



Office of the Attorney General
Washington, D.C. 20530

March 11, 1998

Honorable Newt Gingrich
Speaker of the House
United States House of Representatives
Washington, D.C. 20510

Dear Mr. Speaker:

I am writing to you regarding Section 1128B(a)(6) of the Social Security Act, as amended by Section 4734 of the Balanced Budget Act of 1997, which was signed into law on August 5, 1997. As amended by Section 4734, Section 1128B(a)(6) of the Social Security Act, to be codified at 42 U.S.C. § 1320a-7b(a)(6), provides that whoever:

for a fee knowingly and willfully counsels or assists an individual to dispose of assets in order for the individual to become eligible for medical assistance under a State plan under Title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c), shall . . . (ii) in the case of such a . . . provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than \$10,000 or imprisoned for not more than one year, or both.

Pub. L. No. 105-33, 111 Stat. 522-23. Section 1128B(a)(6) is the subject of constitutional challenges in New York State Bar Association v. Reno, 97-CV-1768-TJM-DRH, in the District Court for the Northern District of New York, and Magee v. United States, 98-CA-073, in the District Court for the District of Rhode Island.

This is to respectfully inform you that, after close and careful scrutiny of the matter, the Department of Justice will not defend the constitutionality of Section 1128B(a)(6) because the counseling prohibition in that provision is plainly unconstitutional under the First Amendment and because the assistance prohibition is not severable from the counseling prohibition.

Notably, Section 4734 of the Balanced Budget Act of 1997 repealed the prior Section 1128B(a)(6) of the Social Security Act, which had been added by Section 217 of the Health Insurance

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Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2008, and which was codified at 42 U.S.C. § 1320a-7b(a)(6) (Supp. II 1996)). The prior Section 1128B(a)(6) of the Social Security Act made it unlawful for any person to "knowingly and willfully dispose[] of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under Title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c)."

Because Section 4734 repealed the provision just quoted, the new Section 1128B(a)(6) of the Social Security Act would prohibit attorneys and other professional advisors from "counsel[ing]" their clients to engage in an estate-planning strategy that itself is lawful. Under these unique circumstances, and in light of the fact that, pursuant to this provision, professional advisors such as attorneys would be prohibited from providing truthful, non-misleading advice to their clients about lawful behavior, we are unable to identify a governmental interest that would justify this restriction on protected speech. Accordingly, we believe that the "counseling" prohibition in Section 1128B(a)(6) of the Social Security Act plainly is unconstitutional under the First Amendment, and cannot survive judicial scrutiny.

The amended Section 1128B(a)(6) of the Social Security Act also would prohibit attorneys and other professionals from "assist[ing]" an individual "to dispose of assets in order for the individual to become eligible for medical assistance", if disposing of the assets results in the imposition of a period of ineligibility for Medicaid nursing home benefits under Section 1917(c). Congress may enjoy greater authority under the Constitution to restrict professional "assist[ance]" that is distinct from "counsel[ing]," since such assistance need not necessarily take the form of protected speech. However, we do not believe that Congress would have intended to impose an assistance prohibition in the absence of a concomitant prohibition either on the underlying conduct (the disposal of assets itself) or on the counseling to engage in such conduct. Accordingly, we have concluded that the assistance prohibition is not severable from the counseling prohibition.

Therefore, in accordance with the practice of the Department, I am hereby informing the Congress that the Department of Justice will not defend the constitutionality of the counseling prohibition in Section 1128B(a)(6) of the Social Security Act. Consistent with my determinations on the constitutional and severability questions, I also am hereby informing the Congress that the Department of Justice will not bring any criminal prosecutions under the current version of that Section.

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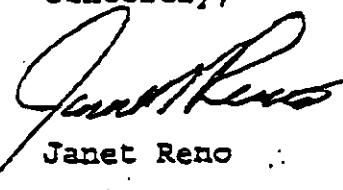
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Finally, I would like to stress that the Department of Justice is available to assist Congress, if it so desires, in attempting to draft new legislation that would address the concerns of Congress in a manner that comports with contemporary First Amendment jurisprudence and that meets other policy objectives of the Congress and the Executive Branch.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet Reno".

Janet Reno