

factors in 21 U.S.C. 823(a) and determined that the registration of Norac Inc. to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Norac Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: September 11, 2009.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. L-11568]

#### Notice of Proposed Individual Exemption Involving General Motors Corporation, Located in Detroit, MI

**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). The transactions involve the UAW General Motors Company Retiree Medical Benefits Plan (the New GM VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the VEBA Trust) (collectively the VEBA).<sup>1</sup> The proposed exemption, if granted, would affect the VEBA, its participants and beneficiaries. **DATES: Effective Date:** If granted, this proposed exemption will be effective as of July 10, 2009.

<sup>1</sup> Because the New GM VEBA Plan will not be qualified under section 401 of the Internal Revenue Code of 1986, 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.

Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department within 45 days from the date of publication of this **Federal Register Notice**.

**ADDRESSES:** All written comments and requests for a public hearing concerning the proposed exemption should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210, Attention: Application No. L-11568. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *gm@dol.gov*, or by FAX to (202) 219-0204 by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Documents 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:** Karen E. Lloyd, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693-8547. (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)(A), 406(a)(1)(B), 406(a)(1)(D), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) of ERISA. The proposed exemption has been requested in an application filed by General Motors Corporation pursuant to section 408(a) of ERISA and in accordance with the procedures set forth in 29 CFR 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<sup>2</sup>

#### *The Applicant*

Prior to its bankruptcy filing on June 1, 2009, General Motors Corporation (Old GM) and its subsidiaries were engaged primarily in the worldwide development, production, and marketing of cars, trucks, and related parts. Old GM had its largest operating presence in North America. As of March 31, 2009, Old GM had total assets on its consolidated balance sheet of \$82,290,000,000 and liabilities of \$172,810,000,000.

By motion filed June 1, 2009, in *In re General Motors Corporation*,<sup>3</sup> Old GM sought approval for the sale of substantially all of its assets to a purchaser sponsored by the United States Department of the Treasury (U.S. Treasury). On July 10, 2009, following approval of the U.S. Bankruptcy Court for the Southern District of New York, certain assets and liabilities of Old GM were sold to General Motors Company (New GM).<sup>4</sup> New GM maintains its headquarters in Detroit, MI, and employs 235,000 people throughout the world.

#### *Background*

Throughout much of 2005, Old GM and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) engaged in extended discussions concerning the impact of rising health care costs on Old GM's financial condition. During these discussions, Old GM asserted that it had the right to unilaterally modify the retiree health benefits under the General Motors Health Care Program for Hourly Employees ("Old GM Plan") and that, if no agreement was reached to address the economic burden of its retiree health obligation, Old GM would do so unilaterally. The UAW disagreed with Old GM's position and asserted that retiree benefits were vested and that Old GM did not have the right to modify them unilaterally. The UAW and a class of retirees ("Class") sued Old GM over this issue, and after an extensive review by the UAW and class counsel (Class Counsel) of Old GM's ability to continue providing retiree health care benefits, the parties entered into a settlement

<sup>2</sup> The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department.

<sup>3</sup> No. 09-50026 (Bankr. S.D.N.Y.).

<sup>4</sup> Following the asset sale, Old GM was renamed Motors Liquidation Company. For the operations, assets and liabilities that were not transferred to New GM, the chapter 11 bankruptcy proceeding will continue in order to resolve creditors' claims and wind down those operations in an orderly way.

agreement, providing for, among other things, the institution of co-pays and deductibles under the Old GM Plan. *UAW et al. v. General Motors Corp.*, No. 05-CV-73991, 2006 WL 891151 (E.D. Mich. Mar. 31, 2006), *aff'd Int'l Union, UAW v. General Motors Corp.*, 497 F.3d 615 (6th Cir. 2006) ("Henry I").

By its terms, however, the Henry I settlement agreement provided only a temporary and limited solution. The settlement agreement imposed new, cost-sharing requirements on UAW-hourly retirees, and required Old GM to make certain payments to a voluntary employees' beneficiary association trust ("Mitigation VEBA") controlled by a committee independent of Old GM, which would act as a funding source to mitigate the impact of these cost-sharing provisions on retirees. The settlement agreement was to remain in effect until at least September 14, 2011, after which either Old GM or the UAW could terminate the agreement and reassert its original position regarding Old GM's ability to unilaterally modify and/or terminate retiree health care benefits. If not terminated, the settlement agreement would remain in effect indefinitely.

In 2007, during labor negotiations concerning a new national collective bargaining agreement for UAW-represented employees, Old GM advised the UAW that it planned to terminate the Henry I settlement agreement in accordance with its terms in 2011, and exercise its right to unilaterally terminate and/or modify the Old GM Plan's retiree coverage for UAW retirees and their dependents, if Old GM's preference for a mutual agreement could not be attained. In response, the UAW reasserted its legal position that post-retirement medical coverage for current UAW retirees under the Old GM Plan is vested and unalterable, but agreed to enter into discussions to see if a solution acceptable to all parties could be negotiated.

On September 26, 2007, the UAW and the Class sued Old GM in the United States District Court for the Eastern District of Michigan, again challenging Old GM's right to unilaterally modify and/or terminate retiree health benefits. *Int'l Union, UAW, et al. v. General Motors Corp.*, No. 07-cv-14074 (E.D. Mich. Sept. 26, 2007) ("Henry II"). Also, on that day, Old GM and the UAW agreed to a memorandum of understanding regarding post-retirement medical benefits.

On February 21, 2008, the Henry II parties agreed on a detailed settlement to effectuate the September 2007 memorandum of understanding ("Henry II Settlement Agreement"). The Henry II

Settlement Agreement provided that on the later of January 1, 2010, or final court approval of the Settlement Agreement, Old GM would terminate retiree coverage under the Old GM Plan for the Class and an additional group of employees and retirees known as the "Covered Group," and would transfer certain assets to the New GM VEBA Plan to provide the Class and Covered Group with post-retirement medical benefits. The VEBA Trust was to receive assets from a number of sources including: funds that were then in the Mitigation VEBA and in the VEBA that supports the Old GM Plan ("the Internal VEBA"), cash from Old GM and Old GM issued notes.

After a fairness hearing, the Henry II Settlement Agreement was approved by the District Court on July 31, 2008, as fair, reasonable, and adequate. See *Int'l Union, UAW, et al. v. General Motors Corp.*, No. 07-cv-14074, 2008 WL 2968408 (E.D. Mich. July 31, 2008). No appeal of the court's order approving the settlement was taken.

The Henry II Settlement Agreement fully resolved the parties' dispute regarding post-retirement health benefits and replaced the Henry I settlement agreement. Under the new agreement, Old GM's obligation to provide post-retirement medical benefits to the Class and Covered Group would be terminated. The New GM VEBA Plan would be established and maintained not by Old GM, but by an employees' beneficiary association consisting of the population covered by the New GM VEBA Plan and administered by an independent committee ("Committee"). The New GM VEBA Plan, to be funded exclusively through the VEBA Trust, would be solely responsible for the payment of post-retirement medical benefits to members of the Class and Covered Group on and after January 1, 2010.

Since final approval of the Henry II Settlement Agreement by the court on July 31, 2008, Old GM's financial position deteriorated significantly due to a steep and unanticipated decline in revenue caused by a dramatic drop in the market for new motor vehicles. As a consequence, Old GM petitioned the Federal government for emergency financial assistance, which resulted in a Loan and Security Agreement dated December 31, 2008, between Old GM and the U.S. Treasury ("2008 Loan Agreement"). The 2008 Loan Agreement required Old GM to present, by March 31, 2009, a certification and report detailing, among other things, the progress made by Old GM and its subsidiaries in implementing a restructuring plan that included (a)

modification of labor contracts, (b) modification of Old GM's obligations to the New GM VEBA Plan, and (c) a bond exchange offer with its creditors. Failure to reach the preceding agreements, to the satisfaction of the President's designee, would cause the 2008 Loan to become due and payable within 30 days.

On March 31, 2009, Old GM entered into amendments to the 2008 Loan Agreement that extended the deadline to June 1, 2009. Between March 31, 2009, and June 1, 2009, Old GM drew additional government aid. On June 1, 2009, Old GM filed for bankruptcy protection.

### Bankruptcy

Given Old GM's financial situation, the bankruptcy, and the need to meet the requirements of the 2008 Loan Agreement, Old GM, the UAW, Class Counsel, and the U.S. Treasury agreed that Old GM and the UAW would enter into another agreement, known as the Modified Settlement Agreement, and seek approval of the Modified Settlement Agreement from the bankruptcy court. The Modified Settlement Agreement governed the provision of post-retirement medical benefits to the Class and the Covered Group by the new company (*i.e.*, New GM) that was anticipated to purchase certain assets of Old GM as part of the bankruptcy action.

On July 5, 2009, the bankruptcy court approved a sale under Section 363 of Title 11 of the U.S. Code by which New GM succeeded to certain assets and liabilities of Old GM ("Section 363 Sale"). The bankruptcy court also approved the Modified Settlement Agreement. The Section 363 Sale closed, and the Modified Settlement Agreement was executed, on July 10, 2009.

Effective as of the Section 363 Sale, New GM has the following capitalization:

*Common Equity:* The outstanding common stock of New GM (New GM Common Stock) (without giving effect to the warrants described below) is allocated as follows:

- 60.8% (304,131,356 shares) to the U.S. Treasury<sup>5</sup>

<sup>5</sup> The Applicant's position is that the U.S. Treasury's ownership of more than 50% of New GM should not result in the U.S. Treasury being considered a party in interest to the New GM VEBA Plan under section 3(14)(E) of ERISA. Section 3(14)(E) states that a party in interest means, as to an employee benefit plan, "an owner, direct or indirect, of 50 percent or more of \* \* \* the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation \* \* \* which is an employer," any of whose employees are covered by

- 11.7% (58,368,644 shares) to the Canadian and Ontario governments (collectively)
  - 17.5% (87,500,000 shares) to the New GM VEBA Plan
  - 10% (50,000,000 shares) to Old GM
- Perpetual Preferred Stock:* Single issue of \$9.0 billion cumulative perpetual preferred stock with a 9% dividend per annum ("Series A"), consisting of:
- \$2.1 billion issued to the U.S. Treasury
  - \$0.4 billion issued to the Canadian and Ontario governments (collectively)
  - \$6.5 billion issued to the New GM VEBA Plan
- Debt:* Approximately \$17.3 billion estimated total consolidated debt (excluding debt related to Old GM's automotive supplier financing program and warranty program), each in a separate issue, including approximately:
- \$6.7 billion owed to the U.S. Treasury
  - \$1.3 billion owed to the Canadian and Ontario governments (collectively)
  - \$2.5 billion owed to the New GM VEBA Plan
  - \$6.8 billion of other, primarily international debt, but excluding Europe
- Warrants:* Separate issues of warrants will be allocated as follows:
- *To Old GM:* Warrants to acquire 45,454,545 newly issued shares of New GM Common Stock, exercisable at any time prior to the seventh anniversary of issuance, with an exercise price set at \$30.00 per share.
  - *To Old GM:* Warrants to acquire 45,454,545 newly issued shares of New GM Common Stock, exercisable at any time prior to the tenth anniversary of issuance, with an exercise price set at \$55.00 per share.
  - *To the New GM VEBA Plan:* Warrants to acquire 15,151,515 newly issued shares of New GM Common Stock, exercisable at any time prior to December 31, 2015, with an exercise price set at \$126.92 per share.

such plan. In the Applicant's view, Congress did not intend the party in interest definition to include the government of the United States or a Cabinet Department of its Executive Branch. In the Department's view, section 3(14) does not apply to the U.S. Treasury in connection with its ownership interest in New GM because a contrary interpretation would conflict with section 514(d) of ERISA. That section provides, in part, that "[n]othing in [title I] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States \* \* \*". If the U.S. Treasury were to be a party in interest with respect to a plan subject to ERISA, then ERISA would prohibit almost any transaction between that plan and the Federal government arising under a federal statutory framework other than ERISA. Accordingly, the Department concurs with the Applicant's conclusion that the U.S. Treasury is not a party in interest under ERISA.

#### *New GM VEBA Plan and VEBA Trust*

The UAW General Motors Company Retirees Employees' Beneficiary Association ("General Motors Company Retirees EBA"), acting through the Committee, will establish and maintain the New GM VEBA Plan, subject to ERISA, to provide retiree health benefits to the Class and Covered Group after the Implementation Date, which will be December 31, 2009. Prior to the Section 363 Sale, the Old GM Plan provided retiree health benefits to the Class and the Covered Group; following the closing of the Section 363 Sale, the General Motors Company Plan ("New GM Plan") assumed provision of the benefits with respect to claims incurred on or before the Implementation Date. The New GM VEBA Plan will be responsible for benefit claims incurred after the Implementation Date.<sup>6</sup>

Beginning with claims incurred on and after the later of (i) July 1, 2009, or (ii) receipt of necessary bankruptcy court approval, the Old GM Plan will be amended and/or implemented to reflect certain benefit changes set forth in Exhibit F of the Modified Settlement Agreement. After the Implementation Date, the Committee will have sole responsibility to determine the scope and level of retiree health benefits available to the Class and Covered Group under the New GM VEBA Plan. The Committee may raise or lower the level of retiree health care benefits available to the Class and Covered Group. In exercising its authority over benefit design, the Committee shall be guided by the principle that the New GM VEBA Plan should provide substantial health benefits for the duration of the lives of all participants and beneficiaries in the New GM VEBA Plan.

The General Motors Company Retirees EBA, along with the UAW Chrysler Retirees Employees' Beneficiary Association and the UAW Ford Retirees Employees' Beneficiary Association, each acting through the Committee, established the VEBA Trust on October 16, 2008. The VEBA Trust will be the funding source for the New GM VEBA Plan. The VEBA Trust is the subject of a trust agreement between the trustee and the Committee, acting on behalf of the respective EBAs. The

<sup>6</sup> As of the date of the bankruptcy filing, approximately 751,700 hourly retirees and dependents in the U.S. received retiree health benefits from Old GM. Of this total, approximately 699,000 are hourly retirees and spouses, surviving spouses and eligible dependents represented by the UAW. Additionally, approximately 78,000 UAW-represented active employees had attained seniority as of September 14, 2007, and will, upon retirement, be covered by the New GM VEBA Plan.

VEBA Trust is intended to be tax-exempt under section 501(c)(9) of the Internal Revenue Code, as amended, and, as a trust holding assets of plans subject to ERISA, will itself be subject to ERISA's fiduciary responsibility standards.

The VEBA Trust will have three separate retiree accounts, designed to segregate payments attributable to GM, Ford, and Chrysler, pursuant to the terms of each company's settlement agreement with the UAW and each respective class. Each retiree account will be a separate, dedicated account, to be used for the sole purpose of funding benefits provided under the separate plans providing health benefits to the retirees of GM, Ford and Chrysler, and defraying the reasonable expenses of each plan. Each retiree account will contain a separate sub-account maintained to hold any employer security. Assets from one retiree account may not offset the liabilities or defray the expenses attributable to another retiree account. The VEBA Trust was structured in this way to allow for the pooled investment of assets and to provide economies of scale to the respective plans' investments, while maintaining a separate plan for each of the three retiree classes. Unless the Committee decides to establish segregated investment vehicles for specific separate retiree accounts, the assets of the separate retiree accounts, other than any employer security sub-account, will be invested on a pooled basis within the VEBA Trust.

Under the terms of the Modified Settlement Agreement, the assets New GM transfers or causes to be transferred to the New GM VEBA Plan will be credited to the GM retiree account in the VEBA Trust (the "General Motors Company Separate Retiree Account"). The transferred assets and remittances of, or attributable to, the GM UAW retirees will be professionally managed and reinvested and will pay benefits and New GM VEBA Plan expenses under the New GM VEBA Plan. The transferred securities issued by New GM will be held in a separate sub-account (the "General Motors Company Employer Security Sub-Account") of the General Motors Company Separate Retiree Account and will be managed by an independent fiduciary.

#### *The Committee*

The Committee acts as the plan administrator and named fiduciary with respect to the New GM VEBA Plan, and appoints the trustee, the independent fiduciary and all investment managers of the VEBA Trust's assets. The Committee is comprised of eleven

individuals, consisting of two groups: Six Independent Members and five UAW Members. The initial Independent Members were approved by the district court in Henry II and the UAW Members were appointed by the UAW. The Modified Settlement Agreement maintains these appointments. Neither Old GM nor New GM has any appointment power, and the Committee will function completely independently of both. No member of the Committee may be a current or former officer, director or employee of Old GM, New GM, Ford, Chrysler, or Chrysler Group, with the following exceptions: (i) A retiree who was represented by the UAW in his or her employment with either Old GM, New GM, Ford, Chrysler, or Chrysler Group, may be a UAW Member of the Committee, and (ii) an employee of Old GM, New GM, Ford, Chrysler, or Chrysler Group who is on leave from the company and is represented by the UAW, may be a UAW Member of the Committee. None of the Independent Members nor any of their family members, employers or partners may have any financial or institutional relationship with either Old GM, New GM, Ford, Chrysler, or Chrysler Group if such relationship could reasonably be expected to impair such Independent Member's exercise of independent judgment.

The UAW Members serve at the discretion of the UAW International President and may be removed or replaced, and a successor designated, at any time by written notice by the UAW International President to the Committee. Independent Members serve for a term of three years, except two of the initial Independent Members will have an initial term of two years, and another two will have an initial term of one year. Independent Members may serve more than one term. An Independent Member will serve on the Committee until expiration of his or her term, or his or her death, incapacity to serve, resignation or removal. An Independent Member may be removed or replaced, and a successor designated, at any time by an affirmative vote of nine of the other members of the Committee. In the event of a vacancy in the group of Independent Members, whether by expiration of a term, resignation, removal, incapacity, or death, a successor Independent Member will be elected by the affirmative vote of nine members. If a successor Independent Member is not appointed within a reasonable time after a vacancy, an arbitrator may be appointed, upon application of any

member, to appoint a successor Independent Member to the Committee.

A majority of the members of the Committee then in office shall constitute a quorum for the purpose of transacting any business; provided that at least one Independent Member and one UAW Member are present. Each Member of the Committee present at the meeting shall have one vote. Generally, actions of the Committee shall be by majority vote of the entire Committee, provided that at least one Independent Member and one Union Member must be a Member in the majority for any Committee action to take effect.

The Committee will select a chair from among its members. The term of the chair will continue until he or she ceases to be a member, resigns as chair or is replaced as chair with another member by majority vote among the remaining members.

#### *Old GM and New GM Role*

Neither Old GM nor New GM will have any role in the governance, management and operations of the New GM VEBA Plan. Old GM and New GM will not be fiduciaries or have any ability to appoint any member of the Committee, and the Committee is not authorized to act for Old GM or New GM and is not an agent or representative of Old GM or New GM for any purpose.

Pursuant to the Modified Settlement Agreement, New GM will cooperate with the UAW and the Committee and at the Committee's request will undertake reasonable actions to assist the Committee in the orderly transition of responsibility for administration of retiree medical benefits from the Old GM Plan, or New GM Plan, as applicable, to the New GM VEBA Plan. Such cooperation may include assisting the Committee in educational efforts and other communications to the Class and Covered Group so that they understand the terms of the New GM VEBA Plan and the shift of coverage for the Class and Covered Group from the Old GM Plan, or New GM Plan, as applicable, to the New GM VEBA Plan, and understand the claims submission process and any other initial administrative changes undertaken by the Committee. At the Committee's request and as permitted by law, New GM will furnish to the Committee such information and will provide such cooperation as may be reasonably necessary to permit the Committee to effectively administer the New GM VEBA Plan. At the request of the Committee, and subject to reimbursement for reasonable costs, New GM will continue to perform the necessary eligibility work for a

reasonable period of time, not to exceed 90 days after the Implementation Date, in order to allow the Committee to establish and test the eligibility database. New GM will also assist the Committee in transitioning benefit provider contracts to the New GM VEBA Plan.

To the extent permitted by law, New GM will allow pension plan participants to voluntarily authorize the withholding of required contributions under the New GM VEBA Plan from pension benefits, and, to the extent reasonably practical, crediting such amounts to the General Motors Company Separate Retiree Account of the VEBA Trust on a monthly basis (the Contribution Withholding). A pension plan participant may elect or withdraw consent for the Contribution Withholding at any time by providing 45 days written notice to the plan administrator of the General Motors Hourly-Rate Employees Pension Plan or such shorter period as may be required by law. New GM also will cooperate with the Committee to make provision for the VEBA Trust payments of the covered benefit related to Medicare Part B premiums to be incorporated into the monthly New GM pension checks for eligible retirees and surviving spouses participating in the New GM VEBA Plan (the Part B Payment).

The New GM VEBA Plan will be responsible for the payment of reasonable costs associated with New GM's administration of payment of the Contribution Withholdings and the Part B Payment. The Applicant asserts that, to the extent these payments are prohibited transactions, the statutory exemption for the provision of services provided by section 408(b)(2) of ERISA provides relief from the prohibited transaction restrictions of section 406(a) of ERISA.

ERISA section 408(b)(2) provides relief for the "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." Under the Department's regulations, a service is necessary for the establishment or operation of a plan if the service is "appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 29 CFR section 2550.408(b)(2).

According to the Applicant, the Contribution Withholding is helpful to the New GM VEBA Plan as it reduces expenses associated with processing of participant contributions and

investigating delinquent contributions. This service is also helpful to participants as it assures that contributions are received on time, and without the need to mail a check monthly to the New GM VEBA Plan. Accordingly, the Contribution Withholding is appropriate and helpful to the New GM VEBA Plan in carrying out its purpose because it reduces expenses and aids in making sure participants receive benefits without interruption.

With respect to the Part B Payment, the Applicant states that it is appropriate and helpful to the New GM VEBA Plan as it allows the New GM VEBA Plan to take advantage of an existing system in order to incorporate a defined, monthly payment to participants into pension checks that participants are already receiving. This obviates the need for the New GM VEBA Plan to develop its own distribution system and undertake the expense of mailing monthly checks to all participants. Accordingly, the Part B Payment also reduces expenses of the New GM VEBA Plan, which helps conserve the amount of resources available to provide benefits.

The Applicant further represents that the costs of the Contribution Withholding and the Part B Payment have not yet been determined. However, the Committee will be subject to ERISA's fiduciary responsibility rules when determining the cost structure, and the Modified Settlement Agreement states that both services will only be provided to the extent permitted by law, and a cost that is not reasonable would not be permitted by law.

In the Department's view, relief under section 408(b)(2) would be available for these services provided the conditions of that exemption are satisfied. Ultimately it is the responsibility of the Committee to determine whether the services provided by New GM satisfy all of the conditions set forth in the statutory exemption and pertinent regulations.

#### *Payments to the New GM VEBA Plan*

As described more fully below, under the Modified Settlement Agreement, New GM transferred to the New GM VEBA Plan (i) New GM Common Stock representing 17.5% of New GM's common equity, (ii) New GM preferred stock with a value of \$6.5 billion, (iii) a note for \$2.5 billion, (iv) warrants entitling the New GM VEBA Plan to acquire an additional 2.5% of New GM Common Stock, and (v) all of the assets in the "UAW-Related Account" of the

Internal VEBA.<sup>7</sup> Additionally, as contemplated by section 12.C. of the Modified Settlement Agreement, the approval order in the bankruptcy case directed that the assets in the Mitigation VEBA be transferred to the New GM VEBA Plan.

#### *Common Stock*

As of the closing of the Section 363 Sale, New GM issued 87,500,000 shares of New GM Common Stock, representing 17.5% of its common stock, to the New GM VEBA Plan. The New GM Common Stock will be held in the General Motors Company Employer Security Sub-Account in the General Motors Company Separate Retiree Account of the VEBA Trust. Any exercise of warrants after the Section 363 Sale will dilute all stock holders ratably. The New GM Common Stock will be transferable, in whole or in part, at any time subject to certain conditions that are contained in the Stockholders Agreement by and among New GM, the U.S. Treasury, the New GM VEBA Plan, and the governments of Canada and Ontario ("Canada") ("Stockholders Agreement"). Pursuant to the Stockholders Agreement and the Equity Registration Rights Agreement by and among New GM, the U.S. Treasury, Canada, the New GM VEBA Plan and Old GM (the Registration Rights Agreement), the New GM VEBA Plan will have demand, shelf, and piggyback registration rights with respect to the New GM Common Stock that are substantially consistent with the registration rights that are held by the U.S. Treasury, Canada and the Old GM unsecured creditors.

#### *Preferred Stock*

As of the closing of the Section 363 Sale, New GM transferred to the New GM VEBA Plan \$6.5 billion of Series A cumulative perpetual preferred stock ("Preferred Stock"). The Preferred Stock is from the same series of preferred stock that was issued to the U.S. Treasury and Canada. The Preferred Stock will be held in the General Motors Company Employer Security Sub-Account in the General Motors Company Separate Retiree Account of the VEBA Trust. The Preferred Stock

<sup>7</sup> Pursuant to the Henry II Settlement Agreement, the Internal VEBA was divided into two bookkeeping accounts effective January 1, 2008; one with assets equal to the value of the Internal VEBA as of December 31, 2007, multiplied by the percentage of Old GM's hourly OPEB liability as of December 31, 2007, attributable to UAW represented employees, retirees, their eligible spouses, surviving spouses and dependents (the "UAW-Related Account"), and the other account of the remaining assets, attributable to non-UAW represented individuals.

will be transferable, in whole or in part, at any time subject to certain conditions that are contained in the Stockholders Agreement. The Preferred Stock carries a 9% dividend rate per annum, and is payable quarterly in cash if, as, and when declared by New GM's Board. Each share of Preferred Stock will have a liquidation preference of \$25. The Preferred Stock is not callable prior to December 31, 2014. The redemption price must be paid in cash.

The Preferred Stock will be senior to the New GM Common Stock and future preferred equity but junior to all existing and future debt. The New GM VEBA Plan will have demand, shelf, and piggyback registration rights with respect to the Preferred Stock that are substantially consistent with its registration rights with respect to the New GM Common Stock. The Preferred Stock has no voting rights, except under the following circumstances, in which case the independent fiduciary will vote the shares. If dividends payable on the Series A preferred stock have not been paid for an aggregate of six quarters, the holders of the Series A preferred stock have the right, as a class, to elect two newly created directorships of New GM. In addition, a two-thirds majority vote of the Series A preferred stock is necessary to authorize the issuance of shares senior or pari passu to Series A preferred stock, amend the terms of Series A preferred stock, or approve a share exchange or reclassification of the Series A preferred stock or merger or consolidation involving New GM.

#### *The Note*

As of the closing of the Section 363 Sale, New GM issued to the New GM VEBA Plan a note ("Note") with a principal amount of \$2.5 billion. The Note will be payable in cash in three equal installments. Each payment will be in the amount of \$1.384 billion and will be made on July 15 of the years 2013, 2015, and 2017. The Note is transferable at any time in whole or in part, subject to certain limited exceptions.

The Note ranks pari passu with notes that were issued to the U.S. Treasury and Canada in the aggregate principal amount of \$8.0 billion. The New GM VEBA Plan will not have registration rights regarding the Note; however, if the notes issued to the U.S. Treasury and Canada are registered or registration rights are extended with respect to such notes, then the New GM VEBA Plan will have demand, shelf, and piggyback registration rights pertaining to the Note that are no less favorable than those pertaining to the U.S. Treasury or Canada notes. Other terms of the Note

are no less favorable than the terms of the U.S. Treasury or Canada notes. The Note will be subordinate to any exit financing, including the U.S. Treasury delayed draw term loan, revolver or any other third party exit financing entered into with the consent of the U.S. Treasury.

#### Warrants

As of the closing of the Section 363 Sale, New GM transferred to the New GM VEBA Plan warrants to acquire 15,151,515 shares of New GM Common Stock representing 2.5% of its common equity on a fully diluted basis ("Warrants"). The Warrants will be held by the General Motors Company Employer Security Sub-Account in the General Motors Company Separate Retiree Account of the VEBA Trust, as will any New GM Common Stock acquired by exercise of the Warrants. The Warrants will be transferable, in whole or in part, at any time subject to certain conditions that are contained in the Stockholders Agreement. The strike price will be set at \$126.92 per share representing a \$75 billion equity value of New GM. The expiration date for the Warrants will be December 31, 2015.

The Warrants will contain other terms which the Applicant represents are typical for securities of this type, including anti-dilution, and partial and cashless exercise provisions. The New GM VEBA Plan has registration rights with respect to the Warrants (and the New GM Common Stock underlying the Warrants) that are consistent with its registration rights with respect to the New GM Common Stock and the Preferred Stock.

#### *Transfer of Assets From UAW-Related Account of the Internal VEBA*

The Internal VEBA is the General Motors Welfare Benefit Trust that is maintained by Old GM as a source of funding for various retiree welfare benefit plans, including the Old GM Plan. Pursuant to the Henry II Settlement Agreement, the Internal VEBA was divided into two bookkeeping accounts effective January 1, 2008: the UAW-Related Account, as described above in footnote 7, and the other account of the remaining assets, attributable to non-UAW represented individuals. As of March 31, 2009, the UAW-Related Account had an estimated asset value of approximately \$9.4 billion.

Until the UAW-Related Account is transferred to the VEBA Trust, the assets of the Internal VEBA will continue to be invested under the existing investment policy, with investment returns, net of expenses, applied proportionally to the

value of the UAW-Related Account. The appropriate New GM Plan fiduciary will direct the trustee of the Internal VEBA to transfer the UAW-Related Account to the VEBA Trust within 10 days after the Implementation Date. At the time of transfer, pursuant to the Modified Settlement Agreement, an amount equal to the UAW-Related Account's share of expenses (to the extent permitted by ERISA) will be retained within the Internal VEBA to pay such expenses. After payment of these expenses is completed, a reconciliation of the amount retained and the actual expenses will be performed. The Internal VEBA will then pay the VEBA Trust for any amount over withheld, or the VEBA Trust will pay the Internal VEBA for any amount under withheld (a "true-up").

#### *Transfer of Assets, Via the Bankruptcy Approval Order, From the Mitigation VEBA*

The Mitigation VEBA was created in connection with the settlement in Henry I, and was established through a trust agreement between State Street Bank and Trust Company and Old GM. The Mitigation VEBA was intended to be a source of "mitigation" payments to Old GM Plan participants to lessen the impact of the new cost-sharing provisions implemented under the Henry I settlement agreement.<sup>8</sup> As of April 30, 2009, the Mitigation VEBA had an estimated asset value of \$1.025 billion. Until the assets and liabilities of the Mitigation VEBA are transferred to the VEBA Trust, its value will be affected by certain additional contributions and by income (including investment returns) offset by mitigation payments and expenses. Pursuant to the Modified Settlement Agreement, the Mitigation VEBA assets will be transferred to the New GM VEBA Plan within 15 days after the Implementation Date, and the Mitigation VEBA will be terminated.

#### *Covered Transactions*

The Applicant seeks exemptive relief for two sets of transactions. The first set of transactions involves the transfer by New GM to the New GM VEBA Plan of the securities described above, and the second set of transactions involves asset transfers to and from the New GM VEBA Plan necessitated by the transition of benefit payment responsibility from one

plan to another, or due to mistaken deposits into the New GM VEBA Plan.

With respect to the transfer of New GM securities to the New GM VEBA Plan, the Applicant states that, following months of negotiations involving the UAW, Class Counsel, Old GM, the U.S. Treasury, and other Old GM debt holders, the transaction embodies the only feasible mechanism to ensure that assets are dedicated to, and held in the New GM VEBA Plan solely for use as retiree health care benefits (and related reasonable expenses). Class Counsel supported the Applicant's request for exemptive relief described herein.

#### 1. Transfer of New GM Securities

The Applicant requests relief from sections 406(a)(1)(E), 406(a)(2), and 407(a) of ERISA for the acquisition and holding by the New GM VEBA Plan of the New GM Common Stock, the Preferred Stock, the Note and the Warrants (the Securities). Additionally, the Department has proposed relief from section 406(a)(1)(A) for the disposition of the Securities, in the event that the Securities are sold in a transaction involving a party in interest.

Section 406(a)(1)(E) prohibits a fiduciary from causing a plan to engage in a transaction, if he knows or should know that such transaction constitutes the direct or indirect acquisition, on behalf of a plan, of any employer security in violation of section 407(a). Section 406(a)(2) prohibits a fiduciary who has authority or discretion to control or manage the assets of a plan from permitting 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) states that a plan may not acquire or hold any "employer security" that is not a "qualifying employer security." Section 407(a)(2) states that a plan may not acquire any qualifying employer security (or qualifying employer real property) if immediately after such acquisition the aggregate fair market value of employer securities (and employer real property) held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

According to the Applicants, when the New GM VEBA Plan acquired the New GM Common Stock, the Preferred Stock, the Note and the Warrants, each asset might not have been a "qualifying employer security" within the meaning of section 407(d)(5) and therefore the acquisition of each would not be permitted under section 406(a). Additionally, the Applicants note that even if the New GM Common Stock, the

<sup>8</sup> The Mitigation VEBA is the subject of Prohibited Transaction Exemption 2009-03, 74 FR 3645 (Jan. 21, 2009), which provided relief for certain cash advances and "true ups" between GM and the Mitigation VEBA related to administration of the Mitigation VEBA.

Preferred Stock, the Note and the Warrants were considered qualifying employer securities, the aggregate fair market value of employer securities held by the New GM VEBA Plan would exceed the 10 percent limitation in section 407(a)(2). Finally, Applicants request relief from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407(a) for the future exercise of the Warrants by the New GM VEBA Plan. When, and if, the New GM VEBA Plan's Warrants are exercised, New GM Common Stock will be acquired and may not constitute a qualifying employer security within the meaning of section 407(d)(5), and, immediately after the acquisition of the New GM Common Stock due to the exercise of the Warrants, the aggregate fair market value of employer securities held by the New GM VEBA Plan may exceed 10 percent of the fair market value of its assets.

Section 406(a)(1)(A) prohibits the sale, exchange or leasing of any property between a plan and a party in interest. The Department is proposing relief from that provision in the event the Securities are disposed of in a transaction with a party in interest.

## 2. Transition Payments

### Benefit Payments and Reimbursements

The Applicant requests exemptive relief from the prohibitions of sections 406(a)(1)(B) and 406(a)(1)(D) of ERISA for certain payments and reimbursements between Old GM, New GM, the Old GM Plan, the New GM Plan and the New GM VEBA Plan.

ERISA section 406(a)(1)(B) prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect lending of money or other extension of credit between a plan and a party in interest. ERISA section 406(a)(1)(D) prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Prior to the Section 363 Sale, the Old GM Plan provided benefits to, among others, individuals who ultimately will be covered by the New GM VEBA Plan. The New GM Plan currently provides benefits to most of these same individuals from the date of the Section 363 Sale until the Implementation Date of the New GM VEBA Plan. The New GM VEBA Plan will have sole responsibility and be the exclusive source of funds for the payment of retiree medical benefits to the Class and

Covered Group, with respect to benefit claims incurred after the Implementation Date.

Under certain circumstances connected to the transition, Old GM, New GM, the Old GM Plan, the New GM Plan, and the New GM VEBA Plan may arguably extend credit or transfer plan assets to one another in order to pay benefit claims that are the legal responsibility of another one of those five parties (the "Responsible Party").<sup>9</sup> The Applicant asserts that mispayments and reimbursements are likely to occur in the normal course due to the administrative realities of health care payments and the shifting of plan responsibilities between multiple plans in a short period of time.

The Applicant provides the following examples of transactions that would require relief under the requested exemption. A UAW retiree is incorrectly classified as an IUE-CWA retiree and is receiving retiree medical benefits in accordance with the New GM Plan, paid directly by New GM. The misclassification is discovered on September 1, 2010, and the New GM VEBA Plan reimburses New GM for the payments relating to claims incurred on or after January 1, 2010. Or, a member of the Covered Group receives medical care on December 28, 2009, thereby incurring a claim under the New GM Plan. However, in April of 2010, the claim is presented to and paid by the New GM VEBA Plan. The New GM VEBA Plan would be reimbursed by the New GM Plan.

In such event, the Responsible Party will reimburse the payor for such benefits, plus interest. According to the Applicant, payment by a payor of benefits for claims incurred after benefit responsibility has been transferred arguably is an extension of credit between the payor and the Responsible Party that is prohibited under section 406(a)(1)(B). Payment by the Responsible Party to the payor as reimbursement for these paid claims arguably is a transfer of plan assets to a party in interest that is prohibited under 406(a)(1)(D).

### Deposits by Mistake

The Applicant likewise seeks relief from section 406(a)(1)(D) of ERISA for return of mistaken payments to the New GM VEBA Plan, with interest.

Under the last paragraph of section 12 of the Modified Settlement Agreement, any deposit made to the New GM VEBA

Plan by mistake will be returned (with earnings) within 30 days of notice to the Committee of the mistake, to the extent permitted by law. The Applicant is concerned that this could be viewed as involving a prohibited transfer of plan assets to a party in interest. Accordingly the Applicant requests exemptive relief for this transaction.

### Conditions Related to the Transfer of New GM Securities to the New GM VEBA Plan: The Independent Fiduciary

Pursuant to the trust agreement of the VEBA Trust, the Committee will appoint an independent fiduciary to manage the General Motors Company Employer Security Sub-Account ("Independent Fiduciary"). The Independent Fiduciary will be a "named fiduciary" and "investment manager" as both terms are defined in ERISA, with complete discretion regarding the holding, ongoing management, and disposition of any New GM security (*i.e.*, the New GM Common Stock, Preferred Stock, Note and Warrants) acquired and held by the New GM VEBA Plan.

The Independent Fiduciary does not have discretion with respect to certain other aspects of the Securities. First, because the New GM VEBA Plan acquired the Securities by virtue of the Section 363 Sale, the Independent Fiduciary had no discretion regarding the acquisition of the Securities. Additionally, under the Stockholders Agreement, the New GM Common Stock held by the New GM VEBA Plan must be voted in the same proportion as votes cast by other stockholders. Therefore, the Independent Fiduciary will have no responsibility for the voting of the New GM Common Stock.

The Independent Fiduciary must be independent of and unrelated to Old GM, New GM, the UAW and the Committee. This will not be the case if (1) such fiduciary directly or indirectly controls, is controlled by, or is under common control with Old GM, New GM, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Old GM, New GM, the UAW or any Committee member in his or her individual capacity in connection with any transaction described in this exemption (except that an independent fiduciary may receive compensation from the Committee or the New GM VEBA Plan for services provided to the New GM VEBA Plan in connection with the transactions discussed 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)

<sup>9</sup> Under section 5A of the Modified Settlement Agreement, claims incurred on or before the Implementation Date will be paid by Old GM or New GM, as applicable, in accordance with the New GM Plan.

the annual gross revenue received by the fiduciary, in any fiscal year, from Old GM, New GM, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.<sup>10</sup>

The Independent Fiduciary may be removed by the Committee on 30 days written notice only for cause.<sup>11</sup> The removal will be effective as specified in

<sup>10</sup> The Department notes that candidates for the position of Independent Fiduciary to the New GM VEBA Plan may be affiliated with entities that provide services to Old GM, New GM, Ford, Chrysler or Chrysler Group or their affiliates. It is the responsibility of the Committee to determine whether such affiliations are likely to affect the judgment of the candidate in performing its services as Independent Fiduciary.

<sup>11</sup> Cause is defined in the Independent Fiduciary Agreement as: (i) Any disqualifying event described in ERISA section 411; (ii) Determination by any court, arbitrator or government regulatory body that the Independent Fiduciary has violated any civil or criminal law (including, but not limited to, securities, antitrust or ERISA) in connection with the performance of its responsibilities to the VEBA Trust. For purposes of avoidance of doubt in connection with this and the subsequent subparagraph, a "determination" shall mean any written judgment, order or decree; court-approved settlement; arbitration award; or enforcement action of a government regulatory body or SRO, in the form of a written sanction, claim, demand or opinion, whether or not appealable; (iii) Determination by any court, arbitrator or government regulatory body that the Independent Fiduciary has materially breached the terms of its engagement, whether or not appealable; (iv) Any action by the Independent Fiduciary that results in imposition of a civil or criminal sanction, any prohibited transaction excise tax, or any civil judgment or award of damages, on the VEBA Trust, the Committee, the trustee, or their respective employees, officers directors or owners (whether or not subject to indemnity by the Independent Fiduciary, an insurer, or any other person); (v) Termination, resignation, or death of the Independent Fiduciary principal or officer assigned to serve as the relationship principal with respect to the VEBA Trust, or the inability of such person to perform his or her duties for a continuous period of more than 30 days; (vi) Any change of ownership of the Independent Fiduciary that constitutes an "assignment" of the Independent Fiduciary's contract with the VEBA Trust, within the meaning of the Investment Advisers Act; (vii) Failure of the Independent Fiduciary to qualify as an "investment manager" within the meaning of ERISA section 3(38); (viii) Any change in the clientele, business or ownership of the Independent Fiduciary that results in an actual conflict of interest; (ix) Failure of the Independent Fiduciary to take into account the legitimate needs of the VEBA Trust for liquidity to pay benefits; (x) Violation of any conditions imposed on the Independent Fiduciary under the terms of the prohibited transaction exemption issued by the Department; (xi) Any other action or inaction of the Independent Fiduciary that the Committee determines to be a material breach of the Independent Fiduciary's agreement or any law, or is likely to result in an irreconcilable conflict; (xii) Any circumstance that leads the Committee to reasonably conclude that the termination of the Independent Fiduciary and replacement by a successor Independent Fiduciary is in the financial interest of the VEBA Trust, provided that the Committee documents the reasons for the termination.

the written notice, provided that the Independent Fiduciary has been given notice of the appointment of a successor independent fiduciary. No successor will be appointed in the event the New GM VEBA Plan ceases to hold any employer security. In the event that the New GM VEBA Plan subsequently acquires or holds an employer security and no appointment of a successor independent fiduciary has been made, any court of competent jurisdiction may, upon application by the retiring independent fiduciary, appoint a successor after such notice to the Committee and the retiring independent fiduciary.

The Committee delegated to a subcommittee (*i.e.*, three Committee members) the responsibility to retain an Independent Fiduciary on behalf of the New GM VEBA Plan. The subcommittee initially determined to proceed with the assumption that the interests of each plan whose assets are held by the VEBA Trust would be best served by seeking to retain a single qualified Independent Fiduciary to represent all three plans (providing health benefits, respectively, to retirees of Chrysler, GM and Ford). However, the subcommittee recognizes the possibility that engaging multiple Independent Fiduciaries may turn out to be the better option.

The subcommittee intends, as part of the interview process for potential candidates for the Independent Fiduciary appointment, to question the candidates on the nature and likelihood of potential conflicts of interest, the appropriate means of monitoring and communicating actual or potential conflicts, including whether the candidates currently have formal conflict monitoring procedures, and mechanisms for dealing with actual or potential conflicts as they are identified. After reviewing the candidates' qualifications, capacity to represent all three plans, willingness to do so, and other relevant factors, in consultation with counsel, the subcommittee anticipates making a final determination as to whether to hire one Independent Fiduciary or multiple Independent Fiduciaries.

The subcommittee will work with the Independent Fiduciary candidate(s) to develop procedures to identify, minimize and address conflicts of interest as they arise. Specifically, in the event that a single Independent Fiduciary is appointed, the subcommittee will engage a "conflicts monitor" to (i) develop a process for identifying potential conflicts, (ii) to regularly review the Independent Fiduciary reports, investment banker reports, and public information

regarding the companies, to identify the presence of factors that could lead to a conflict, and (iii) further question the Independent Fiduciary when appropriate.

Additionally, the subcommittee will be prepared to replace the Independent Fiduciary in the event of an actual and irreconcilable conflict of interest.

Finally, the subcommittee will require the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy will require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflict.

A separate investment bank will be retained with respect to each of the three plans comprising the VEBA Trust. The investment bank's initial recommendations would be made solely with the goal of maximizing the returns for the single plan that owns the securities for which the investment bank is responsible. If the Independent Fiduciary deviated from such initial recommendations, it would find it necessary to explain why it deviated from a recommendation; additionally, such a deviation would be a way for the Committee or its designee to flag possible conflicts of interest in advance. Any contract between the Independent Fiduciary and an investment banker will include an acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

The Independent Fiduciary will comply with the following additional conditions. The Independent Fiduciary will authorize the trustee of the New GM VEBA Plan to dispose of the New GM Common Stock (including shares of New GM Common Stock acquired pursuant to exercise of the Warrants), the Preferred Stock, the Note, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the New GM VEBA Plan, and protective of the participants and beneficiaries of the New GM VEBA Plan.

The Independent Fiduciary will negotiate and approve on behalf of the New GM VEBA Plan any transactions between the New GM VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of the securities contributed to the New GM VEBA Plan).



The Independent Fiduciary will discharge its duties consistent with the terms of the New GM VEBA Plan, the trust agreement, the Independent Fiduciary's agreement, and any other documents governing the employer securities, such as the Registration Rights Agreement.

The New GM VEBA Plan may not incur any fees, costs or other charges (other than described in the trust agreement and the Modified Settlement Agreement) as a result of the transactions exempted herein.

The terms of any transaction exempted herein must be no less favorable to the New GM VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

#### Conditions Related to Transition Payments

The conditions for reimbursements of mispayments require the following procedure for audit and reconciling payments. The Applicants state that given the rapidity of the shifts in responsibility from the Old GM Plan to the New GM Plan, and from the New GM Plan to the New GM VEBA Plan, it is unlikely that any review will be undertaken until at least three months following the Implementation Date.

The Committee and an independent third party administrator of the New GM VEBA Plan will review benefit payments paid during the transition period and determine the dollar amount of any mispayments made, subject to the review and approval of the New GM VEBA Plan's independent auditor. The results of this review will be made available to Old GM and New GM.

Old GM and New GM will perform similar reviews with respect to the Old GM Plan and the New GM Plan. Old GM and New GM will provide the results of their reviews to the Committee.

Interest on any reimbursed mispayment will accrue from the date of the mispayment to the date of the reimbursement. Interest will be determined using the applicable OPEB discount rate. The OPEB discount rate is a rate used to discount projected future OPEB benefits payment cash flows to determine the present value of the OPEB obligation.<sup>12</sup> The rate is developed by New GM's Treasurer's office, working in conjunction with New GM's independent auditor, Deloitte & Touche. The discount rate's validity is attested to by Deloitte & Touche, and is disclosed

in New GM's annual 10K filing with the Securities and Exchange Commission.

If there is a dispute as to the amount of the mispayment and/or reimbursement, undisputed amounts will be paid and the parties will enter into a dispute procedure set forth in section 26D of the Modified Settlement Agreement. Specifically, the parties exchange written notices concerning the dispute and, within 21 days, meet and attempt to resolve the dispute. If the parties are unable to resolve the dispute within 30 days of the meeting, either party can demand arbitration.

In the case of a mistaken deposit to the New GM VEBA Plan, New GM would make a claim to the Committee regarding the specific deposit or transfer made in error or made in an amount greater than that to which the New GM VEBA Plan was entitled. The claim must be made within the Verification Time Period, which is defined as follows in Section VI(r) of the proposed exemption.

The term "Verification Time Period" means: (i) with respect to all Securities other than the Note, the period beginning on the date of publication of the final exemption in the Federal Register and ending 60 calendar days thereafter; (ii) with respect to each payment pursuant to the Note, the period beginning on the date of the payment and ending 90 calendar days thereafter; (iii) with respect to the UAW-Related Account of the Internal VEBA, the period beginning on the date of publication of the final exemption in the Federal Register (or, if later, the date of the transfer of the UAW-Related Account to the New GM VEBA Plan) and ending 180 calendar days thereafter; and (iv) with respect to the Mitigation VEBA, the period beginning on the date of publication of the final exemption in the Federal Register and ending 60 calendar days thereafter.

Accordingly, any claim regarding a mistake with respect to the New GM Common Stock, the Preferred Stock, the Warrants or the transfer of the assets from the Mitigation VEBA must be made within 60 days of the date of publication of the final exemption in the **Federal Register**. A claim regarding a mistake with respect to a payment made pursuant to the Note must be made within 90 days of the date of the payment. A claim regarding a mistake with respect to the transfer of assets of the UAW-Related Account of the Internal VEBA must be made within 180 days of the date of publication of the final exemption in the Federal Register (or, if later, from the date of the transfer of the UAW-Related Account to the New GM VEBA Plan). The Applicant requests a longer period for the assets of the UAW-Related Account of the Internal VEBA due to the difficulty in

determining the value of some of the assets held by the Internal VEBA.

Interest on any mistaken deposit will accrue from the date of the mistaken deposit to the date of the repayment. Interest will be determined using the applicable OPEB discount rate, described above. In the event of a dispute, the procedure set forth in section 26D of the Modified Settlement Agreement, described above, would apply.

#### Statutory Findings

The Applicant makes the following statements regarding the Department's required findings under section 408(a) of ERISA that the exemption is administratively feasible, in the interests of the New GM VEBA Plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the New GM VEBA Plan.

The exemption transactions are administratively feasible because they are relatively simple and straightforward, easy to monitor, and involve the management of the Securities by the Independent Fiduciary.

The exemption transactions are in the interest of the New GM VEBA Plan's participants and beneficiaries and protective of their rights because they embody the only feasible mechanism to ensure that assets are dedicated to, and held in the New GM VEBA Plan solely for use as retiree health care benefits (and reasonable related expenses). The Independent Fiduciary will represent the interests of the participants and beneficiaries of the New GM VEBA Plan by exercising the sole discretion regarding the management and disposition of the New GM securities.

#### Notification of Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

#### 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/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other

<sup>12</sup> OPEB means Other Post-Employment Benefits, and typically includes retiree healthcare benefits, life insurance, tuition assistance, day care, legal services and the like.

provisions of the Act and/or 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, among other things, require a fiduciary to discharge his 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 requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the 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;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. 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

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of the exemption.

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting the following 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, 32847, August 10, 1990), as follows:

##### Section I—Covered Transactions

(a) If the exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of ERISA shall not apply, effective July 10, 2009, to:

(1) The acquisition by the UAW General Motors Company Retiree Medical Benefits Plan (the New GM VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the

VEBA Trust) of: (i) 87,500,000 shares of common stock of General Motors Company (New GM) (the New GM Common Stock) representing 17.5% of New GM equity; (ii) \$6.5 billion of Series A Fixed Rate Cumulative Perpetual Preferred stock of New GM (the Preferred Stock); (iii) a note issued by New GM with a principal amount of \$2.5 billion (the Note); and (iv) warrants to acquire New GM Common Stock representing 2.5% of New GM equity (the Warrants) (collectively, including any additional shares of New GM Common Stock acquired pursuant to the exercise of the Warrants, the Securities), transferred by New GM and deposited in the General Motors Company Employer Security Sub-Account of the General Motors Company Separate Retiree Account of the VEBA Trust.

(2) The acquisition by the New GM VEBA Plan of shares of New GM Common Stock pursuant to the exercise of the Warrants;

(3) The holding by the New GM VEBA Plan of the Securities in the General Motors Company Employer Security Sub-Account of the General Motors Company Separate Retiree Account of the VEBA Trust; and

(4) The disposition of the Securities.

(b) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of ERISA shall not apply, effective July 10, 2009, to:

(1) The payment by Old GM, New GM, the Old GM Plan, the New GM Plan or the New GM VEBA Plan of a benefit claim that was the responsibility and legal obligation, under the terms of the applicable plan documents, of one of the other parties listed in this paragraph; and

(2) The reimbursement by Old GM, New GM, the Old GM Plan, the New GM Plan, or the New GM VEBA Plan, of a benefit claim that was paid by another party listed in this paragraph, which was not legally responsible for the payment of such claim, plus interest.

(c) If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1) and 406(b)(2) of ERISA shall not apply, effective July 10, 2009, to the return to New GM of assets deposited or transferred to the New GM VEBA Plan by mistake, plus interest.

##### Section II—Conditions Applicable to Section I(a)

(a) The Committee appoints a qualified Independent Fiduciary to act on behalf of the New GM VEBA Plan for all purposes related to the transfer of the Securities to the New GM VEBA Plan for the duration of the New GM VEBA Plan's holding of the Securities. Such

Independent Fiduciary will have sole discretionary responsibility relating to the holding, ongoing management and disposition of the Securities, except for the voting of the New GM Common Stock. The Independent Fiduciary has determined or will determine, before taking any actions regarding the Securities, that each such action or transaction is in the interest of the New GM VEBA Plan.

(b) In the event that the same Independent Fiduciary is appointed to represent the interests of one or more of the other plans comprising the VEBA Trust (*i.e.*, the UAW Chrysler Retiree Medical Benefits Plan and/or the UAW Ford Retiree Medical Benefits Plan) with respect to employer securities deposited into the VEBA Trust, the Committee takes the following steps to identify, monitor and address any conflict of interest that may arise with respect to the Independent Fiduciary's performance of its responsibilities:

(1) The Committee appoints a "conflicts monitor" to: (i) Develop a process for identifying potential conflicts; (ii) regularly review the Independent Fiduciary reports, investment banker reports, and public information regarding the companies, to identify the presence of factors that could lead to a conflict; and (iii) further question the Independent Fiduciary when appropriate.

(2) The Committee adopts procedures to facilitate prompt replacement of the Independent Fiduciary if the Committee in its sole discretion determines such replacement is necessary due to a conflict of interest.

(3) The Committee requires the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy shall require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflict.

(c) The Independent Fiduciary authorizes the trustee of the New GM VEBA Plan to dispose of the New GM Common Stock (including additional shares of New GM Common Stock acquired pursuant to exercise of the Warrants), the Preferred Stock, and/or the Note, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the New GM VEBA Plan, and protective of the participants and beneficiaries of the New GM VEBA Plan.

(d) The Independent Fiduciary negotiates and approves on behalf of the New GM VEBA Plan any transactions between the New GM VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of the securities contributed to the New GM VEBA Plan).

(e) Any contract between the Independent Fiduciary and an investment banker includes an acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

(f) The Independent Fiduciary discharges its duties consistent with the terms of the New GM VEBA Plan, the trust agreement, the Independent Fiduciary Agreement, and any other documents governing the employer securities, such as the Registration Rights Agreement.

(g) The New GM VEBA Plan incurs no fees, costs or other charges (other than described in the trust agreement and the Modified Settlement Agreement) as a result of the transactions exempted herein.

(h) The terms of any transaction exempted herein are no less favorable to the New GM VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

#### *Section III—Conditions Applicable to Section I(b)*

(a) The Committee and the New GM VEBA Plan's third party administrator will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the VEBA Trust's independent auditor. The results of this review will be made available to Old GM and New GM.

(b) Old GM and New GM and their respective plans' third party administrator(s) will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the respective plans' independent auditor. The results of this review will be made available to the Committee.

(c) Interest on any reimbursed mispayment will accrue from the date of the mispayment to the date of the reimbursement.

(d) Interest will be determined using the applicable OPEB discount rate.<sup>13</sup>

<sup>13</sup> OPEB means Other Post-Employment Benefits, and typically includes retiree healthcare benefits, life insurance, tuition assistance, day care, legal services and the like. The OPEB discount rate is a

(e) If there is a dispute as to the amount of a reimbursement requested, the parties will enter into a dispute procedure set forth in section 26D of the Modified Settlement Agreement.

#### *Section IV—Conditions Applicable to Section I(c)*

(a) New GM must make a claim to the Committee regarding the specific deposit or transfer made in error or made in an amount greater than that to which the New GM VEBA Plan was entitled.

(b) The claim is made within the Verification Time Period, as defined in Section VI(r).

(c) Interest on any mistaken deposit or transfer will accrue from the date of the mistaken payment to the date of the repayment.

(d) Interest will be determined using the applicable OPEB discount rate.

(e) If there is a dispute as to the amount of a mistaken payment, the parties will enter into a dispute procedure set forth in section 26D of the Modified Settlement Agreement.

#### *Section V—Conditions Applicable to Section I(a), (b) and (c)*

(a) The Committee and the Independent Fiduciary maintain for a period of six years from the date the Securities are transferred to the New GM VEBA Plan, and the shares of New GM Common Stock are acquired by the New GM VEBA Plan through the exercise of the Warrants, the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of this exemption have been met, except that (i) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Committee and/or the Independent Fiduciary, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than the Committee or the Independent Fiduciary shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (b) below; and

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

rate used to discount projected future OPEB benefits payment cash flows to determine the present value of the OPEB obligation.

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

(B) the UAW or any duly authorized representative of the UAW;

(C) New GM or any duly authorized representative of New GM;

(D) the Independent Fiduciary or any duly authorized representative of the Independent Fiduciary;

(E) the Committee or any duly authorized representative of the Committee; and

(F) any participant or beneficiary of the New GM VEBA Plan or any duly authorized representative of such participant or beneficiary.

#### *Section VI—Definitions*

(a) The term "affiliate" means: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (2) any officer, director, partner, or employee in any such person, or relative (as defined in section 3(15) of ERISA) of any such person; or (3) any corporation, partnership or other entity of which such person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(b) The "Committee" means the eleven individuals consisting of six independent members and five UAW appointed members who will serve as the plan administrator and named fiduciary of the New GM VEBA Plan.

(c) The term "New GM Common Stock" means the shares of common stock, par value \$0.01 per share, issued by New GM.

(d) The term "General Motors Company Employer Security Sub-Account of the General Motors Company Separate Retiree Account of the VEBA Trust" means the sub-account established in the General Motors Separate Retiree Account of the VEBA Trust to hold New GM securities on behalf of the New GM VEBA Plan.

(e) The term "Implementation Date" means December 31, 2009.

(f) The term "Independent Fiduciary" means a fiduciary that is (i) independent of and unrelated to Old GM, New GM, the UAW, the Committee, and their affiliates, and (ii) appointed to act on behalf of the New GM VEBA Plan with respect to the holding, management and disposition of the Securities. In this regard, the fiduciary will not be deemed to be independent of and unrelated to Old GM, New GM, the UAW, the Committee, and their affiliates if (1)

such fiduciary directly or indirectly controls, is controlled by, or is under common control with Old GM, New GM, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Old GM, New GM, the UAW or any Committee member in his or her individual capacity in connection with any transaction contemplated in this exemption (except that an independent fiduciary may receive compensation from the Committee or the New GM VEBA Plan for services provided to the New GM VEBA Plan in connection with the transactions discussed 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 fiduciary, in any fiscal year, from Old GM, New GM, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.

(g) The term "Modified Settlement Agreement" means The UAW Retiree Settlement Agreement between New GM and the UAW dated July 10, 2009.

(h) The term "New GM" means the company that acquired certain assets and liabilities of Old GM pursuant to the Section 363 Sale.

(i) The term "Note" means the note issued by New GM with a principal amount of \$2.5 billion.

(j) The term "New GM Plan" means the retiree medical benefits plan maintained by New GM that provides benefits to most of the same individuals as are covered by the Old GM Plan, from the date of the Section 363 Sale until the Implementation Date of the New GM VEBA Plan.

(k) The term "Old GM" means the company that remains in bankruptcy protection after the Section 363 Sale.

(l) The term "Old GM Plan" means the retiree medical benefits plan maintained by Old GM that provided benefits to, among others, those who will be covered by the New GM VEBA Plan.

(m) The term "Preferred Stock" means shares of Series A Fixed Rate Cumulative Perpetual Preferred Stock, par value \$0.01 per share, issued by New GM.

(n) The term "Section 363 Sale" means a sale under section 363 of Title 11 of the U.S. Code, by which on July 10, 2009, New GM succeeded to certain assets and liabilities of Old GM.

(o) The term "Securities" means (i) the New GM Common Stock; (ii) the

Preferred Stock; (iii) the Note; (iv) the Warrants; and (v) additional shares of New GM Common Stock acquired pursuant to exercise of the Warrants.

(p) The term "UAW" means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

(q) The term "Warrants" means warrants to acquire shares of New GM Common Stock, par value \$0.01 per share, issued by New GM.

(r) The term "Verification Time Period" means: (i) With respect to all Securities other than the Note, the period beginning on the date of publication of the final exemption in the **Federal Register** and ending 60 calendar days thereafter; (ii) with respect to each payment pursuant to the Note, the period beginning on the date of the payment and ending 90 calendar days thereafter; (iii) with respect to the UAW-Related Account of the Internal VEBA, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of the UAW-Related Account to the New GM VEBA Plan) and ending 180 calendar days thereafter; and (iv) with respect to the Mitigation VEBA, the period beginning on the date of publication of the final exemption in the **Federal Register** and ending 60 calendar days thereafter.

(s) The term "VEBA" means the UAW General Motors Company Retiree Medical Benefits Plan (the New GM VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the VEBA Trust).

(t) The term "Registration Rights Agreement" means the Equity Registration Rights Agreement by and among New GM, the U.S. Treasury, Canada, the VEBA Trust and Old GM, entered into on July 10, 2009.

Signed at Washington, DC, this 15th day of September 2009.

**Ivan Strasfeld,**

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

[FR Doc. E9-22485 Filed 9-17-09; 8:45 am]

**BILLING CODE 4510-29-P**

## **NATIONAL SCIENCE FOUNDATION**

### **National Science Board; Sunshine Act Meetings; Notice**

The National Science Board, pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n-5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for

the transaction of National Science Board business and other matters specified, as follows:

**AGENCY HOLDING MEETING:** National Science Board.

**DATE AND TIME:** Thursday, September 24, 2009, at 8 a.m.

**PLACE:** Columbus, Ohio, The Ohio State University, Nationwide and Ohio Farm Bureau 4H Center, Bob Evans Auditorium.

**STATUS:** Some portions open, some portions closed.

#### **Open Sessions**

*September 24, 2009*

8 a.m.–8:20 a.m.  
8:20 a.m.–8:35 a.m.  
8:35 a.m.–9:20 a.m.

#### **Closed Sessions**

*September 24, 2009*

9:35 a.m.–10:50 a.m.  
10:50 a.m.–11:05 a.m.  
11:05 a.m.–11:15 a.m.  
11:15 a.m.–11:30 a.m.

**AGENCY CONTACT:** Dr. Robert E. Webber, [rwebber@nsf.gov](mailto:rwebber@nsf.gov), (703) 292-7000, <http://www.nsf.gov/nsb/>.

#### **Matters To Be Discussed**

*Thursday, September 24, 2009*

Open Session: 8 a.m.–8:20 a.m., Bob Evans Auditorium

- National Science Board Chairman's Introduction
- The Ohio State University President's Welcome

Executive Committee

Open Session: 8:20 a.m.–8:35 a.m., Bob Evans Auditorium

- Executive Committee Chairman's Remarks
- Approval of Minutes for the May 2009 Meeting
- Discussion of Board Priorities for FY 2010
- Updates or New Business from Committee Members

Plenary Open

Open Session: 8:35 a.m.–9:20 a.m., Bob Evans Auditorium

- Approval of Plenary Open Minutes, August 2009
- Resolutions to Close Portions of December 2009 Meeting
- Chairman's Report
- Director's Report
- Open Committee Reports
- Board Member Proposal Review Process

Committee on Programs and Plans (CPP)

Closed Session: 9:35 a.m.–10:50 a.m., Bob Evans Auditorium