Bob K.

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EXECUTIVE SESSION

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TUESDAY, JUNE 10, 1980

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United States Senate,
Committee on Finance,
Washington, D. C.

The committee convened at 10:10 a.m., in Room 2221, Dirksen Senate Office Building, the Hon. Herman Talmadge presiding.

Present: Senators Talmadge, Nelson, Matsunaga, Bradley, Baucus, Dole, Packwood, Danforth, Chafee, Wallop, and Durenberger.

Senator Talmadge. The committee will please come to order. Mr. Shapiro.

Mr. Shapiro. The first item on your agenda is the extension of the Airport and Airway Trust Fund taxes. As you may know, the airway system and the tax structure was enacted in 1970 for a ten-year period. It is to expire at the end of June 30, 1980.

The House Ways and Means Committee and the Public Works Committee -- it is a joint jurisdiction bill -- whereas the Title I of the bill is handled by the Public Works Committee, dealing with the authorizations of the taxes for the airway system, and the Title II of the bill is the tax structure.

The House has been working on putting together an extension of these taxes for an additional five-year period of time. The Ways and Means Committee has ordered its bill reported, and it is waiting for House floor action at the present time.

The fact that the taxes expire at the end of this month and the fact that the House has not sent a bill to the Senate means that it is unlikely that you will have the opportunity in the Senate in the Finance Committee and the Senate floor to deal with this subject, to extend the airway system that the House bill is looking at by the time of June 30. As a result of that, the Ways and Means Committee initiated a measure last week to provide a three-month extension from July 1 until September 30th in order to give the Senate the opportunity to review the legislation.

That bill has been reported by the Ways and Means Committee. However, at this date it has not passed the House. The item is on your agenda in the Finance Committee so that in order to expedite matters, and since you are talking about just a three-month extension of all the taxes without any change, the Finance Committee want to agree to that three-month extension so that when the House bill is passed it may be kept at the desk with the instruction the Finance Committee have agreed to it, and then it can immediately go down, be passed by the Senate and sent to the President providing for a simple three-month extension.

Senator Talmadge. Any objection to reporting the bill?

Senator Packwood. Mr. Chairman --

Senator Talmadge. Without objection it is so ordered.

Senator Packwood. -- wait a minute.

Senator Talmadge. Senator Packwood.

Senator Packwood. I want to make sure I understand, Bob. When we passed the Airport Development Act here, we presumed this airline ticket tax would drop to 2 percent if the provisions we had for the principal major airports and negotiating for their own -- I think it is 65 or 75 airports -- and negotiating on their own with the airlines passed. That has not passed the House yet. If that does pass, is there not a presumption that this 8 percent will drop to 2 percent?

Mr. Shapiro. No, the House bill will continue at the 8 percent level for two more years. First of all, let me say it is a five-year extension of all taxes, and it puts all the taxes into the trust fund. At the end of two years, and that is on September 30, 1982, the 8 percent ticket tax on passengers will go down to 5 percent. However, that is the level that it would drop to. It would not under the House bill go any lower than 5 percent.

Senator Bentsen. Okay. Let me ask a question then, Mr. Chairman.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. I apologize for my lateness in arrival, but I had a commitment downtown. Now is the staff recommendation, one, of continuing the 8 percent; is that what you are speaking of now?

Mr. Shapiro. What is being recommended is to continue all taxes for a three-month period to give the Senate Finance Committee and the Senate an opportunity to review the entire five-year extension and make any substantive changes that you would think appropriate.

Senator Bentsen. And that is what we are voting on?

Senator Talmadge. A three-month extension of existing law without change. Any objection? The Chair hears none. Reported.

Mr. Stern. Mr. Chairman, this would not actually be reporting a bill since it is not before the Finance Committee, but this would be to hold it at the desk when it passes the House and say that the Committee had discussed this matter and would recommend approving the bill as sent over.

Senator Talmadge. Now, Mr. Shapiro, this pension plan.

Mr. Shapiro. The next item on your agenda deals with the Pension Benefit Guarantee Corporation. And I think it would be appropriate if I would just take a few minutes and give you some background. The staff has distributed a handout, and let me just say very briefly what is in that and give you the background to it.

There is a bill that has passed the House that is before the committee, and it has a lot of provisions. The staff has reviewed the provisions. We have worked with the staffs of the Senator Labor Committee, the Treasury Department, the Pension

Benefit Guarantee Corporation, and worked with a number of staffs of the members of this committee. In order to help expedite the committee consideration of this matter the staff has listed issues that appear to be appropriate for the committee to consider that have some controversy involved.

Other than that the rest of the items in the House-passed bill that do not appear to have controversy, the staff is assuming the committee will agree to, other than the ones that the staff has listed.

By way of background the Pension Benefit Guarantee Corporation was an outgrowth of the congressional consideration of the ERISA pension laws -- and that is the Employee Retirement Income Security Act of 1974.

The problem came about when the Congress was concerned in its consideration of pension laws of certain employees that at one time thought they had a pension plan, they retired or were about to retire, and then their corporation went out of business. The Studebaker case, for example. And they woke up, they retired, they spent all their years with the corporation, they thought they had a pension, they were receiving benefits. And then they woke up one morning and found out that they had nothing. The reason for that is that these pension plans were not adequately funded, and as long as the corporation stayed in existence, the retirees were being paid by current funds. But once the corporation went out of business there was no adequate funding in the plan, and the employees ended up with nothing.

The Congress was very much concerned about that in its complete review of the pension area in 1973 and 1974. In order to deal with that the Congress passed a self-insurance program, referring to it as termination insurance, to guarantee pension benefits to retirees so that if something happened to their corporation, their pension plan, at least there would be some insurance available to pay some minimum benefits to retirees.

The entity that was created for this is referred to as the Pension Benefit Guarantee Corporation, and that is referred to as PBGC. This corporation maintains a trust on which the insurance benefits are provided for both single-employer plans and multi-employer plans.

Now a single-employer plan is one in which a corporation just has a plan on its own. It has its employees that are covered. A multi-employer plan, however, are pension plans which are really the subject of collective bargaining, and that is between the employers and unions, and a plan on which there is more than one employer that is involved. You have, some of these, a lot of small employers that may be part of an industry, for which their employees may go from one company to the other. A union negotiates a plan as part of a collective bargaining, and that is referred to as a multi-employer pension plan.

The insurance program that was set up, and that is referred to as termination insurance, is funded, and that means the insurance payments are paid by premiums on the plans, the plans themselves. Also the assets that the plans have, if the pension plans terminate, the assets in the plans themselves are part of the insurance proceeds. Also you may have payments by employers who maintain the plans, and they also would be liable for some of the funds for this termination insurance. And lastly is the earnings on any investment of the Pension Benefit Guarantee Corporation.

So these are the sources of funds. I should point out that the federal government is not liable for any of the funds. It is a self-insurance plan, maintained by the Pension Benefit Guarantee Corporation, that is funded by either the unions on behalf of their employees or by the employers under certain circumstances. But there is no responsibility by the federal government to underwrite these particular plans.

In 1974, when Congress passed ERISA, Congress made the Pension Benefit Guarantee Corporation responsible to single-employer plans initially. So all single-employer plans have been covered under the Pension Benefit Guarantee Corporation since 1974.

Senator Chafee. They pay premiums?

Mr. Shapiro. They pay premiums, that is correct. And if a single-employer plan terminates, the Pension Benefit Guarantee Corporation has to pick up the responsibility and pay the benefits under this termination insurance plan that was set up by Congress in 1974.

In the case of the multi-employer plans Congress was not sure of some of the problems that this may present. It was a new type of concern. At that particular time Congress was told and was convinced that these multi-employer plans were financially sound, that they did not need the termination insurance, and Congress decided not to provide mandatory coverage in 1974 for multi-employer plans but to provide a period of time up until 1978 to allow Congress an opportunity to review it and see whether or not any changes were necessary in the legislation before having mandatory coverage of multi-employer plans.

During the interim period the PBGC reviewed multi-employer plans in a more concentrated effort than had been done in the past, and there was a concern that these multi-employer plans were not as financially sound as Congress had thought was an earlier case. And in all fairness, some cases, their status changed. It wasn't that Congress was necessarily being told they were in one status and they were not. In some cases that may have been the case. In other cases their status was changing. Some of the industries were declining industries where you may have more people retiring, not enough new employees coming into that industry, and therefore the funding was not at the same extent that Congress had thought may be the case when they considered it in 1974.

As a result Congress did not want to require mandatory coverage without some changes. The particular problem that came about is what is referred to as withdrawal. If you have a multi-employer plan that is covered and some of the employers withdraw from the plan, the effect of that is putting the burden on those employers that stay in the plan. And they may have to pick up a greater portion of the liabilities, not only for their own employees, but also for other employees on behalf of an employer that may have pulled out of the plan. And therefore, as a result of that concern, the administration, the Pension Benefit Guarantee Corporation felt that we should not require mandatory coverage of multi-employer plans without some changes which would prevent these withdrawals without any liability of employers, and certain other changes that required congressional action.

Congress did not have an opportunity to address these in 1978. We had a full agenda of energy matters, tax bills, and as a result of that that mandatory coverage was pushed forward on several occasions. It most recently had a 60-day extension, so that now the deadline is June 30th, and that is this month. As of July 1 all multi-employer plans would be covered under Pension Benefit Guarantee Corporation unless Congress changed it otherwise.

There is a strong intent for that not to be case, meaning we would prefer there would be some changes in the law rather than simple extension.

Now having given you an overview of the matter, let me show you the procedure of where the legislation is right now.

In May of 1979 the Pension Benefit Guarantee Corporation, and let me say first of all, though it is a separate corporation it is within the Department of Labor and its board of directors includes the Secretary of Labor as the chairman and also includes the Secretary of Treasury and the Secretary of Commerce. So even though it is a separate corporation, it is not funded by the federal government, it does have a strong federal backing as a result of being part of the Department of Labor and having several secretaries sit on its board of directors.

The Pension Benefit Guarantee Corporation has spent a considerable amount of time since 1974 reviewing its program, looking at the time for multi-employer coverage and what changes need to be done in order to accommodate that, presented a bill which the administration has backed to the Congress in May of 1979 to provide a number of revisions in order to bring in the multi-employer plans on an appropriate basis.

That bill has jointly referred to the Labor Committees in both the House and the Senate as well as the tax-writing committees. It was introduced in the House as H.R. 3904 and introduced in the Senate as 1076.

The House Labor Committee, and as you know, both the tax-writing committees have been very much involved during the last year on the windfall profits legislation, and therefore, neither the Ways and Means nor the Finance Committee had an opportunity to spend any time on this matter until only the last several months.

The Senate Labor Committees on the other hand have had an opportunity to spend a considerable amount of time in their subcommittes and their full committees and have had a number of revisions. There has been a coordinated in the staffs of both the Ways and Means Committee, the Finance Committee, and the Joint Tax Committee working along with the Senator Labor staffs and the administration committees.

The House Labor Committee reported its version of the bill. The Ways and Means Committee reported a version, and an accommodation was worked out with the two House committees so that it was taken on the House floor with the changes as one bill and was passed in the House by a vote of 374 to 0. The bill was --

Senator Dole. That means no one understood it.

Senator Bentsen. That is a pretty good assumption.

Mr. Shapiro. Yes. It is a very complicated piece of legislation which I will say that during the course of its consideration in the Ways and Means Committee, and I can't speak for the House Labor Committee, but I think that the Ways and Means Committee focused primarily on some of the specific items in it. The overall aspect and some of the long-range concerns may not have been fully developed to the extent that may be appropriate because it is a very difficult area and the liability is on employers and the concerns of the employees, those who thought they had pensions and may not have one was a major concern. And therefore, I think, looking at all the pieces in the short period of time has been very difficult for both the Ways and Means Committee and the Finance Committee as well.

At any rate, it was simultaneously being considered by the Senate Labor Committee. They also spent a significant amount of time reviewing the legislation. They have reported its version of the bill, and that has been jointly referred to the Finance Committee.

So the House-passed bill, H.R. 3904, is at the desk and is being kept there. What you have before your committee technically is the Senate Labor Bill, S. 1076, which is referred here.

What the procedural aspect of it is for you to make your decisions on this bill. Any differences between your decisions and the decisions of the Senate Labor Committee can be reconciled on the floor, and then it will be used to amend the House-passed bill and sent to the House.

After the Finance Committee acts, we hope to have a continuing dialogue between the staffs of the Finance Committee, the Joint Committee staff and the Senate Labor Committee to try to work out any differences to the extent it can be done at the staff level and then go back to the respective committees, not in the committee as such, but for reconciliation of the floor so that any differences that can be reconciled in concept maybe can be worked out by the two respective committees, and we have to see what the decisions of the Finance Committee are before we can see. But the point I am really saying is that there is very good coordinated staff effort all along this bill, both on the House side and the Senate side. To the extent that staff coordination can alleviate any problems and work out some problems before the Senate floor, we will continue to do so even after the Finance Committee acts.

At any rate, that is the procedural background. You now have the bill before you. The overall objective of the bill is to provide this insurance system under the Pension Benefit Guarantee Corporation in a way to make it financially viable with regard to multi-employer plans.

So that is the key objective, is to make it a financially viable termination insurance system in a way that down the road the federal government will not have the burden to pick up any liabilities if the problems develop.

It is done in several respects. One is to remove incentives from employers to withdraw from plans. In other words, if you have incentives where the employer is better off out of the plan rather than in it, it would just present an undue burden on the corporation, the Pension Benefit Guarantee Corporation, and it wouldn't be fair for some employers to back out and leave the burden to those that stay in. So that is one of the objectives of the bill, is to provide disincentives for employers to leave, meaning that it would be so that they would have incentives to stay part of the system.

Also, there are changes to allow financially distressed plans to reduce their liabilities, also to deal with the guarantees of employees, a revision of the premiums that are paid by the union on behalf of their employees in order to make the system viable as well.

So these are some of the basis objectives that are being accomplished in the legislation. What you have before you is a staff document that is prepared jointly with the Finance and the Joint Committee staff. We have reviewed this document with the Senate Labor staff, the administration, the Pension Benefit Guarantee Corporation.

I will say that it was reviewed in earlier stages. The document was put together last night with some staff recommendations in order to maybe give some guide to the committees in some of the areas. We did not try to be presumptuous to have recommendations in every area because some of the issues are very difficult and we are not sure of the best way to make some recommendations.

In the areas the staff did make recommendations is areas that seem to be to us where there are some accommodations after talking to a lot of groups, staff members of the members of this committee, and we felt that the recommendations may be helpful as a starting point.

I think it may be helpful to go through the considerations, is to turn to page 1 of the staff document which talks about the statement of policy. We can turn pages while I will give you a background of the particular issues. And as I said at the beginning the assumption the staff is making is that this document includes the issues that we are presently aware of. There may be some issues that Senators have that have not been brought to our attention, but if they were brought to our attention, and what we have heard in our numerous meetings with outside groups, which have been very cooperative with the staff in this exchange, we have put on this list. So we are only bringing to your attention issues that have been brought to us that need committee decisions. Items that are not on this list appear to be correct, that have been decided in the House and the Senate versions of the bill.

So if you would like to proceed on this basis, we can go to the first page, which is the statement of policy.

Senator Durenberger. Mr. Chairman?

Senator Talmadge. Senator Durenberger.

Senator Durenberger. I wonder if I could ask Bobby just a general background question, to explain exactly how the multi-employer plans work, in particular, I guess, the employer's role in most of these multi-employer plans. What role or voice does the employer have in the operation of the plan? What control, if any, does he have over investment policies? What control, if any, do employers who are part of these plans have over increases or decreases in benefits? Just as a backgrounder so we can put these issues in perspective.

Mr. Shapiro. I think that is very good. I think it would be very helpful to the committee. Let me start out, and I am going to ask Bill Lieber of our staff who has worked in this area exclusively and who has much more background than I on a lot of this, to add, to give you a little more specifics.

I think I should point out that I don"t think there is any one uniform way that I could say it works in each particular union, in each of the cases. It varies extensively probably from union to union and plan to plan as to how it should work. However, there are some of these multi-employer plans that are made up of very large companies, some very small companies, and they are in different type industries.

In many cases they are negotiated by the unions. I would say in some of your larger employers your employers may have a very strong voice in what goes into it. On the other hand, I think it is fair to say that you may have a number of smaller employers that do not get involved in the negotiation of the pension plans and the conditions to it, and as a result they assume that whatever is worked out on behalf of the negotiators they agree to, they pay their amount of money monthly or however it may be set, and they accept probably on faith as to what has been negotiated in their behalf.

As I said, probably the larger the employer, the more involved they get; the smaller they are, they may have more of a problem with cost, understanding, and they rely on the negotiations on their behalf and on others in that regard.

So I don't think there is any one way, but I think the point that you may be making is that there may be a number of small employers that may not be fully aware of what is involved in some of these pension plans, what responsibilities, liabilities that may be there on their behalf. They know that they are going to pay X amount of dollars each month or each quarter, whatever they have to pay. That seems to fit within their agreement on their collective bargaining agreement, and they may not fully understand all the liabilities that they have agreed to.

Senator Durenberger. Well, clearly, as we go through this process, you know we are all trying to protect the retired employee, but at the same time the decisions we make on this are going to have substantial impact on employers.

Mr. Shapiro. Absolutely.

Senator Durenberger. And it may be a matter of you have to change the Taft-Hartley Trust provisions or something like that, but I don't know whether we could cover both sides of this in our approach here. But I think that is the big concern all of us have, is to protect some of these employers as well as the retired employees.

Mr. Shapiro. You are absolutely correct. You have the two purposes of the committee in consideration of this legislation: one is to protect the employees, those that have retired or are contemplating retirement, thinking that they have certain retirement benefits, they have worked their entire life for it, and to make sure they don't wake up after they have retired and find out that they have nothing or very little.

Alternatively, there certainly is a concern about the employer, to make sure that you don't impose liabilities so strong on them and so much that they find that they just can't stay in business, and they have a choice that if they stay in business they can"t afford the liability and if they go out of business their employees may be hurt. So they are in a very difficult position, a burden that is so great on them; or alternatively, they may have worked their lifetime too and in their later stage of life they may want to sell their business and retire, and they find that they can't sell their business because the contingent liabilities on them are so great that they can't get out of it.

So I think there is a fair concern on behalf of employers that matches your concern that you should have for employees. Reconciling these various concerns are not always easy. In some cases they dovetail and others they are opposite. When you bend over to protect the employees, you are hitting the employer. So they are not easy. I think they should both be kept in mind.

And the proposals that were sent up by the administration tried to have a balance, but people see balances in different respects. In some of the recommendations staff is making and the issues we have here, we do both, trying to protect the employer from the standpoint of making the program solvent and trying not to put a burden that is too great on the employer, at the same time we are trying to look out for the employees as well by way of increasing the guarantees for an employee, also by increasing the premiums to make sure that the guarantees would be covered, and trying to provide de minimus rules on withdrawal liabilities. We have tried to do it, but let me be very fair and say, on behalf of myself and a number of people we have talked to, we are very nervous about this. We are concerned down the road for what may be coming that we can't see today. And I don't feel that I could give this committee any assurance that the changes that we are recommending or when this bill is enacted by whatever change we have, that the system will work the way that I think you would like it to work -- to protect the employees, to make sure it is solvent, that the employers do not have an undue burden. I don't know if we can reconcile all these various factors in the way that I think that I would like to give you the assurance and that you would like to have.

Senator Durenberger. Well, then rather than trying to answer my question in any detail now, perhaps if you would keep in mind as we go through each of these six major issues and any others that I, and I am sure everyone here, would like to know the degree of control which is left with the employer, and particularly if you can help us see it from the standpoint of different kinds of industry as well. You spoke of the fact that different unions will approach it differently. That means obviously different industries will have different approaches, and I think we all need to know as we go through this something about the differences between various industries, require as employer employer control over benefits, contributions, investment policies and so forth.

Mr. Shapiro. I think Mr. Lieber maybe will help you to summarize the way the program works in general, so there may be just a little bit of input that may help as well.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Mr. Chairman, as Chairman of the Subcommittee that held hearings on this, what we have found is a great deal more problems than we found under single employer plans.

Those in questioning and in the testimony, and the counsel under which Congress operated in the beginning, in 1974, on ERISA and multiemployer plans, later in fact did not substantiate it. I think the changing economic conditions forced it. The argument was that said you had multiple employers there would be more stability, and that kind of diversity of employers than you had in the single-employer plan and therefore you could get by with a 50-cent premium, where we went to a dollar at that point on a single employer. That hasn't proven the case because you would have an industry in effect for the multiple employer plan, and an industry would get in trouble, in economic trouble.

So you have seen a number of these pension plans that are not properly funded. You see some of them that are actually holding on waiting for this piece of legislation, and in fact I think will default when this legislation is put into effect, and expect PBGC to help pick up the deficit.

The other side of the problem that we are facing and why we have a real concern is if we don't act on a piece of legislation you are going to see a lot of these people pull out, and you are going to see particularly those that are solvent and can take care of themselves pull out. And they are going to leave the package to those, a lot of them, that are not solvent. And the pensioners are going to be in real trouble.

I think we are faced with a situation where we are going to have to have a piece of legislation. We have looked long and hard at some of the concerns that have been raised, some of them that you have spoken to. We have seen situations where on the withdrawal liability we have had some to testify to us that you would have a small company that would have a million dollars in assets but incur $5 million in liabilities, a trucking company as I recall. A dairy company that I believe stated it had 9 million in assets would incur $14 million in liability upon withdrawal.

Now those things are disputed, and we have a paradox here in that we have very sophisticated people on both sides, lawyers and tax accountants and pension consultants, each saying the other side doesn't understand the piece of legislation, and in great dispute over what it will accomplish.

Now the staff has addressed the major concerns that came before us, and we will have some proposals for a number of those. And the ones I have seen thus far I feel that they have made some real headway in trying to improve the legislation. But there are a lot of imponderables that are going to be left.

Senator Talmadge. Senator Chafee.

Senator Chafee. Mr. Chairman, could I ask the question about is there a public policy reason for having multiple employer plans? Based on what Senator Bentsen said and what Bob said here, it seems to me that when you get a multiple employer plan frequently there is a decreasing sense of responsibility on the part of the employer since he is a small part of a bigger operation. And is the rationale for the multi-employer plan that those employees in that industry are transient and thus get greater insurance from the fact that their employers, be they multi-employers in successive stages are part of a master plan, thus there is a public policy feature in favor of the multi-employer plan? Is that the rationale for it, or is it because the union has become powerful enough to bargain for a multi-employer plan?

Mr. Shapiro. I think you can say that there may be several reasons for it. Let me give you an example which may illustrate it. Let's take the construction industry where you have a construction job. Once that job is finished that employer may leave but the employees are available, and they look around for the work with the next employer.

If you have to have a period of years for vesting, you may find employees of that particular industry, construction in this case, would never get a vested pension plan because they would never be with the same employer if that employer keeps changing. So the union will put together a plan where they have all the construction workers may be part of the union, and if they go from one construction company to the next they will still be able to get a pension plan because it would be a multi-employer plan sponsored through the union, and if he goes from one employer to the other it is still part of a coverage. It is the way they carry your benefits, its portability.

Senator Chafee. I can see it. Is that true with most of them, say the Teamsters' plans? Do truckdrivers move around from company to company?

Mr. Shapiro. It may be that they don't as much as construction. I gave you probably one of the better examples as to the need for multi-employer plans, but it is probably fair to say that the others where there is a multi-employer plan you have the same type of problems, maybe not to the same extent as you have in the construction industry.

Senator Chafee. Thank you. Thank you, Mr. Chairman.

Senator Talmadge. Mr. Shapiro, you may proceed, sir.

Mr. Shapiro. Let me just kind of summarize then the way I am going to approach it so you can just see the big picture first. I am starting off with a statement of policy which does not appear to be controversial from all accounts that we have talked with people. The next big area, and probably the biggest area of consideration in this legislation is withdrawal liability. When someone withdraws from a plan, an employer withdraws, to what extent is there a liability with regard to that employer?

The next area is the computation. Well, it is imposition of the liability and then the computation of that liability. Then we have a de minimus rule on the withdrawal liability, trying to find if there are small amounts that they would have a de minimus rule on a mandatory basis and a discretionary basis. And then the effective date is an important issue.

The next major category is the reorganizations. And this is where a plan is in financial difficulty and we are making some determinations as to whether or not there are reduction of benefits and so forth. So that is an area of financial difficulty.

The next major category is the question of premiums. To what extent should they be increased and how much?

And the following area is the guarantees. To what level should the Pension Benefit Guarantee Corporation guarantee the amounts to employees. And there are some revisions in that.

Lastly, a smaller issue dealing with the actuarial standards requirement for actuaries when they identify certain problems.

So these then are the major areas that the staff has put together as issues for the committee. The first one is on page 1 of our document. It is the statement of policy. It is I. And I think the important reason for statement of policy is a major concern that many of us have now to make it clear for now and the future that the federal government is not underwriting the Pension Benefit Guarantee Corporation, that it is a self-sufficient, guaranteed termination insurance system.

The present statement of policy does not deal with that issue. It relates more to looking at the multi-employer plans. Neither the House bill nor the Senate bill relate to the financial aspects of it, but in talking to the staff it does not appear to be a concern to making this point clear. And therefore, the staff recommendation that is listed at the bottom of that page is that the committee may want to consider providing that the policy of the act is to protect the interest of participants and beneficiaries in multi-employer plans and to provide a financially self-sufficient program for the guarantee of employee benefits under the multi-employer plans.

Senator Talmadge. Any objection to that recommendation, gentlemen?

Without objection it is approved.

Mr. Shapiro. On page 2 of the material begins the big question of withdrawal liability, and this is the question where the employer withdraws from the plan. Under present law there is a problem as to why there are suggested changes. The present treatment says that the liability of the employer under a multi-employer plan ends when the employer withdraws from the plan. He has no liability unless five years after the withdrawal that particular plan terminates and there are insufficient assets in order to guarantee the amount of benefits to the employees.

In that event, that type of termination, each employer who maintained the plan during the five-year period before it terminates would be liable to the Pension Benefit Guarantee Corporation for a share of the insufficiency.

So the only time there is withdrawal liability is if the plan terminates within a five-year period of when an employer withdraws. There is a limitation in present law, however, that an employer is not liable for more than 30 percent of his net worth.

Senator Wallop. Bob, could I ask a question on that, because that sentence is unclear, liabilities limited, however, to 30 percent of its net worth. Is that the plan or the --

Mr. Shapiro. No, the employer.

Senator Wallop. The employer?

Mr. Shapiro. The employer. Okay, now that is present law.

Senator Bentsen. That is also under the single-employer plan now?

Senator Wallop. Yes, I just didn't understand who "it" referred to, whether "it" was the plan or "it" was the employer.

Mr. Shapiro. Senator Bentsen is correct that that limitation of 30 percent of net worth applies both to single-employer plans and multi-employer plans.

Senator Bentsen. Is there any effort to change that 30 percent?

Mr. Shapiro. There isn't. All the bills that have proceeded so far do not have any limit. In other words, there is no cap on that. In other words, they are eliminating that provision in present law. There is a concern that that limit is not the appropriate limit for single-employer plans and that any subsequent legislation on single-employer plans may carry proposals to eliminate that rule. Whether or not to have a cap, as far as I know, has not been determined.

But in the bills, and I am going to get to this later, but in the bills that have passed the House and the Senate Labor Committee do not have any cap at all. They have eliminated the 30 percent limit in the present law and do not substitute it with any limits.

Senator Wallop. Can I ask a question? It seems to me that there is an interest in here that is perhaps one that we haven't talked about. It talks about the employer's interest. It talks about the employee's interest in the solvency of his retirement plan. There is another interest, and that is the employee's present employment. And it would seem of very little use to him to have a pension benefit that was guaranteed if he didn't have a job. And if by inadvertently making this the reason for the downfall of a company, by not having any limit at all, that interest would be ignored.

Mr. Shapiro. There is a very real concern that some employers may be placed in the problem that they can't afford to stay in and they can't afford to go out of business because their liabilities are in excess of their net worth, and they are in a quandary, and there are several situations that we are aware of that present that problem.

Senator Packwood. But it seems to me, Bob, it is helpful if we start with the premise that the purpose of this whole concept from ERISA onward was to guarantee that there would be a pension for a worker who has been guaranteed a pension.

Mr. Shapiro. That is right.

Senator Packwood. And that ought to be the presumption from which we start, and then weigh whatever changes we have to make in that, whether it is withdrawal liability or flexible withdrawal liability, against that goal. And we may have to make some decisions, and we may have to back away from that premise a bit. But I think that ought to be the paramount premise we start with.

Mr. Shapiro. Yes, that is correct. That is fully the case under which this whole program was put together by the Congress in 1974, to have these guarantees for the pensions that the employees thought they had and to provide this termination insurance to cover that.

Senator Dole. Could I just ask one other basic question? Do either of these bills have a sunset provision?

Mr. Shapiro. No.

The next item is an overview of the two bills to give you the flavor of the foregoing specifics. Both of the bills, and that is the House-passed bill and the Senate Labor Committee bill, an employer who totally or partially withdraws from a multiemployer pension plan generally is liable for a portion of the plan's unfunded obligations as of the time of withdrawal. So they are requiring a withdrawal liability. That is the basic premise that the bills revolve around.

There are also special provisions that are added in all of these bills to relieve the employers in certain industries -- for example, the construction, entertainment industry -- from withdrawal liability in certain cases because of the uniqueness of their particular industries. There are also de minimus rules to provide exceptions for very small liabilities, and also the bills have basic methods for computing the liability.

As you will see at the bottom of page 2, there is a definition of complete withdrawal, which is essentially when the employer permanently ceases to have an obligation to contribute under the plan or when an employer permanently ceases all covered operations under the plan. When these two conditions are met, that is a complete withdrawal on which the liability is imposed on the employer.

The second case, the B there at the bottom of the page, partial withdrawal, is the main area that causes problems. So you can crystallize the complete withdrawal many times to a better extent, and partial withdrawals, where you don't have the complete withdrawal, and there are three cases under the House bill on which partial withdrawal occurs.

At the top of page 3 you see those three cases. The first one is that you will have partial withdrawal if there is a 60 percent decline in the employer's contribution base. And that continues for three consecutive years.

So if the employer has a 60 percent decline, that is treated as a partial withdrawal on which he has a withdrawal liability.

The second is a case where you have partial withdrawal because the employer closes one or more facilities, which is commonly referred to as the Facility Closing Rule. So if the employer closes one or more facilities, there is more than a 25 percent decline in the employer's contribution base. In that case you will have liability as a result of the partial withdrawal.

Thirdly, if the employer who is required to contribute to a plan under several collective bargaining agreement and ceases to have an obligation to contribute under at least one, then you have partial withdrawal.

So if there are several collective bargaining agreements and if under one of these collective bargaining agreements the employer no longer has an obligation to continue, he is treated as having a partial withdrawal and on which there is liability imposed in that case.

All three of these, the partial liability is based on his pro rata portion of his liabilities as of the time that he is treated as having a partial withdrawal.

Okay, Item C there, middle of page 3, is a special rule for construction, entertainment industries, and this is where there is a withdrawal and the employer ceases to do business. The assumption here is that that particular employer may finish a construction project. Then that project is finished, but the employees may go to another employer and work on another project, and therefore, the employees, it being a multi-employer plan, are not necessarily disadvantaged, and as a result of that the House bill has a special rule not to impose withdrawal liability on an employer who finishes a project and in effect ceases that operations as that result.

At the bottom of the page, the staff summarizes the Senate Labor bill which come very close to the types of rules for partial withdrawals that are in the House bill. The percentages are changed from 60 percent to 80 percent decline, and it is on a two consecutive-year basis rather than the rule in the House bill.

There is also a different facility closing rule. That is at the bottom of that page, and then we go to the top of page 4, which the Senate Labor Committee also has a comparable rule for the collective bargaining agreement where the employer ceases to have obligations under one of the plans.

There is also a special rule here for retail food industry that is in the Senate bill as well. And the rest of that page is summarizing some of the differences in the Senate bill, although in many respects they are very close, and I am not going to go over every specific one in the Senate bill as such.

In the middle of page 4, the 3 there is a list of the issues that the staff believes appropriate for the Finance Committee to consider, and these deal with partial withdrawals. We have not heard of any problems with regards to a complete withdrawal on the House bill and the way the Senate Labor Committee works, and the issues that we have deal with modifications in the rules relating to partial withdrawals.

There are three issues that require the committee to consider in the case of the definition of partial withdrawal. One is the decline rule, the contribution based upon rule. The second is the facility closing rule, and the third one is the bargaining unit rule. These are the three areas that the staff is making recommendations that you may want to consider.

The specific recommendations are on the top of page 5. In the case of the contribution base the staff has suggested a compromise between both the House rule and the Senate Labor Committee rule, and that is that you may want to consider adopting the contribution decline definition of partial withdrawals as contained in the House bill.

However, instead of a 60 percent decline rate, to use a 70 percent decline rate. And that is where the Senate rule has an 80 percent, we are taking as 70 percent, which is in between the 60 percent of the House and 80 percent of the Senate, and yet using the rule more essentially under the House bill in that regard.

Senator Talmadge. Is there any discussion of that recommendation, gentlemen? Senator Bentsen, do you recommend it?

Senator Bentsen. Yes, I think that is a good compromise, and I have discussed it with staff.

Senator Talmadge. Any objection?

Without objection, it is approved.

Mr. Shapiro. I think it may be appropriate, Mr. Nagle from the Pension Benefit Guarantee Corporation may want to comment on this and some other areas, and I should point out that he and the people in the Pension Benefit Guarantee Corporation have a significant amount of expertise in this area. They have worked in it ever since 1974, and they have got a wealth of background that may be very helpful to the committee. And I think that he indicated he would like to make a comment to the committee in this particular area.

Mr. Nagle. Mr. Chairman, we would have no problem with the staff's recommendations on the partial withdrawal rules except that we would suggest that you might keep the facility closing rule.

One of the objectives in the partial withdrawal rule has not been to trigger, it has been to avoid triggering withdrawal liability when there are temporary fluctuations in an employer's, in the contribution base with respect to a particular employer. But when a facility is closed or withdrawn from the plan, then that signifies some permanent withdrawal from the contribution base, and we think it is appropriate to impose a withdrawal liability in that type of situation.

When a facility is closed or withdrawn from the plan, there may be a considerable impact upon the plan. The other employers will have to pick up the funding burden, and we do think that is an appropriate occasion to keep.

Senator Packwood. What are you suggesting specifically, that an employer who closes a plant for business reasons continue the total liability of the plan for his employees or what?

Mr. Nagle. No, he would continue funding payments.

Senator Packwood. For the employees in that closed plant?

Mr. Nagle. That is right. It would be based upon the withdrawal liability formula spelled out in the legislation and an allocable portion attributable to that facility.

Senator Packwood. I understood the withdrawal part, but I didn't understand what you just said about eliminating the facility closing rule. You don't mean eliminating it then; you mean making it the same as the partial withdrawal?

Mr. Nagle. Yes. The staff has recommended that you might drop the facility closing rule as an incidence of partial withdrawal, and we are suggesting that to the contrary you keep the facility closing rule as a partial withdrawal.

Senator Packwood. All right. And the staff is saying what, eliminate it altogether, you close down, you have no liability?

Mr. Nagle. I think that is the point.

Mr. Lieber. No, what the proposal goes to is suppose you have several facilities. Say you have a chain of stores, food stores.

Senator Packwood. A & P for example.

Mr. Lieber. A & P would be an example. You close one store.

Senator Packwood. Right.

Mr. Lieber. So you close the facility. Under the bills that could trigger a partial withdrawal just because you closed one store, or you had one steamship and you took it out of service.

Senator Packwood. Right.

Mr. Lieber. We have heard from some of the maritime people who are concerned about that.

Senator Bentsen. But you have left in the overall percentage?

Mr. Lieber. But you have left the others in, that is correct.

Senator Bentsen. The overall percentage is still in there.

Mr. Lieber. That is correct, and you haven't had a 70 percent decline.

I think among the concerns that were raised here was you would be saying you closed one store and that produces a partial withdrawal. On the other hand, you could close down 60 percent of your business and not trigger a partial withdrawal, provide it didn't close the facility.

Senator Dole. By adopting that 70 percent, do we need the facility closing rule?

Mr. Lieber. I think that is the question the staff is raising.

Senator Dole. And you suggest we don't?

Mr. Shapiro. We suggest that you may not need it, because there may be certain anomalies the way it may work. The Senate

Labor Committee has it in their bill, and apparently the PBGC believes that it should be kept. It is our feeling that as long as we have the 70 percent we have the safety valve there in case you have a decline, but you don't necessarily need the facility closing rule just because you may close one A & P store, for example.

Senator Wallop. Can the PBGC explain why they feel it is important?

Mr. Nagle. The closing of a facility, or a partial withdrawal can have as severe an impact upon a plant as a complete withdrawal. The problem with devising a partial withdrawal rule has been not to trigger liability for temporary fluctuations, but in the case of a facility you seem less likely to encounter that particular problem. When a facility is closed, it is a permanent type of an event.

Now the House-passed bill did provide that if a facility closing resulted in a 25 percent decline in the contribution base that would constitute a partial withdrawal. Now 25 percent decline can be a substantial removal of employees from the contribution base, can have a considerable impact on the plan, and it does indicate that there has been a permanent withdrawal of that segment of the employer's operation. And it seems to us that it is an appropriate occasion to have a partial withdrawal liability in that event.

Senator Wallop. Say you took a steel corporation and they had a moment in time when they had some old plants that were obviously desirable to close down, but their ultimate plans would be to build new mills. Does anything good happen to them if they go back onstream at some other time?

I mean it seems to me what you are creating is a circumstance where we are going to assure the maintenance of old facilities to the exclusion of new ones as a matter of just business judgment.

Senator Talmadge. Senator Dole.

Senator Dole. Could I just suggest, move we accept the staff recommendations to eliminate the facility closing rule?

Senator Talmadge. Any discussion? Any objection? Without objection it is approved.

Now, gentlemen, we are having a vote on cloture now. We might run another five minutes if you like; then I would suggest we go vote and come back as soon thereafter as possible and make as much progress as we can today.

Mr. Shapiro.

Mr. Shapiro. The third recommendation we have, at the top of page 5, with regard to the definition of partial withdrawal, is in the case of the collective bargaining agreements. We suggest that you may want to adopt the rule in the Labor bill, S. 1076, with respect to an employer who ceases to have an obligation to contribute under at least one but not all collective bargaining agreements.

Senator Wallop. What is that rule?

Mr. Shapiro. It is the rule that is listed at the top of page 4, that says if an employer is required to contribute to a plan under several collective bargaining agreements, it ceases to have an obligation to contribute, however but continues to work under at least one but not all of the agreements, then it is treated as having a partial withdrawal. That is in the Senate Labor bill.

It is not that much different than the House bill, but it seems to work a little bit better.

Senator Talmadge. Any objection? Without objection, it is approved.

Mr. Shapiro. The next issue is in the middle of page 5, transferor liability. This is a very difficult area to get a handle on. It is when you have a business that is either sold. Either you are selling assets or stock, and the question is should the transferor have a liability.

On the one hand, you may think that the transferor itself, it may be that he shouldn't have a liability, but then again this is where you have potential evasion, because you may have someone that will sell it to someone who is not financially solvent, and therefore if the liability is transferred, the transferor has no liability but the transferee can't support and maintain the plan. And therefore, the retirees may be hurt by it.

In order to get around potential evasion there is a concern that you have some form of liability on the transferor when assets or stock may be sold.

The question is how you get a handle on it, and it is not quite clear. In the Senate Labor Committee they applied a transferor liability for the sale of assets. They did not do so with regard to stock or any other transfers.

We do not have a specific recommendation we have in there because we don't know exactly how to get a handle on all types of transfers, because it may cause potential problems. What we may suggest to the committee is that although we don't have it printed here you may want to accept the transferor liability that the Senate Labor Committee has, and that is in the case of assets, but not to have any specific rule with stock that is not generally the case because no one likes to assume potential contingent liabilities when they buy stock, and as a result to require the PBGC in the committee report to review all forms of transfer of stock and any others, and if it appears that there are some abuse, avoidance in this area, that they should make recommendations to the Congress to deal with any avoidance that may occur in the future.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Mr. Chairman, I think that is a good suggestion because I could envision a transfer of assets where in effect there was no equity remaining, and in that kind of a situation the liability means nothing. And you could have a real evasion in this, and the pensioners suffer. So I would think giving some authority there to try to stop these kinds of evasions or fraud would help, because you just can't anticipate every situation.

Senator Talmadge. What are you recommending, Senator Bentsen, same as the staff?

Senator Bentsen. I am recommending what the staff is, that they give PBGC some authority there to look at the overall picture.

Mr. Shapiro. That is right, it would be the same rule of the Senate Labor Committee with regard to assets, but then give the PBGC general authority -- the committee would be instructing PBGC to review the whole area of transfers and if there appears to be other abuses to make recommendations as they see them.

Senator Talmadge. Any objections?

Senator Wallop. Well, Mr. Chairman, I would like to ask --

Senator Talmadge. Senator Wallop.

Senator Wallop. Are you suggesting that they make recommendations through the Congress?

Mr. Shapiro. Yes.

Senator Wallop. So that they would not have unlimited authority to make approvals?

Mr. Shapiro. That is correct.

Senator Dole. They can handle that all right; PBGC, they can do that?

Mr. Nagle. We can make recommendations, yes, Senator.

Senator Talmadge. Any objection?

Senator Durenberger. Mr. Chairman, just to clarify the question.

Senator Talmadge. Senator Durenberger.

Senator Durenberger. To the degree that 1076 does speak to sale of assets I have got a question that relates to those. If this liability is in the form of a lien on the assets or something like that, are we referring only to the assets that are transferred or all assets of the acquiring --

Mr. Shapiro. There is a bond that is generally required in that case. What this is really saying is that the transferor still may have some liability even after he has transferred it to make sure that he doesn't transfer assets to someone who doesn't have any equities at all and the retirees really -- that it is really a transfer just to get around any potential liability by the transferor to deal with that, this particular recommendation would suggest that the transferor has liability on the sale of assets; that is, retained by him for a period of time.

Senator Talmadge. Any further discussion? Ready for the vote? All in favor?

Without objection it is approved.

Let's go vote, gentlemen, and return immediately.

(Recess.)

Senator Talmadge. The committee will come to order. You may proceed, Mr. Shapiro.

Mr. Shapiro. We had left off on page 5 on the item C there in the middle of the page, the expansion of the construction industry exception. Under the bill there is a case where an employer who ceases to do business in the area was covered by a collective bargaining agreement is not subject to withdrawal liability. This applies specifically to the construction industry and the entertainment industry.

Questions have been raised as to whether or not this should cover other industries as well. The Senate bill allows, gives the PBGC discretion to cover any other industry with a four-year delay, meaning they can't do it till four years from now.

We have reviewed the situation knowing that a number of industries are interested in having that particular exception, have approached a number of members on that. And on the top of page 6 the staff has a recommendation which adopts a version of the Senate Labor bill. The suggestion is the committee might want to consider adopting the Senate Labor bill, which gives the Pension Benefit Guarantee Corporation discretion to add specific industries to the rule that withdrawal liability does not apply if they cease to do business, but without the four-year delay. In other words, they can do it immediately, and this is completely within the discretion of PBGC.

Senator Talmadge. Any discussion?

Senator Dole. Mr. Chairman?

Senator Talmadge. Senator Dole.

Senator Dole. On that point I understand Senator Durenberger may have a particular quarrel with that recommendation, may have a slight amendment to it. I wonder if we could just pass over that.

Senator Talmadge. You want to pass over that until he returns? That will go over.

Mr. Shapiro. The next item on page 6 is item D there which is a special exception for the 1950 United Mineworkers plan. The issue involved is whether or not there should be a limited exception from the withdrawal liability that is provided for the 1950 United Mineworkers plan as long as that plan meets a special strict funding requirement.

In our discussion of that with the Pension Benefit Guarantee Corporation it appeared that that is a problem that they have focused on and may have a recommendation that accommodates a concern for both the employees and the employer and deals with the funding, and I think it may be appropriate for the Pension Benefit Guarantee Corporation, Mr. Nagle, to respond to that.

Senator Talmadge. Mr. Nagle.

Mr. Nagle. Could I ask Mr. Cole to comment on that, Mr. Chairman?

Mr. Cole. We reviewed a proposal that was put forward by the employer group and by the union, and there are a number of changes that we would suggest in that proposal to tighten up the instances in which there would be some forgiveness of withdrawal liability for the remaining employers. And we have discussed those changes with Mr. Lieber, and we feel that if these changes are made, then the risk to the insurance system would be very minimal and at the same time it would provide some relief to the employers.

The basic idea is that if there is a very large decline in the nature of one-third of the total contribution base and more than 50 percent of that becomes uncollectable, then if the parties at some point in the future -- it couldn't be immediate, it would have to be at some delayed point in time -- should decide to terminate the plan, the remaining employers would get some limited relief with respect to liabilities that were not attributable to employees that had at least ten years service with the contributing employer.

Senator Talmadge. What you are doing is recommending the staff's suggestion, is that it?

Mr. Cole. Yes. And I think that we can work out the particular details with the staff on this proposal.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Mr. Chairman, I met with the chairman of the House committee on the same issue, and I believe with the modifications that they are discussing that it is an amendment that ought to be acceptable and one that we could work with.

Senator Talmadge. Any further discussion? Senator Dole.

Senator Dole. Well, no discussion, but I assume that the staff consultation includes our staff.

Mr. Shapiro. Senator, every time that we had a meeting the majority and minority staffs attended all discussions, or were invited every single session.

Senator Dole. Well, if it was worked out on that basis, no problem.

Senator Talmadge. Any objection? Without objection it is approved.

Mr. Shapiro. The next item on page 6 is item number E, which is a provision for the West Coast Longshore Labor Plan, and I can summarize that by saying this deals with a provision that was put in the House bill at the recommendation of the Pacific Maritime Association. After the Ways and Means had reported the bill they reviewed the proposal that they had as an amendment and decided they didn't want it. They wrote a letter dated April 10th to Chairman Ullman of the Ways and Means Committee, requesting the provision come out. However, the committee had already reported it, and since they were the sponsors of the amendment and the House bill, they would like for it to come out, this just is a recommendation that the committee bow to their request and just take the provision out.

Senator Talmadge. Any discussion? Any objection? Without objection it is approved.

Mr. Shapiro. At the bottom of page 6 comes a new area, and that is the computation of withdrawal liability. Under the House bill an employer's withdrawal liability is a share of the plan's unfunded benefit obligations. That is all of their obligations, and that particular liability is presumed to be correct.

The annual amount of the withdrawal liability that is determined under the House bill, and that is the amount that the employer pays, is determined by a formula which takes the highest rate that the employer contributes during a 10-year period preceding the employer's withdrawal as the average contribution base. And you take the three consecutive years in this 10-year period which produced the highest average. So it is a formula that is based on those particular calculations.

The employer under the House bill would continue to make that payment for a 30-year period or until the liability is fully paid off.

There is also a provision in the House bill that provides what is referred to as a super trust that allows a reinsurance plan. This is set forth at the top of page 7, where a participating plan may insure their own payment of an uncollectible withdrawal liability.

The Senate bill, S. 1076, provides a different formula that deals with a five-year period rather than the 10-year period for making the determinations, and there is also a period that the payments would apply for 20 years under the Senate bill rather than 30 years that is under the House bill.

So essentially these are the major features of the two bills relating to the computation. The issues for the committee to make decisions is in the middle of page 7. The first one is the base for the computation of withdrawal liability. And the question is should it be on the employer' entire unfunded liability, which is the provision in the House bill.

The staff suggests that you should base the withdrawal liability on a plan's unfunded vested benefits. It is more of a simple case where you can get a handle on what that is. In the case of partial withdrawal it appears appropriate to use the plan's unfunded vested benefits for the computation.

Senator Talmadge. Any discussion? Any objection? Without objection it is approved.

Mr. Shapiro. The next item at issue is at the bottom of page 7 which deals with the base years that you take into account to determine an employer's annual withdrawal liability payment. As I said, the House bill is on a ten-year bill. On the Senate bill was a version of a five-year period.

The staff recommendation is set forth at the top of page 8. What we are suggesting is you may want to adopt a rule that is somewhere between both the House and the Senate under which an employer's annual withdrawal liability payment is determined by reference to the average contribution base, and that is for the high two years within the last five years.

So in other words, you take the last five years, and you take the highest two years for the contribution base, the highest two years for the rate of contribution, and you determine your computation on that basis.

Senator Talmadge. Any discussion? Senator Dole.

Senator Dole. Is that the provision in S. 1076?

Mr. Shapiro. It is a version of that. I mean, it is a modification of that. It is five years, but we are taking the high two on both a contribution base and the contribution rate.

Senator Talmadge. Any objection, Senator?

Senator Dole. No, that is fine.

Senator Talmadge. Any objection? Without objection it is approved.

Mr. Shapiro. The next issue is C on page 8. It is the cap on the duration of the withdrawal liability payments. The House bill has 30 years. The Senate Labor bill has 20 years as the maximum number of years for payment. The staff recommends using the Senate approach, which is a 20-year cap.

Senator Talmadge. Any objection? Without objection it is approved.

Mr. Shapiro. The next item is middle of page 8, item D, the employer ability to challenge withdrawal liability determinations.

The question is should the plan have a presumption that they are correct. The staff has a recommendation which is at the bottom of page 8, that the committee may want to consider adopting rules under which a plan's determination of withdrawal liability is not presumed correct; two, that any disputes as to withdrawal liability are subject to compulsory and binding arbitration; and, three, an employer is required to pay withdrawal liability as determined by a plan pending the resolution of the dispute and any failure to pay the installment pending the resolution of a dispute would not, however, accelerate the payment of liability.

Senator Talmadge. Any discussion? Without objection it is approved.

Mr. Shapiro. The next item is on page 9, E, which is a temporary waiver of withdrawal liability payments, and this is a case where you have an employer that may have financial distress any any payment of the liability may potentially cause that particular employer to go under.

The staff suggests a recommendation that you consider that that requires a plan, once they have the approval of the Internal Revenue Service -- so the IRS would have to make this approval -- but they could temporarily waive the payment of withdrawal liability by an employer as long as that employer is in financial distress. And that is determined by the Internal Revenue Service. The Service would approve any of the waiver requests where the IRS determines that the waiver was in the best interest of a plan's participants and the beneficiary, and a petition for waiver could be filed with the IRS by either the plan or the employer and no approval would be required with a plan on its own to grant a temporary waiver.

Senator Talmadge. Any discussion? Senator Dole.

Senator Dole. The IRS determines financial distress?

Mr. Shapiro. The IRS would make the determination of financial distress. In other words, either the plan or the union or the employer could make the request but the IRS makes that determination that financial distress is there.

Senator Talmadge. Without objection it is approved.

Mr. Shapiro. The next item is a very controversial one in which the staff finds it difficult to have a recommendation as such, and that deals with a dollar limitation on withdrawal liability.

As indicated, present law has a dollar limitation which says that a particular employer would not be subject to any liability to an extent greater than 30 percent of that particular employer's net worth.

Neither the House bill nor the Senate Labor Committee has any dollar limitation. In other words, they repeal the limitation under present law. There are some that have indicated that an employer should know that there is some amount on which there would be some dollar limitation on this actual amount. Making a determination of a percentage of net worth does raise some potential problems in making a determination of what net worth is. There is also a distinction that has been raised by some as to whether or not it should apply to both going concerns and concerns going out of business.

I mean if a business is a going concern that maybe there should be no cap on that, because as long as they are in business they can pay off the amount, and they do have a 20-year cap which you just agreed to. But if a company is going out of business, then possibly there should be a cap that can be determined as of that particular time.

However, that is an issue that the PBGC has a very strong position that they do not feel that you should have any cap at all, and because of the strong views of the other committees, the PBGC, the staff found it difficult to make a recommendation. It may be that you would want to hear a comment from PBGC on why they would like not to have a cap.

Senator Dole. What happens if you take bankruptcy?

Mr. Shapiro. Well, at some point the funds just aren't going to be there. So, you know, if you have liability above any assets or any net worth, they are just not going to be able to get it.

Senator Talmadge. Senator Bentsen, do you have a recommendation on that?

Senator Bentsen. This is one we ought to pass over, I think. This is really one of the toughest ones we face, because they make the point that you can have a company with virtually no net worth that continues to operate, and if you have a limitation of 30 percent, why, they will take that as the liability and pull out of the plan. I have difficulty answering that argument. I am afraid I don't have a recommendation.

Senator Talmadge. Mr. Nagle, do you have a recommendation?

Mr. Nagle. Well, we share the concern that Senator Bentsen just expressed. The fact is that there are many employers who are able to function and quite well with very low net worth, and if there were a net worth limitation on their withdrawal liability many of them would find it advantageous to pull out and saddle the rest of the employers with that burden.

Senator Bentsen. Mr. Chairman, the other side of the argument that we face is the one I cited you earlier, where one company had a net worth of a million and would incur five million of liability, another company had a net worth of nine million and would incur 14 million of liability.

Senator Talmadge. What is the alternative here? Senator Dole I think raised the point. Will they pull out or go bankrupt? Do they have that choice?

Mr. Nagle. Well, one important factor I think should be considered is that under the proposals here they would not have to pay that withdrawal liability in a lump sum. The idea has been to translate that into an ongoing funding obligation so that they would be continuing to pay to the plan over an extended period of years.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Let me make another point, that I think we get to later in these recommendations, and one that I think very strongly we should have, and that is that general creditors come ahead of this liability. Otherwise, you would have the problem of people not being able to borrow money to continue, because they wouldn't know what this contingent liability might be.

I assume that recommendation is coming along later. I believe we had that -- did we have that in the single-employer, that kind of a general creditors have a prior liability -- following the assets rather?

Mr. Halperin. You have the net worth limit. Then of course the general creditors would come first.

Senator Bentsen. I am not sure that the bill presented to us provides that, and I thought that was going to be a recommendation that would be made, where general creditors would come first. Isn't that coming along later?

Mr. Lieber. I believe what happens is that you compute the net worth taking into account all of the assets and liabilities and if there is net worth PBGC's claim has the same status as a tax claim, which is a preferred claim. That is in the single employer program and now.

Senator Bentsen. Well, that is if you are going to the net worth. But if you go the other way where they have the total liability, how would general creditors, what would be their priority? Would they have one? Because if you don't you get into some real credit problems here, don't you?

Mr. Nagle. You could provide for subordinating the claim. What we are particularly concerned about is the ongoing employer who is not in bankruptcy or who is not closing down and paying off creditors. An ongoing employer is the primary concern here.

Senator Bentsen. I think you have to subordinate to the general creditors.

Senator Talmadge. Otherwise, the supplier might not issue supplies.

Senator Bentsen. You could endanger an ongoing company.

Senator Talmadge. Exactly.

Senator Bentsen. Don't you have some recommendations on that at some point?

Mr. Shapiro. On subordination?

Senator Bentsen. Yes, on the question of subordination to try to protect the creditworthiness of a company so it can continue.

Mr. Shapiro. I think we will focus on that. We have not done it as of yet, but let us focus on it and see if we can bring something back to you.

Senator Dole. That might impact what we do on this. Maybe we should pass over this provision until we focus on it.

Senator Talmadge. I saw Senator Durenberger here a moment ago. Is he here now? We could go back to his question.

Senator Matsunaga. Mr. Chairman?

Mr. Shapiro. He suggested he would like to wait for that. If you have a Thursday session he would like to bring this up on Thursday.

Senator Talmadge. I am sorry, I can't hear you.

Mr. Shapiro. Senator Durenberger said he would like to pass over, continue to pass it over until Thursday.

Senator Talmadge. All right.

Senator Talmadge. Senator Matsunaga.

Senator Matsunaga. On the matter now before the committee, relative to single proprietors, in the case of death or retirement of the single proprietor, is the personal property of the single proprietor, their home, which normally the widow or the children would have use of after the death of the single proprietor, now that would be in danger under the present language of the bill, wouldn't it?

Mr. Shapiro. That is correct, it could.

Senator Matsunaga. So some protection needs to be made. Has the staff given any consideration of this, any recommendation?

Mr. Shapiro. We will review it, and on Thursday we will bring it back with some suggestions on the whole issue that you and Senator Bentsen and Senator Dole referred to.

Senator Matsunaga. Because even in the case of bankruptcy the family is protected. So I think we ought to at least go to that extent.

Senator Dole. We are not addressing -- well, I guess we could change that law as far as single proprietors.

Senator Talmadge. What do you want to do, pass this over, gentlemen? No one seems to have an alternative at the moment. Then that would go over for the present.

Mr. Shapiro. At the bottom of page 9 is an issue relating to the disclosure of information relating to what the withdrawal liability may be, and the question is should a plan be permitted to charge the employer for providing a computation.

The House bill and the Senate bill both impose a charge for that. There is some indication that should an employer be entitled to know exactly what he has to pay, and yet there are so many employers in some of these plans as there would be a lot of costs that could be run up and therefore what they suggested we would like to recommend is that there would not be any charge for disclosure. Clearly the amount, the disclosing, as to the way to make the computation and how to do it would not be a charge. But if an employer requests the plan to actually make the computation that the committee may want to go along with what the House bill and the Senate Labor bill has, and that is impose a charge to the extent an actual computation is actually made.

Senator Talmadge. Any discussion?

Senator Packwood. Well, Bob, let's make sure. Is that position number one under the alternatives?

Mr. Shapiro. Yes.

Senator Packwood. All right.

Senator Bentsen. What you are in effect saying is that each plan would provide the raw data of the obligation and then the simulation, compilation of it might be a charge, that part of it be incurred by the employer, is that correct?

Mr. Shapiro. Yes, but if the plan actually makes the computation, that they may charge for actually making that computation.

Senator Bentsen. Yes, pulling all of this information together from the various participants, in effect?

Mr. Shapiro. That is correct.

Senator Talmadge. Any further discussion? Senator Dole.

Senator Dole. What about small employers? Are they going to request the information?

Mr. Shapiro. If they request it, they would have to pay for it. I don't really know to what extent they, on the basis that they would --

(Pause.)

There are times where a bank may want to know what the contingent liability may be, an accountant may want to know. In those cases they may request to have the computation to determine the contingent liability. It would vary. The smaller the employer, maybe the less frequent they would need it because, I don't know what their loan commitments may be or their needs. Probably the larger employer --

Senator Dole. Do you have any idea what we are talking about dollarwise? You talk about a charge, but --

Mr. Shapiro. I would assume the charge would be exactly what it cost. I don't think they would be making money on it. It would be whatever the out-of-pocket cost would be to make that computation would be passed on.

Senator Dole. But I don't think you can give us a dollar number at all --

Mr. Shapiro. No.

Senator Dole. -- because of the various sizes of employers.

Mr. Shapiro. That is right, it would vary.

Senator Talmadge. Any further discussion? Any objection? Without objection it is approved.

Senator Matsunaga. Mr. Chairman, it might be appropriate at this time for me to bring up an amendment the staff might advise. The bill imposes unfunded benefits liability on an employer who withdraws from the multi-employer plan, but a special rule, as I understand, is established for the construction and entertainment industry. And I feel that the special rule ought to be applied to the shipbuilding industry which depends on contracts for specific vessels.

Once the vessels are completed the shipyard is idle until it receives another contract. While the ship is being built, a participating employer will contribute to a plan on behalf of his workers, but when the ship is finished and until a contract is received for a new ship, the workers are temporarily idled and the employer temporarily ceases contributing.

When work is started on another ship, the work force returns and the employer resumes his contribution. These temporary halts in employment and contribution are typical of the shipbuilding industry, and as such temporary stops should not precipitate massive withdrawal liabilities for the employer, for the employer has not actually withdrawn. The employer will resume contribution as soon as the shipyard begins work on a new vessel.

Consequently, I believe the rule for the construction and entertainment industry should also apply to the shipbuilding industry.

Senator Packwood. How does that differ from any other industry that is normally cyclical? I think of timber for one, where we are open and closed and open and closed and open and closed depending upon timber orders.

Mr. Shapiro. The staff has reviewed this concern because we have had a number of industries like your timber and your shipbuilding and others that have raised questions of wanting to have the same special rule that applies to construction. This was on pages 5 and 6 of the staff handout, and it was discussed earlier before you came in, Senator Matsunaga, and it is passed over. The committee hasn't decided yet, because this is the issue that Senator Durenberger would like to bring up on Thursday.

What the staff is recommending, however, is that instead of adding special industries to the construction and entertainment exception that has been agreed to already by the House and Senate Labor Committee, is to take a version of the Senate Labor provision, which gives the Pension Benefit Guarantee Corporation the authority to add other industries to it as it sees fit under the facts and circumstances, because it would be difficult for this committee to look at all the industries that have approached you to be added to it and make those determinations instead of having to do some today and then later on in this session and the next session new industries wanted to come in, you just give the authority to the Pension Benefit Guarantee Corporation as it sees fit under the facts and circumstances to add to it, that it could be done.

Senator Durenberger was not here when that suggestion came up. It was passed over, and he would like it to be passed over again till Thursday. But when he comes back to it, I think this is the whole scope of the discussion.

Senator Bentsen. Mr. Chairman, I would also like to add to that point that we had in the House, as I understand it, hearings on the question of the building trades and the building industry and entertainment industry. And we have been approached by quite a number of different industries that want to be treated this way, and I think you are going to have to give some discretionary authority to PBGC to try to do this rather than to do it --

Senator Talmadge. Why don't we just give that discretionary authority to that and treat all applicable situations alike? Is there any objection to that?

Senator Bentsen. I think we had Senator Durenberger --

Senator Durenberger. Mr. Chairman, only that I would like to be able to bring up the issue with some similar specificity and probably with more people here if I could on Thursday. I can't think of a strong objection to it right now, but I would like to put it in a larger context and if we had time to discuss it.

Senator Talmadge. Do you want to agree to the general principle at the moment? Is that what you are suggesting, Senator Bentsen?

Senator Bentsen. Well, I am supportive of what the staff has recommended --

Senator Talmadge. So am I.

Senator Bentsen. -- giving the discretionary authority to PBGC as they look at each of these industries.

Senator Talmadge. Because I don't think it is possible for us to sit here and legislate and pick out every situation that might be applicable. Now Senator Matsunaga has pointed out one, the shipbuilding industry, and it sounds perfectly reasonable. Senator Packwood has pointed out another, the timber industry, and it sounds perfectly reasonable. There may be some other industries that we haven't even dreamed of.

Senator Bentsen. Well, the garment workers have been in to see us too.

Senator Talmadge. So I think we ought to have the general rule here that any situation that is unforeseen have similar treatment.

Senator Danforth. Mr. Chairman?

Senator Talmadge. Senator Danforth.

Senator Danforth. I wonder if, because Senator Durenberger has made the specific request that it be put over till Thursday, if we could delay it.

Senator Talmadge. You mean this issue? We have already gone over Senator Durenberger's issue.

Senator Danforth. But it is my understanding of what he is saying that he would like to put it over.

Senator Dole. He doesn't have any objection as a general rule. I think he just wants to comment on it at some length on Thursday.

Senator Durenberger. Yes, that is right.

Senator Danforth. But you don't want any decision made today?

Senator Durenberger. I would prefer no decision.

Senator Talmadge. Well, we will put it over then if you desire that.

Let's go to the next issue then.

Senator Talmadge. Senator Moynihan.

Senator Moynihan. Mr. Chairman, could I raise a point which is not unrelated here that I think we could dispose of rather quickly. This has to do with a special situation but one which I don't think should cause us any troubles. It has to do with the Teamsters Union in upstate New York which in 1973 merged with a multi-employer fund that covered the brewery workers in the City of New York. And the two companies, the two brewers rather, that were involved shortly thereafter shut down, leaving 800 workers in a situation of having no actual contributors. And the fund had no assets.

The union has asked that the funds be partitioned. This was a fund that was established before the present law and the PBGC came into effect, and they asked that our statute include the same provisions that the Senate Labor Committee includes, which, one, make it possible for the PBG to partition a plan for which an employer or employers withdrew before the effective date of the bill, and, two, where they do decide to partition that this should not result in a reduction of benefits to those persons whose pensions are already being paid, but if need be an increase in premiums.

Both of these provisions I understand, Mr. Shapiro, are in the Labor Committee bill and that by putting them in our bill this will resolve an uncertainty also.

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Mr. Shapiro. I would like to comment on that, that they are familiar with the particular plans and can give the committee the analysis. I think it may be helpful.

Mr. Cole. The provisions which are in the Labor Committee bill that deal with this issue were provisions that we did not object to. They basically preserve a right that we have under current law to provide relief in appropriate circumstances. And if I understand the proposal correctly, it is merely to take those provisions that are in the Labor bill, make sure they are included in the bill that is reported out of this committee so that the relief provisions that exist in current law with respect to withdrawals that have occurred already in the past and impose a heavy burden on a plan would be preserved and we would have the authority to continue to apply this.

Senator Moynihan. That is my understanding, Mr. Chairman. It is just that there be no shadow cast on the existing provisions by their absence in this measure. Is that your understanding, Mr. Shapiro?

Mr. Shapiro. Yes.

Senator Talmadge. Any further discussion? Senator Dole.

Senator Dole. As I understand, then the workers would be denied benefits under the plan, but they would put benefits under the PBGC, is that?

Mr. Shapiro. Sir?

Senator Dole. Who pays the benefits?

Mr. Shapiro. The PBGC would pay the benefits.

Senator Dole. Who would pay them if we don't adopt the amendment?

Mr. Cole. If this amendment is not adopted, the benefits in a plan, if we refuse to partition a plan the benefits will have to be paid by the plan, which means the burden falls on the remaining employers, both with respect to the benefits and with respect to the liability.

There is a difficult question that we face under current law, which is under what circumstances is it appropriate to partition a plan, and we will have to deal with that.

Senator Moynihan. And this leaves your policy to make that decision unchecked?

Mr. Shapiro. That is correct.

Senator Dole. Well, I don't want to hold up the approval of the amendment. I would like to have our staff have a chance to take a look at it.

Senator Moynihan. Would you do, and I think you will find that this is a straightforward matter, and if so, we can bring it up again on Thursday.

Senator Talmadge. Do you want it to go over then?

Senator Moynihan. I would like to ask that it go over, and

I thank the Chair.

Senator Talmadge. It will go over. Bring up the next item, Mr. Shapiro.

Mr. Shapiro. It is number 8 at the top of page 10 which deals with what is referred to as the super trust. What this does is that it permits a plan to establish a withdrawal liability payment fund to insure all of the withdrawal liability of contributing plans rather than just the unattributable liability, provide that the fund pays the liability of the plan as a lump sum.

It essentially allows these plans to have what is referred to as a super trust, and it seems that that would be appropriate.

Senator Talmadge. Any discussion?

Senator Packwood. Explain that to me, Bob. You have got an insurance fund within an insurance fund in essence?

Mr. Shapiro. In effect that is right.

Senator Packwood. And tell me how it works.

Mr. Shapiro. Let me let Bill add some details to that.

Mr. Lieber. Generally what would happen is a group of plans, for example in a particular industry, would agree that each of the plans would make a contribution to a super trust.

Senator Packwood. The plan make the contribution?

Mr. Lieber. The plan would make the contributions. Now they are going to get the money out of employer contributions of course. That money would be held in the trust, and if an employer withdraws from one of the plans that is participating then the super trust would pay off certain liabilities. Under the House bill and the Senate Labor Committee's bill it could pay off amounts that the employer is excused from because of the de minimus rule. We haven't come to it yet. Also certain amounts that are known as unattributable liabilities. They are assigned to an employer but they aren't attributable to his own employees' work.

Senator Packwood. Wait a minute, you lost me there.

Mr. Lieber. Yes.

Senator Packwood. Just run it by me again. Unattributable liability?

Mr. Lieber. That is correct. It is a liability in the plan. The plan owes for the benefit.

Senator Packwood. Yes.

Mr. Lieber. But there is no employer presently maintaining that plan who is employing the employees who earn that benefit. So it has to be divided among the remaining employers. It is called unattributable liability.

Senator Packwood. Well, this money in the super trust fund is not really purchasing any insurance, it is just another fund, a fund built out of those employers to pay for those workers that for some reason are otherwise uncovered because an employer legitimately was able to withdraw for whatever reason.

Mr. Lieber. Well, it might be that another form of coverage would be, but the employer can't pay. It is uncollectable. So in effect, the super trust would reimburse the plan for withdrawal liability that it is not going to get from another source and assure that the employers in effect prefund their withdrawal liability so that it will be paid.

Senator Packwood. But they are prefunding an unattributable liability, right?

Mr. Lieber. They are prefunding among others the unattributable, the uncollectable, and so on.

Senator Packwood. All right.

Senator Talmadge. Any further discussion? Any objection? Without objection it is approved.

Mr. Shapiro. That takes us to the next area which is item C in the middle of page 10, and these are the de minimus rules. Under the House-passed bill, H.R. 3904, where the withdrawal liability of an employer is less than the greater of either $25,000 or three-quarters of 1 percent of the plan's unfunded benefit obligation, the bill does not propose any withdrawal liability on the employer, unless the plan provides otherwise. In other words, it is not a mandatory de minimus rule. It is a discretionary one. This is the basis for it. However, the plan can eliminate that de minimus rule so it would not apply.

The Senate bill has essentially a similar de minimus rule. The amount, however, is different than the one in the House bill. The staff has made several suggestions. The first one at the bottom of page 10 is whether or not you should have a mandatory de minimus rule in which case the plan could not take it away. It means that it would always be available. The actual staff recommendations at the top of page 11 would suggest that this mandatory de minimus rule is which a plan could not waive and under which this mandatory de minimus amount would be the lesser of three-quarters of 1 percent of a plan's unfunded obligations, $50,000, or two times the employer's average contributions during the five years preceding its withdrawal.

It is just a formula for a mandatory de minimus rule.

Senator Talmadge. Any discussion? Senator Dole.

Senator Dole. I don't understand it, but otherwise --

(Laughter.)

How do I discuss it?

Mr. Shapiro. The major point that you can focus on is the $50,000. For example, it says that if the liability is less than $50,000 you don't have to pay it. Everyone gets a $50,000 amount.

Senator Dole. Except a small employer which wouldn't affect the stability of the plan?

Mr. Shapiro. That is right.

Senator Dole. Just wouldn't have the liability?

Mr. Shapiro. That is right. The mandatory de minimus rule that would not have to be paid, and it is one that a plan could not waive.

Senator Talmadge. Any objection? Without objection it is approved.

Now there is a vote on, and it is 12:21, so I assume we will have to recess at this time, and I believe we come in Thursday at 10:00 a.m. Is that right?

Mr. Stern. That is correct, Mr. Chairman.

Senator Talmadge. Thank you very much for your cooperation, gentlemen.

(Whereupon, at 12:22 p.m. the committee recessed, to reconvene on Thursday, June 12, 1980 at 10:00 a.m.)