

Form	Number of respondents	Frequency of response	Annual responses	Minutes required to complete report	Annual burden hours
BLS 790—Multi	² 30,000	12	360,000	7	42,000
All other BLS—790	³ 325,000	12	3,900,000	7	455,000
Total	391,800	4,746,600	536,100

¹ A subset of current reporters (45,000) receive this "one-time" supplemental form.

² Assumes 3,000 multi-unit firms report by fax for approximately 30,000 establishments.

³ All other BLS—790 forms collect the same information and differ only by industry definitions.

Total Burden Cost (capital/startup):
\$0.

*Total Burden Cost (operating/
maintenance):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 29th day of July, 1996.

Peter T. Spolarich,
Chief, Division of Management Systems,
Bureau of Labor Statistics.

[FR Doc. 96-19716 Filed 8-1-96; 8:45 am]

BILLING CODE 4510-24-M

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 96-63;
Application No. D-10218]

Class Exemption to Permit the Restoration of Delinquent Participant Contributions to Plans

AGENCY: Pension and Welfare Benefits Administration (PWBA), Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The class exemption provides exemptive relief for certain transactions involving the failure to transmit participant contributions to pension plans where such delinquent amounts are voluntarily restored to such plans with lost earnings. This exemption is being granted as part of the Department's Pension Payback Program (the Program), which is targeted at persons who failed to transfer participant contributions to pension plans, including section 401(k) plans, within the time frames mandated by the Department's participant contribution regulation, and thus violated title I or ERISA. The exemption affects plans, participants and beneficiaries of such

plans and certain other persons engaging in such transactions.

FOR FURTHER INFORMATION CONTACT:

Ms. Lyssa Hall, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 219-8971, (this is not a toll-free number.); or William Taylor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 219-9141. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: On March 7, 1996, the Department of Labor (the Department) published a notice in the Federal Register (61 FR 9199) of the pendency of a proposed class exemption from the restrictions of sections 406(a)(1) (A) through (D), 406(b)(1) and 406(b)(2) of ERISA and from the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code.

The Department proposed the class exemption on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B, (55 FR 32836, August 10, 1990).¹

The notice gave interested persons an opportunity to submit written comments or requests for a hearing on the proposed class exemption to the Department. The Department received one written comment and a number of telephone inquiries regarding the proposed class exemption and the Program. There were no requests for a public hearing. Upon consideration of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the comment are discussed below.

Paperwork Reduction Act Analysis

Pursuant to the Paperwork Reduction Act of 1995 (PRA 95), 44 U.S.C. 3507, and 5 CFR Part 1320, the collection of

¹ Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

information in this class exemption was published for public comment on March 7, 1996 (61 FR 9199). No comments were received from the public regarding the collection of information. OMB has approved this collection, with the control number 1210-0097, which expires on January 31, 1997. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Discussion of the Comments

Section I(b) of the proposed exemption contained the requirement that 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. Pursuant to this condition, an employer who had repaid all delinquent contributions prior to March 7, 1996 would not meet this condition of the exemption and thus would be ineligible for the relief provided under the final class exemption to extend relief to employers who voluntarily restored delinquent participant contributions prior to March 7, 1996 but on or after November 28, 1995, the date the Secretary of Labor announced the Department's "public awareness campaign" on 401(k) plans. The commenter stated that the campaign was widely reported in the press and led many employers to review their current payroll practices and to voluntarily correct any errors they uncovered by restoring delinquent amounts plus interest. The commenter further stated that equity would seem to demand that the Pension Payback Program, and the attendant relief from any civil and criminal penalties and any excise taxes that may result from a finding that the transactions were prohibited should be made available to those employers who responded to the Secretary's call for increased scrutiny of 401(k) plans and moved swiftly to resolve a questionable situation. According to the commenter, companies

that took precisely the action the Secretary hoped to encourage with his press conference and awareness campaign should not be denied the relief available through the Program merely because they responded quickly, before the March 7, 1996 announcement of the Program and proposed class exemption.

The Department notes that the purpose of the Program is to benefit workers by encouraging persons to restore delinquent participant contributions to pension plans. The Department agrees with the commenter's views that those persons who voluntarily restore delinquent participant contributions following the Secretary's announcement of the Department's "public awareness campaign" and who met the other conditions of the exemption should be entitled to the relief provided in the exemption. Accordingly, the Department has modified the final exemption as requested by the commenter.

Section I(a) of the proposed exemption provided that:

(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.

In the preamble to the proposed exemption, (61 FR 9199, 9202) the Department noted that 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.

A number of telephone callers objected to this requirement. According to the callers, it would be administratively burdensome and costly to specifically determine what each participant would have earned on his or her account balance during the pertinent period. Two of the callers requested that the Department confirm that the condition requiring an account by account calculation would be satisfied if an earnings factor equal to

the highest rate of return generated by any of the investment options offered under the plan during the applicable period was applied to each of the affected accounts. In the Department's view, the alternative suggested by the callers would satisfy the requirements of section I(a), while reducing overall burdens and costs, since each participant would receive, at a minimum, the amount that otherwise would have accrued on his or her account.

Several telephone callers expressed confusion regarding eligibility for exemptive relief under the proposal if the earnings on delinquent contributions had been repaid prior to the effective date of the Program. The Department has modified section I(b) of the final exemption to clarify that exemptive relief is available for the restoration of earnings on or after November 28, 1995, which are attributable to delinquent contributions that have been restored to a plan prior to the effective date of the Program.

Finally, the Department has determined on its own motion to modify the requirement in section I(a) (1) and (2) of the proposed exemption which provides that earnings on delinquent participant contributions shall be calculated from the date that such contributions were paid to or withheld by the employer. This condition as proposed imposes a more stringent requirement on the calculation of earnings than required by the participant contribution regulation.² The Department has reconsidered this requirement and determined not to require employers to restore more earnings under the Program than otherwise would have been required if the participant contributions had been transmitted in a timely manner. Accordingly, section I(a) (1) and (2) of

² The final participant contribution regulation, which was promulgated in 1988, provides that the assets of a 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 more than 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 case of amounts withheld by an employer from a participant's wages). 29 CFR 2510.3-102.

The Department notes that a notice of proposed rulemaking was published in the Federal Register on December 20, 1995 (60 FR 66036) which would revise the 1988 regulation by changing the maximum period during which participant contributions to an employee benefit plan may be treated as other than "plan assets".

the final exemption has been modified to require that earnings on delinquent contributions be calculated as of the earliest date on which the participant contributions could have been reasonably segregated from the employer's general assets as required by the participant contribution regulation.³

Discussion of the Exemption

1. Scope

The exemption provides conditional relief from 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 a person's failure to transmit participant contributions to pension plans within the time frames required by the participant contribution regulation, provided that such delinquent contributions are restored to the plans together with lost earnings.

The Department notes that the exemption only provides relief for those transactions involving delinquent participant contributions and earnings that are restored to pension plans no later than September 7, 1996. The payments to the plan must relate to amounts paid by participants to, or withheld by, an employer for contribution to a plan no later than April 5, 1996.⁴

2. Conditions

The exemption contains conditions, as discussed below, which the Department views as necessary to ensure that any transaction covered by the exemption are in the interests of plan participants and beneficiaries and to support a finding that the exemption meets the statutory standards of section 408(a) of ERISA.

Under the exemption, all delinquent participant contributions must be restored to the pension plan plus earnings from the earliest date on which such contributions could have been reasonably segregated from the employer's general assets until such money is restored to the plan. The earnings are calculated at the greater of: (1) The amount that would have been earned on the participant contributions during such period if applicable plan provisions had been followed, or (2) the amount that would have been earned on the participant contributions during

³ The Department notes that corresponding changes have also been made to the respective provisions of the Pension Payback Program.

⁴ The Department notes that this date corresponds to the date contained in the Program.

such period using an interest rate equal to the underpayment rate defined in section 6621(a)(2) of the Code during such period.⁵ 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. As previously noted, this requirement would not preclude a calculation which used an earnings factor equal to the highest rate of return generated by any of the investment options offered under the plan during the applicable period for each of the affected accounts.

Second, the exemption requires that 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 received or withheld by an employer from the employees' wages for the calendar year 1995. For those delinquent participant contributions restored to plans on or after November 28, 1995, but before March 7, 1996, the total of all outstanding delinquent participant contributions, excluding earnings, on November 28, 1995 does not exceed the aggregate amount of participant contributions that were received or withheld by an employer from the employees' wages for the twelve calendar months immediately preceding November 1995. Provided that the preceding limitation is met, the exemption also would permit the restoration on or after November 28, 1995 of any earnings that are attributable to participant contributions that have been restored to the plan prior to the effective date of the Program.

Third, the exemption requires that the person meet the requirements set forth in paragraphs (2) through (6) of the Program. Those requirements include, among other things, that: (1) the person notify the Department in writing of its intention to participate in the Program and provide written evidence demonstrating that participant contributions and earnings have been restored to the plan; (2) the person notify affected participants (and send a copy to the Department) that prior delinquent contributions and lost

earnings have been restored to their accounts pursuant to participation in the Program; (3) at the time of notification to the Department 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 or examine the plan or otherwise make inquiry with respect to the status of participant contributions under the plan; and (4) the person must certify in writing, under oath, that it is in compliance with the requirements of the Program and, to its knowledge, not the subject of any criminal investigation or prosecution involving any offense against the United States; has not been convicted of any criminal offense involving employee benefit plans or any other offense involving financial misconduct, nor entered into a consent decree with the Department or have been found by a court of competent jurisdiction to have violated any fiduciary responsibility provision of ERISA.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code to which the exemption does not expressly apply and the general fiduciary responsibility provisions of section 404 of ERISA. Section 404 requires, in part, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA. Nevertheless, the Department notes that those persons who comply with the conditions of the Pension Payback Program will avoid potential ERISA civil actions initiated by the Department resulting from their failure to timely remit participant contributions to pension plans.

(2) The exemption, does not extend to transactions prohibited under section 406(b)(3) of ERISA or section 4975(c)(1)(F) of the Code.

(3) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and of participants and beneficiaries and protective of the rights of participants and beneficiaries of such plans.

(4) The exemption is supplemental to, and not in derogation of other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(5) The class exemption is applicable to a transaction only if the conditions specified in the class exemption are satisfied.

Exemption

Accordingly, the following exemption is granted 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 earliest date on which such contributions could have been reasonably segregated from the employer's general assets (as required by the plan asset-participant contribution regulation) 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 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.

(b) For amounts restored on or after March 7, 1996, 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

⁵ 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).

withheld by, the employer for contribution to the plan for calendar year 1995. For those delinquent participant contributions restored to plans on or after November 28, 1995, but prior to March 7, 1996, the total of all outstanding participant contributions on November 28, 1995, 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 the prior twelve calendar months immediately preceding November 1995. Provided that the preceding limitation is met, the exemption shall apply without limit to the restoration on or after November 28, 1995 of any earnings that are attributable to 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 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 (46 FR 9203).

III. Effective Date: The exemption provides retroactive and prospective relief for those transactions involving participant contributions and earnings that are restored to pension plans on or after November 28, 1995 but 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 6, 1996.

Signed at Washington, D.C. this 30th day of July, 1996.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 96-19718 Filed 8-1-96; 8:45 am]

BILLING CODE 4510-29-M

restoration of delinquent participant contributions.

SUMMARY: This document announces certain amendments to a voluntary compliance program adopted by the Department on March 7, 1996. The program allows certain persons to avoid potential Employee Retirement Income Security Act (ERISA) civil actions initiated by the Department of Labor, the assessment of civil penalties under section 502(1) 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 amendments allow additional persons to take advantage of the program and clarify certain requirements. These amendments primarily conform the terms of the program to a prohibited transaction class exemption that the Department is also publishing today.

DATES: As amended by this notice, the program applies to certain delinquent contributions, and lost earnings on delinquent participant contributions, that are restored to pension plans on or after November 28, 1995, but 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 6, 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: On March 7, 1996, the Department published in the Federal Register a notice of adoption of a voluntary compliance program for restoration of delinquent participant contributions. 61 FR 9203. The program, which is referred to as the Pension Payback Program, is designed to encourage employers to restore delinquent participant contributions to employee pension benefit plans as defined in section 3(2) of ERISA. Under

the program, employers who are eligible to participate and who comply with its conditions, may avoid potential civil actions under ERISA brought by the Department, and Federal criminal prosecutions arising from their failure to timely remit participant contributions and from the failure to disclose such non-remittance.

As a part of the program, the Department also published in the Federal Register on March 7, a proposed class exemption from the prohibited transaction provisions of ERISA. 61 FR 9199. In the notice of adoption, the Department stated that employers who participate in the program could rely on the proposed exemption notwithstanding any subsequent modifications made in issuing the final exemption. Pending promulgation by the Department of the final class exemption, the Department stated that it would not pursue enforcement against employers who comply with the conditions of the program and the proposed class exemption with respect to any prohibited transaction liability which may have arisen as a result of a delay in forwarding participant contributions. Similarly, the Internal Revenue Service advised the Department that it would not seek to impose the sanctions under sections 4975 (a) and (b) of the Internal Revenue Code with respect to any prohibited transaction that meets the requirements of the proposed class exemption.

Today, the Department is publishing in the Federal Register the final class exemption setting forth the conditions for retroactive relief from ERISA's prohibited transaction provisions for eligible persons who comply with the conditions of the program. As a result of comments responding to the proposed exemption, the final exemption contains changes that, among other things, increase the number of persons who may take advantage of the program. A description of the changes and a discussion of the reasons for them appear in the supplementary information to the final class exemption published today.

This document amends and supersedes the notice of adoption of the program issued on March 7, 1996, so that the terms of the program as a whole will remain consistent with the terms of the final class exemption. The principal amendment is that the program now applies to persons who restore or have restored delinquent participant contributions and earnings at any time on or after November 28, 1995, until September 7, 1996. The restored amounts must still relate to delinquent

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Pension Payback Program (Amended)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of adoption of amended voluntary compliance program for