

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a public hearing on the proposed exemption to the address above and within the time period set forth above. Comments received will be made part of the record and will be available for public inspection at the above address.

Proposed Exemption

The Department has under consideration the granting of the following class exemption, under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990).

I. The restrictions of sections 406(a)(1) (A) through (D), 406(b)(1) and 406(b)(2) of ERISA and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to transactions that result from a person's failure to transmit participant contributions to a pension plan within the time frames required by the plan asset—participant contribution regulation (29 CFR 2510.3-102), provided that the following conditions are met:

(a) All delinquent participant contributions are restored to the pension plan plus the greater of:

(1) The amount that otherwise would have been earned on the participant contributions from the date on which such contributions were paid to, or withheld by, the employer until such money is fully restored to the plan, had such contributions been invested in accordance with applicable plan provisions, or

(2) The amount the participant would have earned on the participant contributions during such period using an interest rate equal to the underpayment rate defined in section 6621(a)(2) of the Code from the date on which such contributions were paid to, or withheld by, the employer until such money is fully restored to the plan.

(b) The total of all outstanding delinquent participant contributions on March 7, 1996, excluding earnings, does not exceed the aggregate amount of participant contributions that were paid to, or withheld by, the employer for contribution to the plan for calendar year 1995. Provided that the preceding limitation is met, the proposed exemption shall apply without limit to the restoration of any earnings on delinquent participant contributions that have been restored to the plan prior to the effective date of the Program.

(c) The conditions set forth in paragraphs (2) through (6) of the Program are met.

II. Definitions: For purposes of this proposed exemption:

(a) The term "plan" means an employee pension benefit plan described in section 3(2) of ERISA.

(b) The term "person" means a person as that term is defined in section 3(9) of ERISA.

(c) The term "Program" means the Pension Payback Program published by the Department on March 7, 1996.

III. Effective Date: If granted, the proposed exemption provides retroactive and prospective relief for those transactions involving participant contributions and earnings that are restored to pension plans no later than September 7, 1996. Such restorative payments must relate to amounts paid to, or withheld by, an employer for contribution to a plan no later than April 5, 1996.

Signed at Washington, D.C. this 4th day of March, 1996.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Department of Labor, Pension and Welfare Benefits Administration.

[FR Doc. 96-5392 Filed 3-6-96; 8:45 am]

BILLING CODE 4510-29-P

Advisory Council on Employee Welfare and Pension Benefits Plan; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, a public meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans will be held on April 8, 1996, in Room S2508, U.S. Department of Labor Building, Third and Constitution Avenue, NW., Washington, DC 20210.

The purpose of the meeting, which will begin at 9:30 a.m. and end at approximately noon, is to consider the items listed below and to invite public comment on any aspect of the administration of ERISA.

- I. Welcome and Introduction of New Council Members
- II. Assistant Secretary's Report
 - A. PWBA Priorities for 1996
 - B. Report to Congress
 - C. Miscellaneous Issues
 - D. Announcement of Council Chairperson and Vice Chairperson
- III. Introduction of PWBA Senior Staff and Orientation of New Members
- IV. Report of Advisory Council Working Groups (1994/1995 Term)
- V. Determination of Council Working Groups for 1996

- VI. Procedure for Establishing Council and Working Group Meeting Dates
- VII. Statements from the General Public
- VIII. Adjourn

Members of the public are encouraged to file a written statement pertaining to any topic concerning ERISA by submitting 20 copiers on or before March 25, 1996 to Sharon Morrissey, Acting Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N-5677, 200 Constitution Avenue, NW., Washington, DC 20210. Individuals or representatives of organizations wishing to address the Advisory Council should forward their request to the Acting Executive Secretary or telephone (202) 219-8753. Oral presentations will be limited to ten minutes, but an extended statement may be submitted for the record. Individuals with disabilities, who need special accommodations, should contact Sharon Morrissey by March 25 at the address indicated.

Organizations or individuals may also submit statements for the record without testifying. Twenty (20) copies of such statements should be sent to the Acting Executive Secretary of the Advisory Council at the above address. Papers will be accepted and included in the record of the meeting if received on or before March 25, 1996.

Signed at Washington, DC, this 1st day of March, 1996.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

[FR Doc. 96-5408 Filed 3-6-96; 8:45 am]

BILLING CODE 4510-29-M

Pension Payback Program

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of adoption of voluntary compliance program for restoration of delinquent participant contributions.

SUMMARY: This document announces the adoption of a voluntary compliance program which will allow certain persons to avoid potential Employment Retirement Income Security Act civil actions initiated by the Department of Labor, the assessment of civil penalties under section 502(l) of ERISA and Federal criminal prosecutions arising from their failure to timely remit participant contributions and the failure to disclose such non-remittance. The program also includes relief from certain prohibited transaction liability. The program is designed to benefit workers by encouraging employers to restore delinquent participant contributions to employee pension

benefit plans covered by Title I of ERISA.

DATES: The program applies to certain delinquent participant contributions that are restored to pension plans no later than September 7, 1996. Restorative payments must relate to amounts paid by participants or withheld by an employer from participants' wages for contribution to a pension plan on or before April 5, 1996. Written notification of intention to participate in the program must be received by the Department no later than September 7, 1996.

ADDRESSES: Notification of intention to participate in the program must be sent in writing to: Pension Payback Program Pension and Welfare Benefits Administration, U.S. Department of Labor, P.O. Box 77235, Washington, DC 20013-7235.

FOR FURTHER INFORMATION CONTACT: Jeffrey Monhart, Pension Investigator, Office of Enforcement, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC (202) 219-4377. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Under a current regulation, issued by the Department of Labor in 1988, assets of an employee benefit plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his or her wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event to exceed 90 days from the date on which such amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or 90 days from the date on which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). 29 CFR 2510.3-102.

Except as provided in ERISA § 403(b), plan assets are required to be held in trust by one or more trustees.¹ ERISA § 403(a), 29 U.S.C. 1103(a). In addition,

¹ ERISA § 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans. In addition, the Secretary has issued a technical release, T.V. 92-01, which provides that, with respect to certain welfare plans (e.g., cafeteria plans), the Department will not assert a violation of the trust or certain reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations, involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992), 58 45359 (Aug. 27, 1993).

ERISA's fiduciary responsibility provisions apply to the management of plan assets. Among other things, these provisions make clear that the assets of a plan may not inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan. ERISA §§ 403-404, 29 U.S.C. 1103-1104. They also prohibit a broad array of transactions involving plan assets. ERISA §§ 406-408, 29 U.S.C. 1106-1108.

Employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to make diligent efforts to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions.

As was noted in the preamble to the final regulation published in 1988, the Department of Justice takes the position that, under 18 U.S.C. 664, the embezzlement, conversion, abstraction, or stealing of "any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or any fund connected therewith" is a criminal offense, and that under such language, criminal prosecution may go forward in situations in which the participant contribution is not a plan asset for purposes of Title I of ERISA. 53 FR 17628 (May 17, 1988). The final regulation defined when participant contributions become "plan assets" only for the purposes of Title I of ERISA and the related prohibited transaction excise tax provisions of the Code. The Department reiterates that this regulation may not be relied upon to bar criminal prosecutions pursuant to 18 U.S.C. 664.

Recent investigations conducted by the Department have revealed numerous violations related to employers' delay in transmitting or failing to transmit to employee benefit plans amounts that a participant or beneficiary pays to an employer, or amounts that employers withhold from participants' wages, for contribution to the plans. Although the Department believes that in the vast majority of contributory employee benefit plans, participant contributions are handled with integrity, evidence uncovered in ongoing investigations indicates that such delays are not uncommon.² The recent enforcement

² In the Spring of 1995 PWBA began a project to investigate misuse of employee contributions to

activities, which focused on participant contributions, indicate a significantly higher frequency of violations for such investigations than the Department encounters in general.³

In addition, the Department, in responding to requests for technical assistance from employers and participants, has received information that many employers who receive participant contributions are under the misimpression that the current regulation permits a delay of up to 90 days in segregating such contributions, even if the participant contributions can reasonably be segregated much sooner. The Department has also received similar information from a variety of other sources. Such delays deprive participants of earnings on their contributions and increase the risk to participants and their beneficiaries that their contributions will be lost due to the employer's insolvency or misappropriation by the employer.

In order to better protect the security of participant contributions to employee benefit plans, on December 20, 1995, the Department of Labor published in the Federal Register a notice of proposed rulemaking to revise the regulation at 29 CFR 2510.3-102 (60 FR 66036). The Department's proposal would change the maximum period during which participant contributions to an employee benefit plan may be treated as other than "plan assets" to the same number of days as the period in which the employer is required to deposit withheld income taxes and employment taxes under rules promulgated by the Internal Revenue Service (IRS). The proposed regulation also solicited comments on the advisability of other measures that the Department might consider to address the problem of delays in transmitting participant contributions to plans. The comment period for this proposal expired on February 5, 1996. The Department held a public hearing on the proposal on February 22 and 23, 1996, in Washington, DC.

employee benefit plans and in particular in 401(k) plans. As of October 31, 1995 there were 417 employee contribution investigations open and 130 cases were closed during the year. More than \$3.7 million has been recovered through voluntary compliance in situations where employee contributions were not placed in trust for participants.

³ Of the 130 closed employee contribution cases, 44, or 33.8 percent of closed cases, resulted in findings of violations of ERISA's fiduciary provisions. This compares to a finding of fiduciary violations in 12 percent of all other closed cases in FY 95.

The Pension Payback Program

In order to encourage persons who have been delinquent in remitting participant contributions to pension plans, the Department has determined to announce a voluntary compliance program to be known as the Pension Payback Program. The program applies only to the restoration of participant contributions and lost earnings to employee pension benefit plans as defined in section 3(2) of ERISA. As described in the following notice, the Pension Payback Program contains two principal elements.

1. The Program will permit certain persons who are delinquent in the remittance of participant contributions to pension plans to avoid civil actions brought by the Department of Labor and Federal criminal prosecutions for such delinquencies if the conditions of the Program are met.

2. A final class exemption under section 408(a) of ERISA that is being published in proposed form today will govern these transactions. However, persons who participate in the Program transaction. However, persons who participate in the Program may rely on the proposed exemption notwithstanding any subsequent modifications made in issuing the final exemption. Thus, on a temporary basis, pending promulgation by the Department of the final class exemption setting forth the condition for retroactive relief, the Department will not pursue enforcement against persons who comply with the conditions of the Program with respect to any prohibited transaction liability which may have arisen as a result of a delay in forwarding participant contributions. The Internal Revenue Service has advised the Department of Labor that it will not seek to impose the Internal Revenue Code section 4975 (a) and (b) sanctions with respect to any prohibited transaction that is covered by the proposed class exemption notwithstanding any subsequent changes to the proposed exemption when it is finalized, provided that all the requirements of the proposed class exemption are met.

The conditions for each of the two elements are the same and are set forth in the following notice. In particular, the Program is available to a person only if the delinquent participant contributions withheld or received by an employer, excluding earnings, do not exceed the aggregate amount of participant contributions that were received by the employer for the calendar year 1995. The purpose of this limitation is to prevent the Program

from being available to persons involved in particularly serious delinquencies.

The program applies only to delinquent participant contributions that are restored to pension plans no later than September 7, 1996. Restorative payments must relate to amounts paid by participants or withheld by an employer from participants' wages for contribution to a pension plan on or before April 5, 1996. Written notification of intention to participate in the Program must be received by the Department no later than September 7, 1996.

Under the proposed exemption, all delinquent participant contributions must be restored to the pension plan plus earnings from the date on which such contributions were paid to, or withheld by, the employer until such money is restored to the plan. The earnings are calculated at the greater of: (1) The amount that would have earned on the participant contributions during such period if applicable plan provisions had been followed, or (2) the amount that would have earned on the participant contributions during such period using an interest rate equal to the underpayment rate defined in section 6621(a)(2) of the Internal Revenue Code during such period. In the Department's view, this condition requires that the earnings be calculated on an account by account basis in order to mirror the earnings the participants would have otherwise accrued. The underpayment rate defined in section 6621(a)(2) is based on the Federal short-term rate determined quarterly by the Secretary of the Treasury and is designed to reflect market rates of interest rather than serve as a penalty. Courts have applied rates determined under section 6621 in awarding prejudgment interest in cases under Title I of ERISA. *Martin v. Harline*, No. 87-NC-115J (D. Utah Mar. 31, 1992) 15 Emp. Ben. Cases (BNA) 1138, 1153; *Whitfield v. Cohen*, 686 F. Supp. 188, 193 (E.D.N.Y. 1988); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988).

Except as provided in the final class exemption, the Program does not afford relief from civil actions that may be filed by persons other than the Departments of Labor and Justice, and the Internal Revenue Service. Upon finalization of the class exemption, persons who have complied with its conditions will not be subject to the restrictions of sections 406(a)(1) (A) through (D), 406(b)(1) and 406(b)(2) of ERISA and the sanctions resulting from the application of section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, for transactions that result from such

person's failure to transmit participant contributions to pension plans in accordance with the time frames described in the participant contribution regulation at 29 CFR 2510.3-102. The Program does not apply to criminal prosecutions brought by State governments, although the Department has determined not to affirmatively refer information to the States for criminal prosecution concerning persons who voluntarily restore participant contributions in accordance with the terms of the Program.

Notice of Adoption of Voluntary Compliance Program for Restoration of Delinquent Participant Contributions

Pension Payback Program

The Department of Labor (the Department) today announced adoption of the Pension Payback Program which is designed to benefit workers by encouraging employers to restore delinquent participant contributions plus lost earnings to pension plans. This program is targeted at "persons", as that term is defined at section 3(9) of the Employee Retirement Income Security Act (ERISA), who failed to transfer participant contributions to pension plans defined under section 3(2) of ERISA, including section 401(k) plans, in accordance with the time frames described by the Department's regulations, and thus violated Title I of ERISA.

The conditional compliance program is available to certain persons who voluntarily restore delinquent participant contributions to pension plans. Those who comply with the terms of the Program will avoid potential ERISA civil actions initiated by the department, the assessment of civil penalties under section 502(l) of ERISA and Federal criminal prosecutions arising from their failure to timely remit such contributions and non-disclosure of the non-remittance. The Department of Justice has indicated its support for the Program. The Department of Labor will not pursue enforcement against persons who comply with the conditions of the Program with respect to any prohibited transaction liability which may have arisen as a result of the person's delay in forwarding the participant contributions until promulgation by the Department of a final class exemption setting forth the conditions for retroactive exemptive relief. A notice of proposed exemption is being published today in the Federal Register. Participation in the Program will be available to persons who rely on the

proposed exemption notwithstanding any subsequent modifications to the final exemption. The Department has further determined not to affirmatively refer information to the states for criminal prosecution concerning those persons who voluntarily restore participant contributions in accordance with the Program. The Internal Revenue Service has advised the Department of Labor that it will not seek to impose Internal Revenue Code section 4975 (a) and (b) sanctions with respect to any prohibited transaction that is covered by the proposed class exemption notwithstanding any subsequent changes to the proposed class exemption when it is finalized, provided that all the requirements specified in the proposed class exemption are met.

The Program only applies to certain delinquent participant contributions plus earnings that are restored to pension plans no later than September 7, 1996. Such restorative payments must relate to amounts paid by participants or withheld by an employer from participants' wages for contribution to a plan on or before thirty days following the date of this announcement. Specifically, the Program applies to delinquent participant contributions plus earnings, provided that the delinquent contributions outstanding on the effective date of the Program, excluding earnings, do not exceed the aggregate amount of participant contributions that were received or withheld from the employees' wages for calendar year 1995. Provided that the contribution limitation described in the previous sentence is not exceeded, the Program will also apply, without limit, to the restoration of any earnings on delinquent participant contributions that have been restored to the plan prior to the effective date of this announcement.

The Program is available only if the following conditions are met:

(1) All delinquent participant contributions are restored to the employee benefit plan plus the greater of (a) or (b) below.

(a) The amount that otherwise would have been earned on the participant contributions from the date on which such contributions were paid to, or withheld by, the employer until such money is fully restored to the plan had such contributions been invested during such period in accordance with applicable plan provisions, or

(b) Interest at a rate equal to the underpayment rate defined in section 6621(a)(2) of the Internal Revenue Code from the date on which such contributions were paid to, or withheld

by, the employer until such money is fully restored to the plan, provided that the total of all outstanding delinquent contributions on the effective date of the Program, excluding earnings, does not exceed the aggregate amount of participant contributions that were received or withheld from the employees' wages for calendar year 1995.

(2) The Department is notified in writing no later than September 7, 1996 of the person's decision to participate in the Program and provided with: (a) Copies of cancelled checks or other written evidence demonstrating that all participant contributions and earnings have been restored to the employee benefit plan; (b) the certification described in paragraph (6) below; and (c) evidence of such bond as may be required under section 412 of ERISA.

(3) The person informs the affected participants within 90 days following the notification of the Department described in paragraph (2) above, that prior delinquent contributions and lost earnings have been restored to their accounts pursuant to the person's participation in the Program and, thereafter, provides a copy of such notification to the Department. If a statement of account or other scheduled communication between the plan or its sponsor and the participants is scheduled to occur within this time period, such statement may include the notification required by this paragraph.

(4) The person has complied with all conditions set forth in an exemption proposed by the Department today.

(5) At the time that the Department is notified of the person's determination to participate in the Program, neither the Department nor any other Federal agency has informed such person of an intention to investigate or examine the plan or otherwise made inquiry with respect to the status of participant contributions under the plan.

(6) Each person who applies for relief under the Program shall certify in writing, under oath and pain of perjury, that it is in compliance with all terms and conditions of the Program and, to its knowledge, neither it nor any person acting under its supervision or control with respect to the operation of an ERISA covered employee benefit plan:

(a) Is the subject of any criminal investigation or prosecution involving any offense against the United States;⁴

⁴ For purposes of this paragraph, an "offense" includes criminal activity for which the Department of Justice may seek civil injunctive relief under the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1964(b)). A "subject" is any individual or entity whose conduct is within the scope of any ongoing inquiry being conducted by

(b) Has been convicted of a criminal offense involving employee benefit plans at any time or any other offense involving financial misconduct which was punishable by imprisonment exceeding one year for which sentence was imposed during the preceding thirteen years or which resulted in actual imprisonment ending within the last thirteen years, nor has such person entered into a consent decree with the Department or been found by a court of competent jurisdiction to have violated any fiduciary responsibility provisions of ERISA during such period; or

(c) Has sought to assist or conceal the non-remittance of participant contributions by means of bribery, graft payments to persons with responsibility for ensuring remittance of plan contributions or with the knowing assistance of persons engaged in ongoing criminal activity.

Signed at Washington, D.C., this 4th day of March 1996.

Olena Berg,

Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor.

[FR Doc. 96-5391 Filed 3-6-96; 8:45 am]

BILLING CODE 6510-29-M

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meeting

TIME AND DATE: 8:30 a.m., March 25, 1996.

PLACE: On board MISSISSIPPI V at the Foot of Eight Street, Cairo, IL.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Report on general conditions of the Mississippi River and Tributaries Project and major accomplishments since the last meeting; (2) Views and suggestions from members of the public on any matters pertaining to the Flood Control, Mississippi River and Tributaries Project; and (3) District Commander's report on the Mississippi River and Tributaries Project in Memphis District.

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TIME AND DATE: 8:30 a.m., March 26, 1996.

PLACE: On board MISSISSIPPI V at City Front, Memphis, TN.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Report on general conditions of the Mississippi River and Tributaries Project and major accomplishments since the last meeting; and (2) Views and suggestions from members of the public on any matters

a Federal investigator(s) who is authorized to investigate criminal offenses against the United States.