Agreement), the Certificate of Incorporation, the Salaried Independent Fiduciary Agreement, and successors to these documents.

(d) The Independent Fiduciaries have negotiated and approved or will negotiate and approve on behalf of their respective VEBA any transactions between the VEBA and Kaiser involving the Shares that may be necessary in connection with the subject transactions (including, but not limited to, registration of the Shares contributed to the Hourly Trust), as well as the ongoing management and voting of such Shares.

(e) The Independent Fiduciary has authorized or will authorize the Trustee of the respective VEBA to accept or dispose of the Shares only after such Independent Fiduciary determines, at the time of each transaction, that such transaction is feasible, in the interest of the Hourly or Salaried VEBA, and protective of the participants and beneficiaries of such VEBA.

(f) The VEBA have incurred or will incur no fees, costs or other charges (other than those described in the Hourly and Salaried Trusts, the Independent Fiduciary Agreements, the Hourly Settlement Agreement, and the Salaried Settlement Agreement) as a result of any of the transactions described herein.

(g) The terms of any transactions between the VEBA and Kaiser have been or will be no less favorable to the VEBA than terms negotiated at arm's length under similar circumstances between unrelated third parties.

(h) The Board of Trustees of the Hourly VEBA (the Hourly Board) and the Board of Trustees of the Salaried Board have maintained or will maintain for a period of six years from the date any Shares are contributed to the VEBA, any and all records necessary to enable the persons described in paragraph (i) below to determine whether conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Hourly Board and the Salaried Board, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than the Hourly Board and the Salaried Board shall be subject to the civil penalty that may be assessed under section 502(i) of the Act if the records are not maintained, or are not available for examination as required by paragraph (i) below.

(i)(1) Except as provided in section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (h) above have been or shall be unconditionally available at their customary location during normal business hours by:

(A) Any duly authorized employee or representative of the Department;

(B) The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the USW) or any duly authorized representative of the USW, and other unions or their duly authorized representatives, as to the Hourly VEBA only;

(C) The Salaried Board or any duly authorized representative of the Salaried Board, as to the Salaried VEBA only;

(D) Kaiser or any duly authorized representative of Kaiser; and

(E) Any participant or beneficiary of the VEBA, or any duly authorized representative of such participant or beneficiary, as to the VEBA in which such participant or beneficiary participates.

(2) None of the persons described above in subparagraph (1)(B), (C), or (E) of this paragraph (i) has been or shall be authorized to examine the trade secrets of Kaiser, or commercial or financial information that is privileged or confidential.

##### *Section III. Definitions*

For purposes of this proposed exemption, the term—

(a) "Certificate of Incorporation" means the certificate of incorporation of Kaiser as amended and restated as of the

Effective Date of Kaiser's Plan of Reorganization.

(b) "Effective Date" means July 6, 2006, which is also the effective date of Kaiser's Plan of Reorganization.

(c) "Hourly Board" means the Board of Trustees of the Hourly VEBA.

(d) "Hourly Independent Fiduciary Agreement" means the agreement between the Hourly Independent Fiduciary and the Hourly Board.

(e) "Hourly Settlement Agreement" means the modified collective bargaining agreements with various unions in the form of an agreement under sections 1113 and 1114 of the United States Bankruptcy Code (the Bankruptcy Code) between the USW and Kaiser.

(f) "Hourly Trust" means the trust established under the Trust Agreement between the Hourly Board and the Hourly Trustee, effective June 1, 2004.

(g) "Hourly VEBA" means "The VEBA For Retirees of Kaiser Aluminum" and its associated voluntary employees' beneficiary association trust.

(h) "Independent Fiduciary" means the Independent Fiduciary for the Hourly VEBA (or the Hourly Independent Fiduciary) and the Independent Fiduciary for the Salaried VEBA (or the Salaried Independent Fiduciary). Such Independent Fiduciary is (1) independent of and unrelated to Kaiser or its affiliates; and (2) appointed to act on behalf of the VEBAs with respect to the acquisition, holding, management, and disposition of the Shares. In this regard, the fiduciary will not be deemed to be independent of and unrelated to Kaiser if: (1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with Kaiser; (2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this proposed exemption; except that the Independent Fiduciary may receive compensation for acting as an Independent Fiduciary from Kaiser in connection with the transactions described herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision, and (3) the annual gross revenue received by the Independent Fiduciary, during any year of its engagement, from Kaiser exceeds one percent (1%) of the Independent Fiduciary's annual gross revenue from all sources (for Federal income tax purposes) for its prior tax year. Finally, the Hourly VEBA's Independent Fiduciary is Independent Fiduciary Services, Inc. (IFS), which has been

appointed by the Hourly Board; and the Salaried VEBA's Independent Fiduciary is Fiduciary Counselors Inc. (FCI), which has been appointed by the Salaried Board.

(i) "Independent Fiduciary Agreements" means the Hourly Independent Fiduciary Agreement and the Salaried Independent Fiduciary Agreement.

(j) "Kaiser" means Kaiser Aluminum Corporation and its wholly owned subsidiaries.

(k) "Registration Rights Agreement" refers to the Registration Rights Agreement between Kaiser, National City Bank, and the Pension Benefit Guaranty Corporation, acknowledged by the Hourly Independent Fiduciary with respect to management of the Stock held by the Hourly Trust.

(l) "Salaried Board" means the Board of Trustees of the Kaiser Aluminum Salaried Retirees VEBA.

(m) "Salaried Independent Fiduciary Agreement" means the agreement between the Salaried Independent Fiduciary and the Salaried Board.

(n) "Salaried Settlement Agreement" means the settlement, in the form of an agreement under section 1114 of the Bankruptcy Code, between Kaiser and a committee of five former executives of Kaiser appointed pursuant to section 1114 of the Bankruptcy Code as authorized representatives of current and future salaried retirees.

(o) "Salaried Trust" means the trust established under the Trust Agreement between the Salaried Board and the Salaried Trustee, effective May 31, 2004.

(p) "Salaried VEBA" means the Kaiser Aluminum Salaried Retirees VEBA and its associated voluntary employees' beneficiary association trust.

(q) "Shares" or "Stock" refers to shares of common stock of reorganized Kaiser, par value \$.01 per share.

(r) "Stock Transfer Restriction Agreement" means the agreement between Kaiser, National City Bank, and the PBGC, acknowledged by the Hourly Independent Fiduciary with respect to management of the Kaiser's Stock held by the Hourly Trust.

(s) "Trusts" means the Salaried Trust and the Hourly Trust.

(t) "USW" means the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

(u) "VEBA" means a voluntary employees' beneficiary association.

(v) "VEBAs" refers to the Hourly VEBA and Salaried VEBA.

The availability of this exemption is subject to the express condition that the material facts and representations

contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the applications change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

**Ivan L. Strasfeld,**

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

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## MILLENNIUM CHALLENGE CORPORATION

[MCC FR 06-16]

### Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in Fiscal Year 2007 and Countries That Would Be Candidates but for Legal Prohibitions—Update

**AGENCY:** Millennium Challenge Corporation.

**ACTION:** Notice.

**SUMMARY:** MCC is providing an update to the report originally submitted on August 11, 2006 to reflect a change in the statutory eligibility status of candidate countries.

### Report on Countries That Are Candidates for Millennium Challenge Account Eligibility for Fiscal Year 2007 and Countries That Would Be Candidates but for Legal Prohibitions—Update

MCC is providing an update to the report originally submitted on August 11, 2006 to reflect a change in the statutory eligibility status of candidate countries. This report to Congress is provided in accordance with section 608(a) of the Millennium Challenge Act of 2003, 22 U.S.C. 7701, 7707(a) ("Act").

The Act authorizes the provision of Millennium Challenge Account ("MCA") assistance to countries that enter into compacts with the United States to support policies and programs that advance the progress of such countries toward achieving lasting economic growth and poverty reduction. The Act requires the Millennium Challenge Corporation ("MCC") to take a number of steps in determining the countries that will be eligible for MCA assistance for fiscal