

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.*

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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

participant contributions that were received or withheld by the employer no later than April 6, 1996.

As a result of this change, it is necessary to amend the condition in the program that the maximum amount of outstanding delinquent participant contributions on March 7, 1996, excluding earnings, must not exceed the aggregate amount of participant contributions that were received or withheld for the 1995 calendar year. This condition remains unchanged for restorations that occur on or after March 7, 1996. Under the amended program, for restorations that occurred on or after November 28, 1995 and prior to March 7, 1995, the total outstanding delinquent participant contributions on November 28, 1995, excluding earnings, must not have exceeded the aggregate participant contributions received or withheld from the employees' wages for the twelve calendar months immediately preceding November 1995.

This document reflects an amendment of the program provisions for calculation of the earnings or interest that must be restored in addition to delinquent participant contributions. Under the amendment, the earnings or interest must be calculated from the earliest date on which such contributions reasonably could have been segregated from the employer's general assets. Under the program as originally announced, earnings or interest were required to be calculated from the date on which the participant contribution was received or withheld by the employer.

This document also contains a number of minor amendments intended to eliminate certain repetitive provisions of the program when it was originally issued and clarify the language and structure of its provisions. The amendments contained in this document are effective as of March 7, 1996, the date on which the Department first published the Program in the Federal Register.

Except as provided in the 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. Persons who have complied with the exemption's 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 persons'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 government, 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 Amended Voluntary Compliance Program for Restoration of Delinquent Participant Contribution

##### *Amended Pension Payback Program*

The Department of Labor (the Department) today announced adoption of the Amended Pension Payback Program (the Program) which is designed to benefit workers by encouraging employers to restore delinquent participant contributions plus lost earnings to pension plans. The Program, which supersedes a program announced on March 7, 1996 (61 FR 9199), 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 Program is available to certain persons who voluntarily restore, or have restored, delinquent participant contributions to pension plans in accordance with the terms of the Program. 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(1) 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 and who comply with the class exemption setting forth the conditions for retroactive exemptive relief published by the Department today in the Federal Register. 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 Department has also granted a class exemption (published today in the Federal Register) under section 408(a) of ERISA with respect to prohibited transactions which may have arisen as a result of a delay in remitting participant contributions.

The Program only applies to certain delinquent participant contributions plus 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 by participants or withheld by an employer from participants' wages for contribution to a plan on or before April 6, 1996. The Program also applies to the restoration, on or after November 28, 1995, but no later than September 7, 1996, of any earnings attributable to delinquent participant contributions that were restored to the plan prior to November 28, 1995, without limit as to the amount of such earnings.

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 earliest date on which such contributions reasonably could have been segregated from the employer's general assets by the employer until the date 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 earliest date on which such contributions reasonably could have been segregated from the employer's general assets by the employer until the date such money is fully restored to the plan.

In determining the amount described in (a) above for a participant directed defined contribution plan, the person seeking relief under the Program may apply the highest rate of return earned by any of the investment alternatives available under the plan during the applicable period.

(2) The total outstanding delinquent contributions do not exceed the following limits:

(a) For amounts restored on or after March 7, 1996, the delinquent contributions outstanding on March 7, 1996, excluding earnings, may not exceed the aggregate amount of participant contributions that were received or withheld from the employees' wages for calendar year 1995.

(b) For amounts restored 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, cannot exceed the aggregate amount of participant contributions that were received or withheld from the employees' wages for the twelve calendar months immediately preceding November 1995.

(3) 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 (7) below; and (c) evidence of such bond as may be required under section 412 of ERISA.

(4) The person informs the affected participants within 90 days following the notification of the Department described in paragraph (3) 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.

(5) The person has complied with all conditions set forth in the class exemption issued by the Department today.

(6) 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.

(7) 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;\*

(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, DC this 30th day of July, 1996.

Olena Berg,

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

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## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 96-5 CARP DSTRA]

### Digital Performance Right in Sound Recordings

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Precontroversy discovery schedule and request for notices of intent to participate.

**SUMMARY:** The Copyright Office of the Library of Congress is announcing the precontroversy discovery schedule, including the date of initiation of arbitration, for the Copyright Arbitration Royalty Panel (CARP) proceeding to set the rates and terms for the 17 U.S.C. 114

\*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.

compulsory license for nonexempt digital subscription transmissions. The Office is also requesting interested parties to file comments on the rate petition by August 30, 1996. Parties who wish to participate in the CARP proceeding must file their Notices of Intent to Participate by August 30, 1996.

**DATES:** Comments on the rate petition, and Notices of Intent to Participate are due on or before August 30, 1996.

**ADDRESSES:** If sent by mail, an original and five copies of the comments, and an original and five copies of the Notice of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If hand delivered, an original and five copies of the comments, and an original and five copies of the Notice of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington D.C. 20540.

**FOR FURTHER INFORMATION CONTACT:** William Roberts, Senior Attorney, or Tanya Sandros, CARP Specialist, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On November 1, 1995, the President signed into law the "Digital Performance Right in Sound Recordings Act of 1995" ("Digital Performance Act"). Pubic Law No. 104-39. The Digital Performance Act creates an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. See 17 U.S.C. 106(6).

Among the limitations on the performance of a sound recording publicly by means of a digital audio transmission is the creation of a new compulsory license for nonexempt subscription transmissions. The Digital Performance Act defines a "subscription transmission" as one that "is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." 17 U.S.C. 114(j)(8). All nonexempt subscription transmissions are eligible for section 114 compulsory licensing provided they are not made by an "interactive service," which is defined in part as "one that enables a