

• *Incentive Fee (the Incentive Fee)*,<sup>11</sup> which will be based on whether the return on the amount the Plan has invested in the timber assets, as determined by the cash distributions to the Plan and the current appraised value of the timber assets, exceeds a “hurdle rate.” The Incentive Fee will be calculated to include both realized and unrealized gains and losses. It will be a “rolling” fee, inasmuch as performance will be measured based on cumulative performance over the life of TCG’s Management Agreement, rather than over a discrete period. The Incentive Fee will consist of three components—a fixed hurdle rate, cash distributions, and the appraised value of the timber assets with respect to the Plan’s Timber Rights. The hurdle rate will be a percentage fixed in the TCG service contract. The Incentive Fee will reflect 20% of the cumulative performance exceeding the hurdle rate, with the Plan retaining 80%. Such percentage has been approved and set by UCF, the Plan fiduciary independent of TCG, and it is not subject to TCG’s discretion. The cash distributions to the Plan will be the actual outflow net after expenses of payments made to the Plan out of the timber assets and any miscellaneous income expected to be generated by the Timber Rights, such as those derived from hunting, fishing and other licensing activities, reducing the value of the timber assets being managed. Thus, the Incentive Fee will not include amounts reinvested in the timber assets nor expenses paid with respect to those assets, which would be reflected instead in the appraised value. The appraised value of the timber assets will be determined by a qualified, independent appraiser, using standard methods for valuing timber. The timber appraiser will be selected by UCF. TCG will not have any discretion over the determination of the appraised asset value component of its fee calculation. The Incentive Fee will be calculated every three years and paid at three-year intervals, subject to withholding 50% of the accrued performance fee until final

disposition to avoid any overpayment in any particular period.

#### *Duties of the Independent Fiduciary*

The Department notes that the appointment of an independent fiduciary to represent the interests of the Plan with respect to the proposed transactions that are the subject of the exemption request is a material factor in its determination to propose exemptive relief. The Department believes that it would be helpful to provide general information regarding its views on the responsibilities of an independent fiduciary in connection with the in kind contribution of property to an employee benefit plan. As noted in the Department’s Interpretive Bulletin, 29 CFR 2509.94–3(d) (59 FR 66736, December 28, 1994), apart from consideration of the prohibited transaction provisions, plan fiduciaries must determine that acceptance of an in kind contribution is consistent with the general standards of fiduciary conduct under the Act. It is the view of the Department that acceptance of an in kind contribution is a fiduciary action subject to section 404 of the Act. In this regard, section 404(a)(1)(A) and (B) of the Act requires that fiduciaries discharge their duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. In addition, section 404(a)(1)(C) requires that fiduciaries diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Accordingly, the fiduciaries of a plan must act “prudently,” “solely in the interest” of the plan’s participants and beneficiaries, and with a view to the need to diversify plan assets when deciding whether to accept an in kind contribution. If accepting an in kind contribution is not “prudent,” not “solely in the interest” of the participants and beneficiaries of the plan, or would result in an improper lack of diversification of plan assets, the responsible fiduciaries of the plan would be liable for any losses resulting from such a breach of fiduciary responsibility, even if a contribution in kind does not constitute a prohibited transaction under section 406 of the Act.

18. In summary, the Applicant represents that the proposed

transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Independent Fiduciary, acting on behalf of the Plan, will represent the Plan’s interests for all purposes with respect to the Timber Rights contribution, and will determine prior to entering into any of the transactions described herein, that each such transaction, including the Timber Rights contribution, is in the interest of the Plan;

(b) The Independent Fiduciary will negotiate and approve the terms of any of the transactions between the Plan and U.S. Steel that relate to the Timber Rights;

(c) The Independent Fiduciary will manage the holding, disposition, and assignment of the Timber Rights and take whatever actions it deems necessary to protect the rights of the Plan with respect to the Timber Rights;

(d) The terms of any transactions between the Plan and U.S. Steel will be no less favorable to the Plan than terms negotiated at arm’s length under similar circumstances between unrelated third parties;

(e) The Independent Fiduciary will determine the fair market value of the Timber Rights contributed to the Plan as of the date of such contribution. In determining the fair market value of the Timber Rights Contribution, the Independent Fiduciary will obtain an appraisal from a qualified, independent appraiser selected by the Independent Fiduciary, and will ensure that the appraisal is consistent with sound principles of valuation;

(f) The fair market value of the Timber Rights will not exceed 5% of the Plan’s total assets at the time of such contribution.

(g) In general, the Plan will pay no fees or commissions in connection with the Timber Rights contribution.

(h) Five years from the date of the Timber Rights contribution, U.S. Steel will contribute, to the Plan, an amount in cash calculated to make the Plan “whole.”

(i) U.S. Steel will indemnify the Plan with respect to all liability for hazardous substances released on the Property prior to the execution and closing of the Timber Rights contribution.

(j) The Plan will retain the right to sell, in whole or in part, any of its Timber Rights’ interests to any third party purchaser.

#### *Notice to Interested Persons*

Notice of proposed exemption will be provided to all interested persons by first class mail within 4 days of

<sup>11</sup> The Applicant represents that the Incentive Fee payable to TCG will meet the criteria in the Department’s advisory opinions on performance fees (see Advisory Opinions 86–20A, 86–21A, and 89–28A). However, the Department is providing no opinion in this proposed exemption on whether the Incentive Fee payable to TCG by the Plan is or will be consistent with the fiduciary responsibilities contained in Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a)(1) of the Act requires, among other things, that the plan fiduciary act prudently and solely in the interest of the plan and its participants and beneficiaries when making investment decisions on behalf of a plan.