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401(k)

U.S. Department of Labor

Assistant Secretary for
Pension and Welfare Benefits
Washington, D.C. 20210

DATE: 2-6-96

TO: KATHLEEN WALLMAN

AGENCY: THE WHITE HOUSE

TELEPHONE NUMBER: 456-6611 ***FAX:*** 456-6279

FROM: ***OLENA BERG***
Assistant Secretary
Pension and Welfare Benefits Administration
U. S. Department of Labor
200 Constitution Avenue, NW, Room S-2524
Washington, DC 20210

COMMENTS:

NUMBER OF PAGES INCLUDING COVER SHEET 7

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U.S. Department of Labor

Assistant Secretary for
Pension and Welfare Benefits
Washington, D.C. 20210

February 6, 1996

MEMORANDUM FOR SETH P. WAXMAN
Associate Deputy Attorney General

FROM: E. OLENA BERG Olena Berg
Assistant Secretary of Labor,
Pension and Welfare Benefits Administration

SUBJECT: PENSION PLAN VOLUNTARY COMPLIANCE PROGRAM

My staff and I have reviewed your January 31 draft of the proposed Pension Plan Voluntary Compliance Program. I would like to express my appreciation to you and the Department of Justice for your willingness to work with us and the Internal Revenue Service to make this program a success. Your draft, I believe, goes a long way toward reconciling the differing interests among the agencies in order to make the program successful.

There are, however, four points which require more clarification or further discussion. Because of the way in which the working drafts have been developed, I am not sure if these issues reflect substantive disagreements between us or if some or all of the apparent differences merely represent drafting difficulties. We have therefore rewritten the draft proposal in a manner which, I believe, should take us the next step toward agreeing on a final proposal. We did not alter the first paragraph which deals with how the program is announced, but note that this warrants further discussion. The major changes we made in your proposal and our reasons for them are outlined below.

First, your draft reflected two changes relating to interest on delinquent participant contributions. You deleted a sentence in our draft which permitted, without limit, the restoration of any lost earnings on delinquent participant contributions which may have been restored to the plan prior to the effective date of the Program. Also, our prior draft had put a dollar limit on participation in the program which is equal to or less than the aggregate participant contribution amount for 1995. Your draft changed that to the sum of the participant contribution **plus** interest for 1995. This change would make the cut-off point for participation in the program much more difficult to determine and might thus deter employers from participating. Since, to my knowledge, these changes had never been previously discussed, it is possible that they were inadvertently made. However, if these changes were intentional, I would appreciate my staff being told the reasoning behind them so that we can discuss them further.

Second, you have inserted a provision which requires an applicant to notify plan participants of the employer's participation in the program. We remain concerned that such a notification might provide a sufficiently strong disincentive so as to materially weaken the effectiveness of the program. Nevertheless, we have drafted the following language which, we believe, will meet your concerns while, at the same time, minimize the disincentive to participate:

> The person has or shall notify the affected participants in their next statement of account that prior delinquent contributions and lost earnings have been restored to their account pursuant to the person's participation in the Pension Plan Voluntary Compliance Program.

Third, it is unclear to us how you intend your new ¶ (7)(b) to be modified by the general language of ¶ (7). If, as indicated in the introductory language of the paragraph, both actual knowledge and a relationship to an employee benefit plan are required before subparagraph (b) becomes applicable, we believe your concern is already addressed by subparagraph (a). If it is not to be so modified, as we discussed at our meeting, we think the prohibition is too broad.

Finally, we believe the language of ¶ (7)(d)(2) is both unnecessary and unworkable as written. Since the program only involves a limited amount of money and excludes those with criminal records, those under investigation regarding contributions to the Plan and those who have resorted to bribery or graft to conceal the defalcations, I think sufficient protections exist to insure that only our target audience participates in the Program. Also, your reference to "La Cosa Nostra" does not provide meaningful clarification to our target audience, and is clearly inappropriate under the circumstances. Therefore, we would prefer to eliminate this provision entirely. However, if this is unacceptable to you, we have rewritten the prohibition, as part of our new paragraph (6)(c).

In summary, I think we have come a long way toward defining a mutually acceptable program which would allow meaningful recovery on behalf of employee benefit plans and their participants while, at the same time, being sensitive to other governmental concerns. Our revised draft seeks to clarify the ambiguities in the various drafts as noted above while, at the same time meeting the concerns which you have previously expressed.

My staff and I are ready to meet with you at your convenience, if necessary, to work out these few remaining details.

Pension Plan Voluntary Compliance Program

The Department of Labor (the Department)and the Internal Revenue Service (the IRS) today announced adoption of the Pension Plan Voluntary Compliance Program which is designed to benefit workers by encouraging employers to restore delinquent participant contributions to pension plans. The Department of Justice has agreed to support the program. This program is targeted at persons who failed to transfer participant contributions plus lost earnings to pension plans defined under section 3(2) of the Employee Retirement Income Security Act of 1974 (the Act), including section 401(k) plans, within the timeframes mandated by the Department's regulations, and thus violated title I of the Act.

The conditional compliance program is available to those 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 the Act and Federal criminal prosecutions arising from their failure to timely remit such contributions and concealment of the non-remittance. The Department and the IRS are also adopting a temporary non-enforcement policy 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 which, when finalized, will replace the non-enforcement policy, 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 Program only applies to certain delinquent participant contributions plus earnings that are restored to pension plans no later than ___(insert date: 6 months from start of program)___. 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 such contributions do not exceed the aggregate amount of participant contributions that are received or withheld from the employees' wages for calendar year 1995. In addition, the program applies 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) 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.

(2) The Department is notified in writing no later than ______ of the person's decision to participate in the Program and provided with copies of cancelled checks or other written evidence demonstrating that all participant contributions and earnings have been restored to the employee benefit plan, as well as evidence of such bond as may be required under section 412 of the Act.

(3) The person has or shall notify the affected participants in their next statement of account that prior delinquent contributions and lost earnings have been restored to their account pursuant to the person's participation in the Pension Plan Voluntary Compliance Program.

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

(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 Pension Plan Voluntary Compliance 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 or target of any criminal or civil investigation or prosecution relating to the plan;

(b) has been convicted of a criminal offense involving employee benefit plans 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 the Act 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.

U. S. Department of Justice

Office of the Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

DATE: January 31, 1996

TO: Kathleen M. Wallman

Telephone No. ( ) 456 - 6611 Fax No. ( ) 456 - 6279

FROM: Seth P. Waxman

Associate Deputy Attorney General

Telephone No. (202) 514 - 4560 Fax No. (202) 514 - 9368

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SPECIAL NOTE(S)

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U. S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Olena Berg

FROM: Seth P. Waxman SPW

RE: Pension Plan Voluntary Compliance Program

DATE: January 31, 1996

CC: Kathleen M. Wallman

Enclosed, per our discussion yesterday, is a revised proposed draft of the Public Statement. Once you have had an opportunity to review it, please give me a call so we can discuss how to proceed.

DRAFT

1/24/96 DOJ Recommended Revision

DOL Draft Public Statement Concerning the Proposed "Pension Plan Voluntary Compliance Program"

The Department of Labor ("the Department") and the Internal Revenue Service have determined to implement a conditional compliance program for those persons who voluntarily restore delinquent participant contributions to pension plans. The Department of Justice has agreed to support the program.

The Pension Plan Voluntary Compliance Program is designed to benefit workers by encouraging employers to restore delinquent participant contributions to pension plans. This program is targeted at persons who failed to transfer participant contributions plus lost earnings to pension plans defined under section 3(2) of the Employee Retirement Income Security Act ("ERISA"), including section 401(k) plans, within the timeframes mandated by the Department of Labor's (the Department) regulations, and thus violated title I of the Act.

Those who comply with the terms of the program will avoid potential ERISA civil and federal criminal actions arising from their failure to timely remit participant contributions and the assessment of civil penalties under section 502(l) of the Act. The Department and the Internal Revenue Service also will adopt a non-enforcement policy 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 class exemption setting forth the conditions for retroactive exemptive relief. The Department has further determined not to affirmatively refer information for criminal prosecution to the state concerning those persons who voluntarily restore participant contributions in accordance with the program.

The program will apply with respect to delinquent participant contributions plus earnings that are restored to pension plans not later than June 30, 1996. Such restorative payments must relate to amounts paid by participants or withheld by an employer from participants' wages for contribution to a plan no later than 30 days following the date of this announcement. The program is not applicable to delinquent employer (i.e., nonparticipant) contributions.

Participation in the program is available only if the following conditions are met:

(1) Delinquent participant contributions plus earnings do not exceed the aggregate amount of participant contributions that are received or withheld from the employees' wages for the 12 months immediately preceding the effective date of this announcement.

(2) All participant contributions are restored to the employee benefit plan plus the greater of:

DRAFT

(a) the amount that otherwise would have been earned on the participant contributions from the earliest date on which such contributions could have been reasonably segregated from the employer's general assets until such money is fully restored to the plan, or

(b) interest at a rate equal to the underpayment rate defined in section 6621 (a)(2) of the Internal Revenue Code from the earliest date on which such contributions could have been reasonably segregated from the employer's general assets until such money is fully restored to the plan.

(3) The Department is notified in writing of the person's decision to participate in the program and provided with copies of cancelled checks or other written evidence demonstrating that all participant contributions and interest have been restored to the employee benefit plan, as well as evidence of such bond as may be required under section 412 of the Act.

(4) The applicant notifies all participants in the affected plan of the applicant's decision to participation in this voluntary disclosure program, and so certifies to the Department;

(5) The person complied with any additional conditions in a retroactive exemption proposed by the Department.

(6) At the time 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 its intention to investigate the plan or otherwise made inquiry with respect to the status of participant contributions under the plan.

(7) Each person who applies for relief under the program shall certify in writing under oath that to its knowledge neither it, nor any person acting under its supervision in regard to the operation of an employee benefit plan,

(a) has been advised by the Department or any other Federal agency of an intention to investigate the plan and no inquiry has otherwise been made by any federal agency concerning the status of participant contributions under the plan;

(b) is the subject of any criminal investigation or prosecution involving any offense against the United States;[1]

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[1] 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 a federal investigator(s) who is authorized to investigate criminal offenses against the United States.

DRAFT

(c) has been convicted at any time of any criminal offense involving an employee benefit plan, or of any other offense involving financial misconduct which was punishable by imprisonment exceeding one year for which sentence was imposed within the past 13 years or which resulted in actual imprisonment ending within the last 13 years;[2] 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 provision of the Act during the preceding thirteen years.

(d) sought to assist or conceal the non-remittance of contributions to an employee benefit plan by:

(1) means of bribery or graft payments to persons with responsibility for ensuring remittance of plan contributions;

(2) seeking or obtaining the intervention of any person or organization known by the participant to engage in criminal activity for profit, such as members of La Cosa Nostra; or

(e) owes to the plan employee contributions in an amount greater than the maximum amount subject to restitution and relief under this program.

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[2] For purposes of this program, the term "convicted" means that the guilt of the defendant was established, whether by guilty plea or its equivalent, trial, or plea of nolo contendere.

U.S. Department of Labor

Assistant Secretary for
Pension and Welfare Benefits
Washington, D.C. 20210

DATE: 12/22/95

TO: Rahm Emanuel

AGENCY:

TELEPHONE NUMBER: *FAX:*

FROM: ***OLENA BERG***
Assistant Secretary
Pension and Welfare Benefits Administration
U. S. Department of Labor
200 Constitution Avenue, NW, Room S-2524
Washington, DC 20210

COMMENTS:

Attached is DOJ's memo on the amnesty program, along with our internal reaction. Please note that the DOJ memo represents only the recommendations of the Criminal Division.

If you need to discuss this with us next week, call my office (219-8233). Although I will be out, you will be referred to the appropriate person.

Thanks!

NUMBER OF PAGES INCLUDING COVER SHEET 7

Should you experience any problems receiving this transmission, please call (202) 219-8233.

December 22, 1995

MEMORANDUM FOR E. OLENA BERG
Assistant Secretary, PWBA

FROM: SHERWIN KAPLAN
Deputy Associate Solicitor, PBSD

SUBJECT: DEPARTMENT OF JUSTICE COMMENTS ON PENSION PLAN VOLUNTARY COMPLIANCE PROGRAM

I have read John C. Keeney's Memorandum to Alan D. Lebowitz on the above subject dated December 21, 1995. Despite its opening sentence expressing support for the program, the conditions Mr. Keeney seeks to impose make the program totally unworkable.

Mr. Keeney's proposed paragraph 8 requires prior, express concurrence, on a case by case basis, in all situations in which there has been active misrepresentation. Since virtually all participant contributions are made either through payroll deductions (for which the employee receives a pay stub indicating the amount of the deduction) or direct contribution (for which the employee receives a receipt or acknowledgment of some sort), active misrepresentation would occur each time an employer documents a payment which was not forwarded to the plan. In other words, in virtually all cases. This would cause three problems. First, requiring employers to disclose evidence of potential criminal wrongdoing with no assurances that they will not be prosecuted will greatly lessen participation in the program. Second, the approval process, which would presumably be done by United States Attorneys' offices, would be time consuming, burdensome on both the government and the participants and lead to uneven results. Finally, requiring prior approval on a case by case basis would trigger imposition of a civil penalty pursuant to ERISA §502(l) in an amount equal to 20% of the amount recovered.

The additional burden of compliance, combined with the lack of certainty of relief from criminal sanctions and the imposition of civil penalties remove all advantages of the program.[1]

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[1] Even the advantage of the prohibited transaction exemption would be removed. The excise tax assessed against a party in interest involved in a prohibited transaction is less than the civil penalty imposed by ERISA §502(l) and would be offset against it.

A second concern relates to DOJ's insistence that anyone obtaining relief under the program cooperate in any investigation concerning crimes arising from or related to the delinquencies under consideration. If this means that relief will only be granted to the first person who comes through the door, but is conditioned on that person helping to prosecute other officers of the company, not many people will come forward. Our original understanding was that, if the conditions of the program are met, there will be no prosecution for crimes arising from or related to the delinquencies in question. Anything short of that would not confer immunity if restitution is made.

We have other problems with DOJ's proposal, but they are not of as fundamental a nature as those discussed above. Basically, if the program is to succeed, we must be in a position of offering something tangible to those who choose to participate. What we have proposed is freedom from civil and criminal sanctions if certain objective conditions are met. Under the DOJ proposal, we are offering nothing of value until DOJ has approved each specific applicant and, even then, the matter will not be laid to rest since the potential of criminal prosecutions arising out of the same transactions will continue to exist.

MEMORANDUM

TO: Alan D. Lebowitz
Deputy Assistant Secretary
for Program Operations
Pension and Welfare Benefits Administration
United States Department of Labor

FROM: John C. Keeney
Acting Assistant Attorney General

DATE: December 21, 1995

SUBJECT: Pension Plan Voluntary Compliance Program

The Criminal Division has recommended to the Attorney General and the Deputy Attorney General that the Department of Justice support the Department of Labor's voluntary compliance program for certain pension plan offenders. However, we have previously expressed our concern about the effect of the proposed program on investigations involving an employer's active misrepresentation of his payment obligations to pension plan participants as well as the corruption of union officials or plan adminstrators who are responsible for ensuring that contributions be remitted to the plan. We have also explained our concern that the compliance program not impede the use of such investigations by the Department of Labor's Office of Labor Racketeering for the purpose of combatting organized crime and labor racketeering.

As you are aware, restitution of employee contributions is not a legal defense to prosecution with respect to monies which have already been converted to the use of an employer or which have been obtained by fraudulent conduct. It is also not a defense to other corruption which may arise from an employer's need to conceal or continue the delinquency. United States v. Panepinto, 818 F.Supp. 48 (E.D.N.Y. 1993), aff'd without opinion, 28 F.3d 103 (2d Cir. 1994) (indictment charging embezzlement of employer welfare plan contributions and bribery of a union official); United States v. Grizzle, 933 F.2d 943

(11th Cir. 1991) (convictions for embezzlement of employee vacation plan contributions and false certification of payrolls); United States v. S&Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983) (convictions of mail fraud and ERISA reporting crimes based on false remittance statements used to conceal unpaid pension and welfare obligations). Moreover, prosecution may be undertaken as a practical matter where there exists a question of whether restitution was undertaken only after a criminal investigation had commenced.

Because these cases reflect that employer delinquncies are sometimes accompanied by criminal activity on the part of third parties, we recommend that a condition of relief require that any person seeking relief under the program cooperate fully and truthfully with any inquiry concerning the application or with any investigation by a federal law enforcement agency concerning crimes which arise from or are related to the delinquencies under consideration. Moreover, we have included a condition that requires the Department of Justice's express concurrence in the granting of relief to any person whose deliquency is determined to have been accompanied by active misrepresention of such person's payment obligation to the plan or its participants, bribery or graft payments affecting the operation of the plan, or who has acted in concert with persons associated with organized criminal groups.

We believe that the proposed condition to exclude persons currently under investigation, which in your proposal is based on the Justice Department's notification to the program applicant of his status as a target or subject of an ongoing investigation related to a employee benefit plan, is unworkable. Such warnings, if given at all prior to indictment, may occur long after the criminal investigation has commenced. Instead, the existence of any overt criminal investigation involving any federal offense whose conduct can be determined by the Department of Labor or the applicant should be grounds for denying participation in the compliance program.

However, the existence of an undercover investigation should not necessarily disqualify the applicant from partiicipation in the program where the investigating agency may not wish to disclose the existence of the undercover investigation to the Pension and Welfare Benefits Administration as well as the applicant. The danger of disclosing any undercover operation involving covert investigative techniques directed at the offender or others acting in concert may outweigh the possibility that a serious offender could avoid prosecution of his pension crimes by participation in the program.

We also believe that the exclusion of persons previously convicted of crimes, related to employee benefit plans during the past 13 years under your proposal, is too narrow. If an individual applicant had been convicted of a benefit plan-related crime within that period, he likely would be disqualified from participation in plan operations and would be subject to other criminal sanctions in ERISA (29 U.S.C. § 1111). Moreover, the federal sentencing guidelines more severely punish offenders with prior criminal convictions -- for example, by considering felony sentences of imprisonment which were imposed within fifteen years of the instant offense or which were imposed at any time where actual imprisonment ended within fifteen years of the instant offense. U.S.S.G. § 4A1.2(e). One of the Pension and Welfare Benefits Administration's most significant investigations involved an individual who was convicted of non-ERISA crimes involving securities, changed his name, and obtained employment involving an employee benefit plan from which he embezzled funds to operate a failing business. United States v. Evans, 796 F.2d 264 (9th Cir. 1986).

Finally, because this program did in fact originate with your agency, we request that the announcement only reflect the Department of Justice's support of the program. The Criminal Division recommends that the Department of Justice's support be based on inclusion of the following language in the proposed written announcement of the program:

Page 1, Second Paragraph of the December 18, 1995, Draft Proposal:

> "The Department of Labor [and the Internal Revenue Service] has [have] determined to implement a conditional compliance program for those persons who voluntarily restore delinquent participant contributions to pension plans. The Department of Justice has agreed to support such a program.

Page 2, Paragraphs (5) and (6) of the December 18, 1995, Draft Proposal:

> "(5) At the time that the Department of Labor is notified of the person's determination to participate in the program, such person is not the subject of any criminal investigation or prosecution involving any offense against the United States, including any activity for which the Department of Justice may seek civil injunctive relief under the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. § 1964(b)). For purposes of this program, a 'subject' is any individual or entity whose conduct is within the scope of any ongoing inquiry being conducted by non-covert investigative techniques by a federal investigator(s) who is authorized to investigate any criminal offense against the United States.

> "(6) The person who seeks or obtains relief under this program has not been convicted at any time of any criminal

offense involving an employee benefit plan, or of any other offense punishable by imprisonment exceeding one year for which sentence was imposed within fifteen years of the commencement of such person's pension delinquency or related criminal activity or which resulted in actual imprisonment during such fifteen year period. For purposes of this program, the term 'convicted' means that the guilt of the defendant was established, whether by guilty plea or its equivalent, trial, or plea of nolo contendere."

Page 2, New Paragraphs (7) and (8)

"(7) No relief shall be granted to any person who fails to provide full and truthful cooperation in any inquiry relating to the application for participation in the program or any investigation by a federal law enforcement agency which arises from or is related to the delinquency or criminal activity which is the subject of the application. Cooperation includes the disclosure and use of information and documents obtained from the applicant or other persons under his supervision or control as deemed relevant and appropriate by any federal law enforcement agency in any criminal, civil, or administrative proceedings arising out of the disclosed or related matters."

"(8) No relief shall be granted to any person without the express concurrence of the Department of Justice where any application, inquiry relating to the application, or any other investigation of the applicant results in the determination that the applicant or other person subject to his supervision has actively misrepresented his payment obligations to the plan or its participants, has engaged in bribery or graft payments affecting the operation of the plan, or has acted in concert with persons associated with organized criminal groups."

U. S. Department of Justice

Office of the Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

DATE: January 18, 1996

TO: Kathy Wallman

The White House

Telephone No. (202) 456-6611 Fax No. (202) 456-6279

FROM: Seth P. Waxman

Associate Deputy Attorney General

Telephone No. (202) 514-4560 Fax No. (202) 514-9368

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1. Kathy Wallman		
2.		
3.		
4.		
5.		

REMARKS:

Kathy --

Here's where we are on the pension plan issue.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions.

FROM: (Name, org. symbol, Agency/Post)	Room No. –Bldg. / Phone No.
Seth P. Waxman Associate Deputy Attorney General Department of Justice	4208-Main DOJ 202-514-4560

U.S. Department of Justice
Criminal Division
Organized Crime and Racketeering Section
Suite 300, Washington Center Building
1001 G Street, N.W.
P.O. Box 27598
Washington, D.C. 20038-7598

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MEMORANDUM

DATE January 16, 1996

TO: Alan Lebowitz
PWBA, DOL

FAX No. 9-219-6531

FROM: Jerry Toner

Labor Unit Voice Tel. 202-514-3666 / 3954
Labor Unit FAX 202-514-9837

REMARKS:

I have attached a draft response to your letter of January 2, 1996, concerning the proposed Voluntary Compliance Program and conditions which we believe are needed to ensure that serious criminal offenders are not afforded relief because of the program. We have attempted to clarify the description of those offenders for which the Department of Justice would expect to be consulted before relief from criminal prosecution is given. We have also forwarded a copy of the draft response to the Attorney General's Advisory Committee for United States Attorneys for its review.

Because you have advised that a meeting of representatives from our respective agencies would be helpful, we would be willing to discuss the program and our proposed conditions at your earliest convenience.

DRAFT

<u>REVISED DRAFT January 16, 1996</u>

Alan D. Lebowitz
Deputy Assistant Secretary
for Program Operations
Pension and Welfare Benefits Administration
United States Department of Labor

Dear Mr. Lebowitz:

This office has considered the views expressed in your letter of January 2, 1996, in response to our prior recommendations concerning the proposed Pension Plan Voluntary Compliance Program. We are sympathetic to the underlying purpose of that program and the voluntary restitution of delinquent contributions to the pension plans for which monies were withheld or collected from employees. Therefore, the Department of Justice is prepared to accommodate one of your major concerns by attempting to more clearly describe the circumstances in which we believe relief for certain criminal offenders is not warranted without the express approval of the Department of Justice.

Accordingly, we have revised the condition recommended for inclusion as paragraph (8) in the draft public announcement of the program which you furnished for the Department's review on December 18, 1995. For example, the Department of Justice would be willing to forego its case-by-case approval of participation in the program for an employer who may have knowingly misused employee contributions for the operation of his business following the mistaken decision that the continued operation of a failing business was more important than the viability of his employees' retirement plan. In such a case, the Department of Labor would not be required to refer the program application for the Department of Justice's consideration unless the applicant's crime was described in revised paragraph (8) below.

That is, the Department of Labor would be required to inform the appropriate United States Attorney of a particular application only in those cases where the theft of plan assets by non-remittance was accompanied by evidence demonstrating (1) concealment of the non-remittance from plan participants, or

DRAFT

from persons who have the responsibility for enforcing remittance of contributions to the plan, by means of false statement; (2) corruption by bribery or graft payments of third parties with similar oversight responsibility, such as a plan administrator, union official, or Labor Department agency; or (3) where the intervention of persons associated with organized criminal groups has been sought in order to assist or conceal the non-remittance, for example, by ensuring that the pension plan or sponsoring labor organization did not enforce its contractual right to compel the remittance of contributions.[1] In addition, we would require that each applicant for relief certify, subject to the penalties for perjury, that to the applicant's knowledge the foregoing circumstances did not exist at the time application for participation in the program was made to the Department of Labor.

With respect to your objection to the case-by-case review of relief afforded such offenders, we appreciate that the Pension and Welfare Benefits Administration has limited investigative resources and would prefer to limit its administration of the compliance program to documenting the amounts recovered and, in appropriate cases, verifying compliance with the criteria imposed by the published terms of the program or a class exemption to be issued under ERISA for the prohibited transactions in question. However, as our prior communications have indicated, both the Department of Labor and the Department of Justice have a responsibility to ensure that serious criminal offenders are held accountable under the federal laws governing employee pension plans.

Your letter states that you do not believe that it is likely that the individuals whom the Government might otherwise seek to prosecute will escape prosecution by reason of the compliance program envisioned by the Department of Labor. However, in our view unless egregious criminal offenders are expressly excluded

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[1] These exclusions generally describe the factual circumstances in <u>United States v. Panepinto</u>, 818 F.Supp. 48 (E.D.N.Y. 1993), <u>aff'd without opinion</u>, 28 F.3d 103 (2d Cir. 1994) (sustaining an indictment which charged an employer's embezzlement of employer welfare plan contributions and his prohibited payments to a union official); <u>United States v. Grizzle</u>, 933 F.2d 943 (11th Cir. 1991) (upholding an employer's convictions for embezzlement of employee vacation plan contributions and false certification of payrolls to the Department of Labor on federally funded projects); <u>United States v. S&Vee Cartage Co.</u>, 704 F.2d 914 (6th Cir. 1983) (affirming employer's convictions of mail fraud and ERISA reporting crimes based on false remittance statements used to underreport employee hours and identities of employees for the purpose of concealing underpaid contributions to union-sponsored pension and welfare plans).

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from relief as part of the publicly announced terms of the program, successful criminal prosecution of such offenders during the five years following the program may be hampered by such offenders' assertion of putative defenses based on selective prosecution. If the egregious offender asserts a claim that he would have received relief under the program had he known of and could have applied for such relief, we may need to explain why such an offender's conduct would not have been excused under the publicly announced criteria for relief even if the offender had applied and complied with the other terms of the program. Consequently, we think that the program as drafted by the Department of Labor has a potentially adverse effect on any criminal prosecution related to employee contribution delinquencies whether or not the offender applies for relief under the program.

In our experience, employers who fail to remit pension contributions and seek to conceal or facilitate that non-payment by fraud or corruption of other persons with oversight responsibility frequently fail to comply with other federal labor and tax laws. Therefore, we are willing to forego the criminal prosecution of such offenders only after an informed decision can be made as to the prosecutive merit of the particular delinquency which is accompanied by fraud or corruption. In our view, to forego the prosecution of such persons without a case-by-case review risks sending a message to pension plan participants that neither the particular employer nor the Federal Government can be trusted to ensure the safety of their retirement funds.

Furthermore, we do not believe that the compliance program should impair the efficacy of the program against organized crime and labor racketeering which is maintained by both the Departments of Justice and Labor and in which the existing criminal case law governing employer delinquencies was developed. In our view, the employer who calls upon persons associated with organized crime groups to facilitate the non-payment of his pension obligations should be afforded relief under the program only after the highest possible assurance has been obtained that he has not only made full restitution, but that he will not seek the mob's assistance in the future, and that he will cooperate with the Government's efforts to ensure that others will not seek mob assistance.

You argue that a case-by-case review may require the imposition of the statutory civil penalty which is imposed on plan fiduciaries and persons who have knowingly participated in prohibited transactions because a court might construe the case-by-case review as a "settlement agreement" for purposes of ERISA Section 502(l). We appreciate that the Department of Labor may not wish to grant a waiver of the civil penalty in these cases where such a waiver would have to be based on a determination that the fiduciary or other person had acted reasonably and in

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good faith as contrasted with the alternative ground for waiver based on severe financial hardship. See 29 U.S.C. § 1132(1)(3). However, under the Department of Labor's draft proposal the Department of Justice is being asked to effectively waive potential criminal penalties for these same persons without having the opportunity to review the transactions on a case-by-case basis. We respectfully assert that the availability of the criminal enforcement tools within ERISA is as important as the future integrity of the civil enforcement mechanisms in the statute.

Nevertheless, we are prepared to assist you in minimizing the risk that a court might construe the case-by-case review of relief for certain offenders as a "settlement agreement" with the Secretary of Labor. As explained above, our primarily concern in the first instance is the criminal offender's degree of venality as contrasted with the amount of monies which may be recovered from the offender. Therefore, it may be possible to devise a mechanism whereby an initial review of the application is undertaken to ensure that the evidentiary factors described in paragraph (8) below are not present before any determination is made with respect to the total amount of the offender's delinquency and the potential recovery on which the ERISA civil penalty would depend.

Consequently, the Department of Justice is prepared to support the Pension Plan Voluntary Compliance Program, provided that the following language is contained in the publicly announced criteria for participation in the program:

Page 1, Second Paragraph of the December 18, 1995, Draft Proposal:

> "The Department of Labor [and the Internal Revenue Service] has [have] determined to implement a conditional compliance program for those persons who voluntarily restore delinquent participant contributions to pension plans. The Department of Justice has agreed to support such a program.

Page 2, Paragraphs (5) and (6) of the December 18, 1995, Draft Proposal:

> "(5) At the time that the Department of Labor is notified of the person's determination to participate in the program, such person is not the subject of any criminal investigation or prosecution involving any offense against the United States, including any criminal activity for which the Department of Justice may seek civil injunctive relief under the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. § 1964(b)). For purposes of this program, a 'subject' is any individual or entity whose conduct is within the scope of any ongoing inquiry being

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conducted by non-covert investigative techniques by a federal investigator(s) who is authorized to investigate any criminal offense against the United States.

"(6) The person who seeks or obtains relief under this program has not been convicted at any time of any criminal offense involving an employee benefit plan, or of any other offense punishable by imprisonment exceeding one year for which sentence was imposed within fifteen years of the commencement of such person's pension delinquency or related criminal activity or which resulted in actual imprisonment during such fifteen year period. For purposes of this program, the term 'convicted' means that the guilt of the defendant was established, whether by guilty plea or its equivalent, trial, or plea of nolo contendere."

Page 2, New Paragraphs (7) and (8)

"(7) Relief may be granted only to those persons who provide full and truthful cooperation in any inquiry relating to the application for participation in the program or any investigation by a federal law enforcement agency which arises from or is related to the delinquency or criminal activity which is the subject of the application. Cooperation includes the disclosure and use of information and documents obtained from the applicant or other persons under his supervision or control as deemed relevant and appropriate by any federal law enforcement agency in any criminal, civil, or administrative proceedings arising out of the disclosed or related matters."

"(8) Relief may be granted only with the concurrence of the Department of Justice where the applicant or other person subject to his supervision has knowingly failed to remit employee contributions to the plan and also:

(a) purposely concealed such non-remittance from plan participants or other persons with responsibility for ensuring remittance of plan contributions, including a plan administrator, plan sponsor, union official, or agency of the Department of Labor, by means of false statements which expressly misrepresent that the required remittance has been timely and properly made;

(b) sought to assist or conceal such non-remittance by means of bribery or graft payments to persons with responsibility for ensuring remittance of plan contributions, or

(c) sought to assist or conceal such non-remittance by knowingly seeking or obtaining the intervention of persons associated with organized criminal groups.

Each applicant also shall certify under oath, subject to the penalties for perjury, that to the applicant's knowledge the foregoing circumstances described in this paragraph did not exist at the time application for participation in the program was made to the Department of Labor."

Thank you for providing the Department of Justice with the opportunity to comment on the Voluntary Compliance Program. Please feel free to direct any questions you may have in this matter to this office.

Sincerely,

John C. Keeney
Acting Assistant Attorney General
Criminal Division

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MEMORANDUM FOR RAHM EMANUEL

FROM: KATHLEEN WALLMAN

SUBJECT: 401(k)

DATE: DECEMBER 29, 1995

Seth Waxman and I traded phone calls but never connected today, so I have nothing new to report on this. I'll keep trying him tonight and will follow up on Tuesday. Sorry.

KW

401 (k) AMNESTY PROPOSAL MEETING

THURSDAY, JANUARY 18 - 11:00 AM - WARD ROOM

<u>PARTICIPANTS</u>:

RAHM EMANUEL
STEVE NEUWIRTH

<u>DOL</u>:

THOMASENIA DUNCAN
ACTING DEP SOLICITOR FOR NAT'L OPERATIONS

OLENA BERG (219-8233 - VALERIE)
ASST SEC - PENSION & WELFARE BENEFITS ADMIN

ALAN LEBOWITZ
DEP ASST SEC

<u>DOJ</u>:

SETH WAXMAN (ROSA)

JOHN KEENEY, CRIMINAL DIVISION

GERALD TONER, CRIMINAL DIVISION