

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 486,724 annual burden hours associated with this collection.

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, Justice Management Division, United States Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: October 20, 2006.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2006-15; Exemption Application No. D-11039]

Grant of Individual Exemption To Amend Prohibited Transaction Exemption (PTE) 95-31 Involving the Financial Institutions Retirement Fund (the Fund) and the Financial Institutions Thrift Plan (the Thrift Plan) Located in White Plains, NY

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

ACTION: Grant of Individual Exemption to Amend PTE 95-31.

SUMMARY: This document contains a final exemption that amends PTE 95-31 (60 FR 18619, April 12, 1995), an exemption granted to the Fund and the Thrift Plan. PTE 95-31 involves the provision of certain services, and the receipt of compensation for such services, by Pentegra Services, Inc. (Pentegra), a wholly-owned, for-profit subsidiary corporation of the Fund. These transactions are described in a notice of pendency that was published in the *Federal Register* on July 3, 2002 (67 FR 44643).

EFFECTIVE DATE: This exemption is effective October 26, 2006.

FOR FURTHER INFORMATION CONTACT: Christopher Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8544. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: PTE 95-31 provides an exemption from certain prohibited transaction restrictions of

section 406(a) and 406(b)(1) and (b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1)(A) through (E) of the Code. Specifically, PTE 95-31 permits the provision of certain services, and the receipt of compensation for such services, by Pentegra to: Employers (the Employers) that participate in the Fund and the Thrift Plan; and employee benefit plans (the Plans) sponsored by such Employers. The exemption contained herein expands the scope of PTE 95-31 by permitting the provision of certain trust services, and the receipt of compensation for such services, by Trustco (a wholly-owned, for-profit subsidiary corporation of the Fund that will provide directed, non-discretionary trust services) to the Plans, the Employers, the Thrift Plan, and individual retirement accounts (the IRAs) established by certain employees, officers, directors and/or shareholders of the Employers (the Individuals). In addition, the exemption permits the provision of certain services by Pentegra to the Thrift Plan and the IRAs; and the receipt of compensation by Pentegra in connection therewith.

This individual exemption to amend PTE 95-31 was requested in an application filed on behalf of the Fund and the Thrift Plan (together, the Applicants) pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990).¹ The notice of proposed amendment gave interested persons an opportunity to submit written comments or requests for a public hearing on the proposed amendment to the Department. The Department received 7 comments and no written requests for a public hearing. The Applicants responded to these comments in a letter received by the Department on February 19, 2004. Ernst & Young LLP, an independent fiduciary as discussed in further detail below, submitted a letter received by the Department on February 9, 2006.

Discussion of the Comments Received

Several of the commenters expressed general concern that the proposed exemption does not contain sufficient

safeguards to protect the Fund. In response, the Applicants state that numerous safeguards will be in place to protect the Fund with regard to both the creation and operation of Trustco. In this regard, the Applicants represent that the establishment and operation of Trustco will be overseen by: The Office of the Comptroller of the Currency (the OCC), an independent fiduciary, an independent auditor, and the Fund's board of trustees. The Applicants state that, before granting trust status to Trustco, the OCC must determine that Trustco can reasonably be expected to achieve and maintain profitability, and operate in a safe and sound manner. To the extent trust status is granted to Trustco, the OCC will thereafter periodically examine, among other things, the trust company's management, operations, internal controls, audits, earnings, asset management and compliance with applicable laws and regulations.

The Applicants state that the establishment and operation of Trustco will be further overseen by an independent fiduciary (currently, Ernst & Young LLP). In this regard, the independent fiduciary will review the services that will be provided by Trustco, and, if the services are reasonable and appropriate for the trust company, give an express approval for such services. The independent fiduciary will also review the provision of trust services by Trustco to ensure that the terms contained therein reflect terms at least as favorable to Trustco and the Retirement Fund. Thereafter, the independent fiduciary must perform periodic reviews to ensure that the services being provided by Trustco remain appropriate for Pentegra and Trustco.

The Applicants additionally state that Trustco's financial statements will be audited each year by an independent certified public accountant, and such audited statements will be reviewed by the independent fiduciary.

The Applicants represent also that the Trustco board will be independent from the Pentegra and Thrift Plan boards (as described in further detail below). The Applicants state that, at least once a year, the Trustco board of directors will provide a written report to the Fund Board, describing in detail: the services provided by Trustco, the fees received for such services, and an estimate of the fees the trust company expects to receive the following year.

A commenter requested specific information regarding: (1) Pentegra clients that have requested the creation of Trustco; (2) Pentegra's stand-alone expenses, and the percentage that such

¹ Section 102 of the Reorganization Plan No. 4 of 1978 (43 FR 44713, October 17, 1978, 5 U.S.C. App 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

expenses will increase if Trustco is established; (3) the revenue streams that will result from the creation of Trustco; and (4) the return on investment that the creation of Trustco will provide to the Fund.

With regard to (1) above, the Applicants represent that certain employers that receive services from Pentegra have asked Pentegra to provide related trust services. Specifically, sponsors of qualified and nonqualified plans that receive recordkeeping services from Pentegra have asked whether Pentegra can serve as trustee with respect to such plans. The Applicants represent also that certain Pentegra clients have indicated that they would prefer to have all of their services, including trust services, provided by one entity. With regard to (2) above, the Applicants state that preliminary financial projections for Trustco indicate that Trustco will incur expenses of \$866,500 in year one. If 2004 had been the first year of the existence of Trustco, the projected expenses of \$866,500 would represent a 29.5% increase over Pentegra's 2004 budgeted stand-alone expenses of \$2,942,388. With regard to (3) above, the Applicants state that Trustco anticipates charging an asset-based fee of four basis points for 401(k) plan trust services. According to the Applicants, this is the same fee that is charged by trust companies to plans that receive non-trust services from Pentegra. With respect to trust services provided to employee stock ownership plans (ESOPs), the Applicants state that Trustco anticipates charging \$7,000 per plan. According to the Applicants, this is the same fee charged by trust companies to ESOPs that receive non-trust services from Pentegra. With regard to (4) above, the Applicants anticipate that the creation of Trustco will result in the following expenses in years One through Five, respectively: \$866,500; \$1,057,825; \$1,188,466; \$1,327,115 and \$1,474,429. The Applicants further anticipate that the creation of Trustco will result in the following revenue in years one through five, respectively: \$869,729; \$1,085,667; \$1,306,877; \$1,533,609 and \$1,766,124. Accordingly, the Applicants expect that Trustco will be profitable from the first year of its existence onward. Given the expected capital investment of \$2 million by Pentegra, the expected returns on investment regarding the proposed trust company are: 0.2% for Year One; 1.4% for Year Two; 5.9% for Year Three; 10.3% for Year Four; and 14.6% for Year Five.

Several commenters questioned the necessity of the Fund's proposed

creation of Trustco. These commenters expressed concern that Trustco might not be an appropriate investment for the Fund. In response, the Applicants state that the following factors were relevant to the Fund's decision to create Trustco: (1) Employers currently receiving services from Pentegra have asked Pentegra to provide related trust services; and (2) the "market" for defined benefit pension plans is stagnant, at best. The Applicants state that, given these factors, the creation of Trustco is necessary since it will enable Pentegra, a Fund asset, to retain existing clients and attract new ones in a shrinking market. The Applicants state further that the creation of Trustco is appropriate since it will enable the Fund to "unlock" the employee benefit plan-expertise contained in Pentegra and create greater economies of scale with respect to the costs of administering the Fund.

Commenters expressed further concern regarding the impact the creation of Trustco would have on benefits provided under the Fund. In response, the Applicants represent that the Fund does not permit the reduction of accrued benefits, regardless of any investments made by the Fund. The Applicants state that any expenses incurred in connection with the formation of Trustco will not result in a reduction of benefits accrued by participants in the Fund.

Another commenter inquired the following: (1) How, and in what amounts, would Trustco provide value to the participants and beneficiaries of the Fund; (2) whether Trustco is sufficiently separate from the Fund and Pentegra so as not to create a significant risk or liability to Pentegra, the Fund, the Thrift Plan, and affected participants and beneficiaries; (3) what is the source and amount of Trustco's initial capitalization; (4) whether Trustco will be staffed with competent, experienced staff and have sufficient bonding or insurance to mitigate liability; and (5) what is the expected timeframe for Trustco to become profitable.

With regard to (1) above, the Applicants state that the creation of Trustco would benefit the Fund by permitting Pentegra to use existing resources/skills to retain clients and attract new ones. The Applicants state further that the creation of Trustco would enable the Fund to further diversify its portfolio and create new products and services, the benefits of which would inure to the Fund's participants. The Applicants represent that preliminary financial projections for Trustco project that net income will

increase from \$3,229 in Year One to \$291,694 in Year Five.

With regard to (2) above, the Applicants state that the Trustco board of directors will be structured to be independent from the Pentegra and Fund boards of directors. Any member of the Fund board who is also a member of the Trustco board will abstain from any discussions or deliberations undertaken by the respective boards of directors with respect to any service or lease agreements between the Fund and Trustco. The Applicants represent also that Trustco will be subject to a limited amount of liability since Trustco will provide only directed, nondiscretionary trust services and will not have any investment discretion with respect to the assets being held in trust. Additionally, Trustco will not engage in any securities lending transactions and/or provide any cash management services.

With regard to (3) above, the Applicants state that the Fund will provide the trust company's initial capitalization of \$2,000,000, an amount that is consistent with OCC requirements. The Applicants anticipate that, on an ongoing basis, no more than one-half of one percent of the Fund's assets will be invested in Trustco.

With regard to (4) above, the Applicants represent that Trustco will be staffed with competent, experienced employees, at least one of which will be a Trustco officer who will be fully dedicated to overseeing the company's day-to-day operations. The Applicants state that the OCC will carefully evaluate the credentials of such officer prior to the establishment of Trustco as a trust company. The Applicants state further that Trustco will have the necessary insurance to comply with any applicable laws and/or regulations.

With regard to (5) above, the Applicants represent that preliminary financial projections (described above) indicate that Trustco will be profitable in its initial and subsequent years of operation.

Another commenter questioned: (1) Whether it would be more appropriate for the Thrift Plan, and not the Fund, to own a profit-making enterprise such as Trustco; and (2) whether a business plan has been developed by Pentegra for Trustco.

With regard to (1) above, the Applicants state that the Fund may invest a portion of its assets in a trust company as long as such an investment is prudent, in the best interests of the participants and beneficiaries of the Fund, and supports the primary objective of the Fund's investment program of meeting/beating its

liabilities. In contrast, the Thrift Plan is a tax-qualified multiple employer defined contribution plan and, therefore, participants in the Thrift Plan determine how to invest their accounts (within the array of investment options offered under the Thrift Plan). The Applicants represent that there is no opportunity for the Thrift Plan to more aggressively pursue a return on investments through fee-based services because the assets of the Thrift Plan are fully allocated to the accounts of the participants who control the investments.

With regard to (2) above, the Applicants represent that before Trustco can be created, a formal business plan must be submitted to, and approved by, the OCC and the Fund Board of Directors. The Applicants represent that waiting to develop a formal business plan until after the proposed exemption is granted precludes the possibility that the Fund will pay an unnecessary and costly expense (*i.e.*, in the event the Department did not grant the proposed exemption).²

As noted above, the Department received a letter from Ernst & Young on February 9, 2006. In the letter, Ernst & Young states that it reviewed the application (D-11039) for this exemption submitted by the Applicants to the Department as well as the comments submitted by Retirement Fund participants. Ernst & Young states further that the rationale expressed by the Applicants for providing trust services is consistent with the provision of services Pentegra currently provides. Ernst & Young acknowledges that it will review whether the provision of trust services by Trustco reflect terms that are at least as favorable to Trustco and the Retirement Fund as the terms generally available in arm's length transactions between Trustco and employers which do not participate in the Retirement Fund. Ernst & Young states that it is reasonable to assume that the contemplated formation of a national trust company will be in the interests of the Retirement Fund participants and that the OCC's oversight will provide sufficient protection.

After full consideration and review of the entire record, including the written comments, the Applicants response, and the independent fiduciary's statements, the Department has determined to grant the individual exemption to amend 95-31, as proposed. The comments, the Applicants' response, and the

independent fiduciary's letter have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which 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; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The exemption will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) The Department finds that the amended exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(4) This exemption supplements, and is not in derogation of, any other provisions of the Act and the Code, 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; and

(5) This exemption is subject to the express condition that the facts, representations, and statements made, or referred to, in: PTE 95-31, the notice of proposed exemption relating to the amendment of PTE 95-31, and this grant, accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

Exemption

Section I. Covered Transactions

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the provision of certain services, and the receipt of compensation for such services, by Pentegra Services, Inc. (Pentegra), a wholly-owned, for-profit subsidiary corporation of the Fund, and Trustco, a wholly-owned subsidiary corporation of Pentegra (collectively, the Service Providers), to: The Thrift Plan; employers that participate in the Fund and/or the Thrift Plan (the Employers); employee benefit plans sponsored by the Employers (the Plans); and the individual retirement accounts (the IRAs) established by certain employees, officers, directors and/or shareholders of the Employers (the Individuals); provided that the following conditions are met:

(a) A qualified, independent fiduciary of the Fund determines that the services provided by the Service Providers are in the best interests of the Fund and are protective of the rights of the participants and beneficiaries of the Fund;

(b) The terms associated with the provision of services by the Service Providers to the Plans, the Thrift Plan, and the IRAs, at the time such services are entered into, are not less favorable to all parties to the transaction than the terms generally available in comparable arm's-length transactions involving unrelated parties;

(c) The Service Providers receive reasonable compensation for the provision of services, as determined by an independent fiduciary;

(d) Prior to the provision of services by the Service Providers, the independent fiduciary will first review such services and will determine that such services are reasonable and appropriate for the Service Providers, taking into account such factors as: Whether the Service Providers have the capability to perform such services, whether the fees to be charged reflect arm's-length terms, whether Service Provider personnel have the qualifications to provide such services, and whether such arrangements are reasonable based upon a comparison with similarly qualified firms in the same or similar locales in which the Service Providers propose to operate;

(e) No services will be provided by the Service Providers without the prior review and approval of the independent fiduciary;

² A copy of the preliminary financial projections provided by Pentegra to the Department of Labor for the first five years of Trustco's existence is on file with the Department under D-11039.

(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).¹ If granted, the proposed exemption would permit, effective July 6, 2006, (1) the

¹ 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.