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401(k)

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DRAFT STATEMENT: PRESIDENT CLINTON AND 401K

Hard-working Americans need to feel safe and secure in the knowledge that their hard-earned retirement dollars will be there when they need it most.

The actions my Administration is taking today will make certain the government has the tools necessary to assure American workers they can put their 401(k) savings into a system they can trust.

Every American should be encouraged to set aside money for their retirement and make investments in their economic future, confident that the system works, free from fear of financial loss.

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THE WHITE HOUSE

WASHINGTON

December 7, 1995

Dear Mr. Leader:

Since the beginning of this Administration, we have worked together to protect the retirement savings of hard-working Americans. Last year, Congress passed legislation proposed by the Administration that secured the retirement promises made to over 40 million workers in traditional pension plans.

Blay | Now we must all act to ensure that the savings of the 22 million American workers who put their hard-earned money into 401(k) plans are safe. We need to make certain the government has the tools to assure American workers they can put their savings -- and their trust -- into a system that will be there when they need it most.

I urge you to swiftly approve legislation we sent to Congress in July that would give both private auditors and the government new strength and more effective tools with which to enforce the law and prevent abuse of employee retirement savings by unscrupulous employers.

My Administration has consistently urged Americans to save for their retirement -- a message echoed by financial planners, consumer groups and virtually everyone who has considered this issue. But Americans need to know their savings are safe if they are to follow this sound advice.

While the vast majority of employers fully respect and protect their employees' savings, some employers are abusing that trust. Last week, the Department of Labor, which protects private pensions, urged consumers to watch for warning signs to protect their 401(k) investments. The Department of Labor's Pension and Welfare Benefits Administration has begun a nationwide enforcement initiative that has already uncovered the misuse of millions of dollars of contributions by workers. Over \$3.5 million has already been returned to workers; 310 investigations remain open, and more cases are coming.

On July 6, Secretary of Labor Reich transmitted to Congress the "ERISA Enforcement Improvement Act." Our legislation would help in early identification of potential abuses, strengthen pension plan auditing and subject abusers to new penalties. Since July, we have worked with members of Congress and the

financial community to develop a bipartisan consensus to protect our workers.

I am sure you agree with the 22 million Americans who place their faith and trust in 401(k) plans that this is an issue of protection, not partisanship.

I strongly urge you to give this important legislation your immediate attention, and urge that it be enacted before the end of the year. America's workers shouldn't be asked to wait a day longer.

Sincerely,

A handwritten signature in black ink, appearing to read "Daschle". The signature is written in a cursive, slightly slanted style.

The Honorable Thomas A. Daschle
Democratic Leader
United States Senate
Washington, D.C. 20510

DEPARTMENT OF LABOR

Fact Sheet on 401(k) Regulation

- ◆ In a few days the Department will publish for public comment in the Federal Register a proposed regulation which would in some cases reduce the maximum amount of time an employer will have to transmit employee contributions (whether paid to the employer or withheld from wages) to an employee benefit plan. We are proposing this rule change because we believe that our investigations of many plans - and particularly 401(k) plans - highlight the immediate need to reduce the exposure of participant contributions to the risks of employer financial distress and misuse by cutting back the maximum time employers could have to transmit such amounts to plans.

- ◆ Under the Department's existing ERISA regulation (29 CFR 2510.3-102), which was adopted in May 1988, employee contributions are deemed to be plan assets on the earliest date on which such contributions can reasonably be segregated from the general assets of the employer - but in any event no later than 90 days from the date of withholding by, or payment to, the employer.
 - On the basis of PWBA investigations, it appears that the current rule is too loose. Some employers are ignoring the "reasonably segregable" rule and instead regard the 90-day maximum as in effect a "safe harbor" legitimizing their holding of participant contributions in their general assets for the full 90 days. This results in unnecessary exposure of participant contributions to misuse by employers and to employer financial distress.

 - Improvements in technology relating to electronic payroll processing and fund transfers further support the case for substantially tightening the maximum 90 day period contained in the current rule.

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- ◆ The proposed regulation will continue to require that employee contributions be transmitted to benefit plans as soon as they can be reasonably segregated from the employers' general assets.
- ◆ The proposal will also provide that the maximum amount of time employers will have to transmit employee contributions to benefit plans would be no later than the maximum amount of time employers have under the IRS's Employment Tax Deposit rules. The amount of time an employer has to deposit such amounts is determined by the amount of employment taxes paid by the employer during a 12-month look-back period.
- ◆ In general, these IRS rules require employers with larger payrolls to make tax deposits within one or a few days of withholding from wages, while employers with smaller payrolls may make such deposits on a semi-weekly, weekly, or monthly basis, depending on the amount of taxes involved. For example, if an employer has paid a total of \$50,000 or more of employment taxes during the look-back period, it must deposit its employment taxes under the semi-weekly rule, which requires the deposits of amounts withheld within a week or less. This would apply to the vast majority of employers.

DEPARTMENT OF LABOR

Fact Sheet on the Employee Contribution Project

Background:

Nationwide there are 140,000 401(k) plans, covering 22 million people, with combined assets totaling \$522 billion.

Early this year, after PWBA regional offices began noticing an increase in the number of complaints about 401(k) plans, PWBA launched an enforcement project aimed at protecting employees' 401(k) contributions.

On November 28, Secretary Reich announced that \$3.5 million had been returned to 401(k) plans:

- * \$700,000 from 23 different companies of the 116 cases that had been closed to date.
- * \$2.6 million by voluntary compliance from companies among the 310 investigations still open.
- * \$200,000 as a result of conversations with employers where PWBA did follow up on participant complaints (no informal investigations opened).

Recent Activities:

During the last two weeks, PWBA has received 948 inquiries from participants concerned about their 401(k) plans.

Prior to the announcement, PWBA received an average of 5.4 401(k) inquiries per day. During the last 2 weeks, PWBA has received an average of 105 401(k) inquiries per day.

35 new investigations have been opened.

2 new criminal charges have been filed in federal courts in Michigan and Kentucky. (See attached summaries)

Many employers misunderstand the existing regulation. They believe it provides a 90-day holding period when in fact it does not. The 90-day requirement is the absolute maximum. (see attached examples)

**Recent
Criminal Actions**

Since the beginning of the year, seven (7) cases have resulted in criminal prosecutions of individuals accused of activity related to diversion of employee contributions. Two (2) of these cases were prosecuted within the past week and a half.

U.S. v. Lasch

Warren Lasch, of East Lansing, Michigan, pled guilty on November 29, 1995, to a charge of failing to file a pension plan annual report to the Secretary of Labor. Lasch was the former President and majority stockholder of the now defunct Robin Transport, Inc., Haslett, Michigan, which sponsored a 401(k) pension plan.

At the plea, Lasch agreed to make restitution of \$48,069, part of which included money that was withheld from employees' paychecks as contributions to their plan and not forwarded to the plan. Lasch was also fined \$500 for failing to file the 1991 annual report.

Sentencing is pending. The maximum sentence under the federal sentencing guidelines is 6 months imprisonment and a fine of \$5,000.

U.S. v. Mattingly

Joseph Patrick Mattingly, of Prospect, Kentucky, president of the Magnum Tool and Die company, Louisville, was charged on December 7, 1995 with embezzling \$68,933 of employee contributions by not forwarding the deductions to the plan. Arraignment is scheduled for December 19. If convicted, he faces maximum penalties of 10 years imprisonment and a fine of \$500,000.

Note: Please be aware that an indictment or criminal complaint is an accusation only and that a person is presumed innocent until and unless proven guilty.

Examples
Misunderstandings of the 90 Day Employee Contribution Regulation

- Various allegations were made regarding a sponsor who was a consulting firm in the environmental cleanup industry. These allegations included government contract improprieties and misuse of 401(k) funds. The investigation disclosed that over the past 3 years, when the company was experiencing cash flow problems, the employer did not properly forward the employees 401(k) contributions. The investigation revealed that the employer believed that they had a ninety day safe-harbor in which to transfer the employee contributions to the investment manager. The employer stated that this ninety day rule was the advice they received from "experts" in the pension benefits area.
- Employees were having their 401(k) contributions deducted from their pay either every week or every other week. The controller of the employer would send the contribution check to the bank every 45 or 60 days. The controller believed that they had up to ninety days to forward the employees' contributions. After this issue was discussed with the controller it was decided that new procedures be implemented whereby employee contributions would be forwarded to the bank every two weeks.
- As a defense to the late forwarding of participant contributions, a plan sponsor explained that it relied on a third party administrator's letter stating that "Treasury regulations" allowed an employer up to 90 days in which to make the contributions.
- The employer operates a chain of small corner-type grocery stores in Kentucky and Tennessee with approximately 247 plan participants and \$2.8 million in plan assets. According to a representative of the employer, he was not aware, until the receipt of the Cincinnati Regional Office's voluntary compliance letter, that his company's past practice of transmitting voluntary 401(k) employee contributions to the plan annually at the time of the annual employer contribution failed to comply with ERISA regulations. Subsequent discussions between the employer and the third party administrator left the employer with the understanding that employee contributions must be forwarded at least quarterly or every 90 days. The employer believed, from the advice of his third party administrator, that there was a 90 day period in which an employer may transfer withheld contributions and remain within ERISA compliance.
- One investigation actually discovered a 401(k) plan document which stated that elective contributions would be forwarded by the employer to the trust not less frequently than monthly, but in no event later than 90 days after the deferral. Consequently, the employer may have viewed the 90-day period as a "safe harbor," thus depriving participants of earnings on the unremitted contributions.

Pres. statement

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