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EXECUTIVE SESSION

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THURSDAY, JUNE 12, 1980

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United States Senate,

Committee on Finance,

Washington, D. C.

The committee convened at 10:05 a.m., in Room 2221, Dirksen Senate Office Building, the Hon. Herman Talmadge presiding.

Present: Senators Talmadge, Nelson, Bentsen, Moynihan, Matsunaga, Baucus, Boren, Bradley, Dole, Packwood, Heinz, Chafee, and Durenberger.

Senator Talmadge. The committee will please come to order. We have two back-to-back votes in the Senate at 12:00. That means for all practical purposes we will have to try to finish this bill by 12:00. I would suggest that we follow the procedure of letting the staff proceed as they did on Tuesday, with the staff recommendations, and then vote on them, and then vote on any amendments that may be offered by members of the committee. Is that agreeable?

Senator Packwood. Mr. Chairman, that is agreeable if we can finish this by 12:00. I am going to Oregon this afternoon for some hearings on the damage to the Columbia River because of the Mt. St. Helens eruption. If there is a possibility. If we get to about eleven o'clock and it appears we might not make it, I have two amendments and possibly three, depending where we are, that I would at least like to bring up for the committee's consideration.

Senator Talmadge. I hope we can complete action today. We made excellent progress last Tuesday, and that included probably half the time on explanations. So I believe there is a good chance of completing action today.

Mr. Shapiro, you may proceed, sir.

Mr. Shapiro. Mr. Chairman, we left off on page 11. We had begun talking about the de minimus rules. I think what I am going to do is to pick up from there and go through the rest of the document. We had a couple of items we had passed over. A couple of senators wanted to revisit items, and I will do that afterwards because at least one of the senators is not here now.

Senator Talmadge. What page are we on?

Mr. Shapiro. This is picking up on page 11, item number B, where there is the discretionary de minimus rule and we are talking about a dollar cap. We had finished last week on the mandatory de minimus rule, and this is the discretionary one which can be reduced by the plan.

The staff recommendation on the discretionary rule is that the committee might want to consider a $150,000 cap on the amount which a plan may provide as a de minimus amount of withdrawal liability, and as is the cases that this amount can be reduced by the plan. It is the discretionary de minimus rule.

Senator Talmadge. Any objection? Senator Dole.

Senator Dole. I don't want to object, but I want to see, is that about where we were discussing last time?

Mr. Shapiro. Yes, that is where we ended off. We had not even started this one last week. We are not picking up any of the items that were passed over last time.

Senator Dole. You say $150,000?

Mr. Shapiro. Yes.

Senator Bentsen. I have no objection.

Senator Talmadge. Without objection, it is agreed to.

Mr. Shapiro. The next one is item number C on page 11. It is the phase-out of the de minimus amounts as withdrawal liability increases. The point here is that we have withdrawal liabilities, and we have de minimus amounts, but as the liability increases the phase-out amounts would be phased out. What we have is the staff recommendation on item 2 there. So the committee might want to consider a rule under which an amount determined as de minimus under the mandatory de minimus rule would be phased out dollar for dollar as an employer's withdrawal liability, determined without regards to the de minimus rule, exceeds $100,000. That is for the mandatory de minimus rule.

Next, in the case of the discretionary de minimus rule, the phase-out could be dollar for dollar to the extent that the withdrawal liability exceeds $150,000.

Senator Bentsen. These are arbitrary figures, but I think they are reasonable figures, Mr. Chairman.

Senator Talmadge. Any objection? In that connection do you have a provision in this bill -- suppose we have a small sawmill with 25 employees, that is unionized, and he changes unions. Would that be a partial withdrawal? Is that taken care of? Does the bill provide for that contingency? Or vote the union out.

Mr. Shapiro. Yes, there is a proposal that we understand a member wants to bring up in the case of a union withdrawal. That is not part of here. It is not in here as of now.

Senator Talmadge. There is no staff recommendation on that?

Mr. Shapiro. That is correct.

Senator Talmadge. That would be a partial withdrawal, wouldn't it?

Mr. Lieber. It could be partial or total.

Senator Talmadge. Shouldn't we have some provision in there to provide for that contingency?

Mr. Lieber. The concern has been raised by a number of folks, and the difficulty with it has been, in the past, that it is difficult to tell whether the union in fact initiated the withdrawal or whether the employer really wanted to do it. The concern is that if you say that the employer doesn't have liability where the union initiates it then in some cases it will appear that the union initiated it where it may not really be the case.

Senator Talmadge. All right, go ahead.

Mr. Shapiro. The next item is on page 12, and this is the effective date on withdrawal liability. This has also been a controversial issue. When the bills were introduced by the administration, it would have had a date which is now retroactive back to February 27, 1979.

The House bill has this date, that is retroactive to that date. The Senate bill, Senate Labor bill, also has that date. So all the bills so far have a date that is retroactive to February 27, 1979.

When the Finance Committee considered the 60-day extension, the committee made a statement that the date would not be any later than April 28, 1980. Several of the senators who expressed that were intending for that to be the date. So the staff does not have a recommendation as such, and I think the only two dates that you have before you right now is a retroactive date back to February 27, 1979, or the date that the committee discussed when they had the 60-day extension, which was to have a date of April 28, 1980.

The effect of that is that any employer that withdrew from a plan prior to April 28th, for example, would not be covered by any of the withdrawal liability provisions.

Senator Talmadge. Do you think the April 28 date is all right?

Senator Bentsen. That is all right with me, Mr. Chairman.

Let me say, Mr. Chairman, I have traditionally on this committee opposed retroactive dates because you have a situation where you change the rules of the game after the fact, and I think that that is an undue burden. I think you also probably have a constitutional question.

Senator Talmadge. Senator Packwood.

Senator Packwood. I am not sure we have a constitutional question, and we have often passed retroactive tax bills, almost a year retroactive --

Senator Bentsen. That is right, and I have traditionally opposed them though.

Senator Packwood. -- which are constitutional, I think, however.

One of the problems you have though if you change the date from the House bill of February 27 is all of the employers who withdrew after that but before whatever date we arrive upon are going to place a burden on the remaining employers who stay in the plan. I am not sure that is fair. I think we would be better off to stick with the original House date, which is retroactive only in the sense if you mean when did we consider the bill. It is not retroactive though from the standpoint of the House bill or notice, fair notice, to anybody else.

I would prefer that we stick with the House bill, or at a minimum, if we don't take that date, require that employers who actually promised benefits be required to stick with that promise;

and if it is a big employer that pulled out, pays more in addition, pays more than 10 percent of the contributions, then I think you are leaving the other employers with an unfair liability I think if you are going to change the date from February 27 you ought to make those two exceptions. If the employer promised the pension benefits, they are obligated to keep them; and if the employer pays more than 10 percent of the contributions to the fund, they at least ought to have whatever the withdrawal liability is we impose on other employers.

Senator Bentsen. I would have to oppose that, Mr. Chairman. I believe that you have, in effect, put on a very major increase in liability after they have left the plan and they have operated under the law as they saw it at that time. I would question the equity in doing that type of thing.

Senator Talmadge. Senator Dole.

Senator Dole. Mr. Chairman, I join Senator Bentsen. I would hope that we could apply the withdrawal liability rules only to withdrawals appearing after April 28.

Senator Talmadge. Well, let's have a show of hands. All in favor of Bentsen's proposal raise your hand.

(A show of hands.)

Contrary?

It is agreed to. Proceed.

Mr. Shapiro. Just one modification to that, to make it clear for the record, is that it hasn't brought, if you are using the April 28 date, to be consistent, the contribution base on behalf of the employers that have been withdrawn prior to April 28 would have to be reduced to have consistency as far as any future withdrawals, that it would look back to the contribution base of only those employers that were part of the plan after April 28.

Senator Talmadge. Is that agreeable? Without objection, it is so ordered.

Mr. Shapiro. The next item on page 13 gets to the issues of reorganization, and the first one is the accrued benefit adjustments. Under present law there are certain cases in general where you have plan amendments that are not permitted -- these are amendments to the plan itself -- are not permitted to reduce the benefits that have already accrued to the employee. That means that the employee has the benefits, they cannot be reduced.

The House bill, certain plan benefits, including benefits that may be paid to current retirees, could be eliminated by a plan in reorganization because of financial distress. In particular, a plan could eliminate benefit increases that were made after March 26, 1980, but it would be limited within a five-year period before the plan enters reorganization.

The Senate bill is substantially the same as the House, except that the benefit increases could go before March 26, 1980. It is not limited to only increases after March 26, 1980.

The question the committee has in this regard is whether or not the committee wants to allow the plans in reorganization to eliminate some of the benefits that retirees or employees could get for a five-year period. This was one that is very difficult for the staff to make a recommendation, because it is somewhat controversial in this respect.

The options that the committee has before it are, first, to go along with the House bill, which allows the plan benefits to be eliminated but uses the March 26, 1980 date; the Senate bill, which is essentially the same as the House, but allows them to go back before March 26, 1980; or, alternatively, a provision that would eliminate the authority of a plan to reduce benefits earned by employees merely because of a plan's reorganization. That means that an employee's benefits could not be reduced in the future.

It is one that the staff feels that the committee may want to address because of the significant controversy that has been expressed about this provision.

Senator Talmadge. Senator Bentsen, do you have a suggestion on this?

Senator Bentsen. I am sorry, I was talking to one of the members on another matter. Now what is the issue?

Mr. Shapiro. This is the issue about when a plan is in reorganization because of financial distress.

Senator Talmadge. Page 13, bottom of the page, alternatives.

Mr. Shapiro. Whether the plan could be permitted to eliminate any benefits that a retiree or employee could get within a five-year period before it goes into reorganization.

The staff found it difficult to make a recommendation for this particular one, because, although the House bill and the Senate bill both made recommendations that allow the plan to take away benefits, where the House bills says it could only be done after March 26, 1980 and the Senate bill says you can go back before March 26, 1980 to take away benefits, there are some that have argued that you should not reduce any benefits from an employee as far as the future is concerned.

These are the various options that you have, and because of some of the controversy the staff thought that the committee might want to discuss that before we would suggest a modification.

Senator Bentsen. I have no recommendation on it, Mr. Chairman.

Senator Dole. Is there a staff recommendation?

Mr. Shapiro. We have not as yet, because there have been, because of the House bill and Senate bill in this regard, there have been some newspaper articles that have complained about both the House bill and the Senate bill taking away retirement benefits of employees.

Now if you don't take away the benefits and some of these plans go into reorganization, the effect of that is that the PBGC may have to pay more and therefore the premiums may go up. The question is that if the benefits of any of the retirees or the employees were increased during the five years before reorganization, the question is should the plan be allowed to reduce those increases because they just didn't have the money to pay it, they were in financial distress.

Senator Dole. Well, I think if they are insolvent we ought to delete the authority for the financially distressed plan to eliminate benefit increases, not a plan that is solvent.

Mr. Shapiro. Well, one of the options that we have here is item number C there which would eliminate the authority of a plan to reduce benefits earned by employees merely because the plan is reorganization. In other words, it would say that you couldn't take away the authority, so the retirees could get what they have.

What has happened is that the House and Senate bills both have provisions that allow retirees' benefits to be reduced by the plan if the plan was in financial distress. There have been several newspaper articles that have come out about that, and as a result a number of retirees have started writing letters complaining about the possibility of their benefits being reduced in the future.

Senator Bentsen. But this was part of the compromise that they were trying to arrive at in order to make the thing work, in order to see that overall that there might be some reduced benefits.

Mr. Shapiro. That is right.

Senator Bentsen. But at least you would have a guarantee up to that point.

Mr. Shapiro. See, that is where the House and Senate positions were coming from, is that if you had an increase in benefits five years before a reorganization, where the plan was in financial distress, that the plan could be permitted to reduce some of those increased benefits, and the retirees don't want their benefits reduced.

Senator Dole. Would they be protected if we adopt alternative C?

Mr. Shapiro. C would protect the retirees; their benefits would not be reduced. Either the House or the Senate bill would give the plan the authority to reduce it. Now the trustees have to vote for that, and those trustees are on behalf of the unions and in some cases the management. So you know, it is not automatic that they would be reduced because you have trustees on behalf of many of the employees that would have to vote to take it away. So there is some protection there as well.

Senator Bentsen. Let me understand now, is this for those who have already retired?

Mr. Shapiro. Yes.

Senator Bentsen. It is limited to those, is it not?

Mr. Shapiro. It is not limited to those, but those are a big category because they are actually receiving their retirement benefits now. It applies to current retirees as well as any employees that would retire in the future whose benefits when they retired were increased five years before reorganization.

Senator Dole. These are accrued benefits we are talking about now?

Mr. Shapiro. These are the retirement benefits.

Senator Dole. I would recommend we adopt alternative B.

Senator Bentsen. Well, you put an extra burden on the fund. I would like to hear from PBGC to see what they think. I would like to do that, you know, if it can carry it.

Mr. Nagle. Senator Bentsen, I don't really think there would be a significant additional burden in doing what Senator Dole has suggested. We have tended to support the authority of the trustees to reduce or eliminate the benefits that have been in effect for five years, mainly not because we wanted to encourage such reduction or even because we thought it would happen, but because we thought there would be instances in which the trustees would be more willing to agree to a warranted benefit increase if they had some feeling that they weren't totally locked into it if the plan should run on hard times.

Senator Bentsen. Give me some feel. Give me a measurement. I know that you can't give me anything with great assurance, but are you talking about 10 cents, are you talking about 50 cents?

Mr. Nagle. Are you talking about the cost for the insurance system?

Senator Bentsen. Yes.

Mr. Nagle. I don't think it is a matter of cost for the insurance system, Senator Bentsen, because it is not proposed that these benefits would be guaranteed, and in the case of insolvency this is a question of simply whether the trustees in a plan in reorganization, which is not receiving PBGC assistance.

Senator Bentsen. All right, I have no objection. I think that is fine then.

Senator Talmadge. You recommend B, Senator?

Senator Dole. C.

Senator Talmadge. C?

Senator Chafee. Mr. Chairman?

Senator Talmadge. Senator Chafee.

Senator Chafee. Certainly C is the most attractive. There is no question about it. I just wanted to make clear what we are getting into. In other words, what you are saying is that if you have C there would be a tendency for the trustees to show more caution in the increases promised knowing that if they do so that they are committed to them and they can't just subsequently reduce them.

Mr. Nagle. We think that is right, Senator Chafee. I can't prove it, but it is our thought that that probably would be the case in many instances.

Senator Chafee. Now if the plan went insolvent, then your guarantee under this goes up to 80 percent, right?

Mr. Nagle. Well, it would go up to 80 percent of a portion of the benefit, but the guarantees do not cover benefit increases within the five years prior to insolvency.

Senator Talmadge. Senator Dole moves the adoption of alternative C. Any objection? Without objection it is approved.

Mr. Shapiro. The next item is on page 14. We get into two issues relating to the minimum contribution requirement. The first one deals with the benefit increases. Under present law there is no restriction on benefit increases under a plan in financial distress, but there is a requirement that the cost of such benefit increases must be reflected in the minimum funding standard for a plan.

The House bill provides that the minimum contribution requirement does not reflect a part of the cost of limited benefit increases that may be adopted by a financially distressed plan in reorganization.

The Senate bill, the Senate Labor Committee's bill, provides that the minimum contribution requirement is increased by the cost of all benefit increases that may be adopted by a plan in reorganization.

The staff is suggesting that you may want to consider the Senate Labor bill which would make financially distressed plans fund currently for any benefit increases.

Senator Talmadge. Any objection?

Senator Dole. That would keep them out of trouble later on, wouldn't it?

Mr. Shapiro. That is the intent of it, yes.

Senator Talmadge. Without objection it is agreed to.

Mr. Shapiro. Page 15 is the second issue under the minimum contribution requirement, and this relates to certain special tests that may be applied for the minimum contribution requirement. Under present law the minimum funding standard of ERISA does not provide an accelerated funding schedule for financially distressed plans.

The House bill does provide for an accelerated funding schedule. It does it by the use of a minimum contribution requirement for any financially distressed plan in reorganization. The bill, however, provides for a safe harbor rule for the minimum contribution requirement so that an employer does not have to contribute in a year, or increase his contribution more than 7 percent of any of the contributions that he was required to pay for a previous year. So it is a safe harbor rule, limiting it to 7 percent.

The House bill also includes two others tests, referred to as an asset replenishment test and an asset benefit test, that deals with the additions to any minimum contribution requirement.

The Senate bill also provides for some limitation. They use a different standard, which is a minimum funding standard, plus 5 percent of the amount each year the plan has been in reorganization. The Senate bill does not have an asset replenishment test or an asset benefit test. The staff is suggesting that you may want to consider a version of both the House and Senate, which is to have a safe harbor test using the 7 percent rule under the House bill so that an employer does not have to pay more than 7 percent of the contributions for the previous year, and delete the replenishment test and the asset benefit test like the Senate bill deleted it.

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

Mr. Shapiro. The next item on page 16 deals with the issue of premiums. This is a very important issue to those involved because this is amount of additional payment that would have to be made by the union on behalf of the employees which would go through the PBGC.

Under present law the ERISA provisions in 1974 provided that the premium for multi-employer plans was to be 50 cents per plan participant. At that particular time the thought was that the multi-employer plans were solvent, they were in good shape, and that you would have a smaller amount.

The single-employer plans at that time were required to pay $2.60, the difference of the 50 cents, recognizing that Congress at that time thought that they would not be required to have any significant financial liability with regard to the multi-employer plan.

Senator Chafee. Is that still the amount for single employers?

Mr. Shapiro. Single employers is $2.60.

Senator Bentsen. The single employer at the time was a dollar, and they came in and wanted 50 cents for single employer and multi-employer, and frankly, that forced the single employer to a dollar. And it was assured then that they would never come back and ask for anymore. It is now at $2.60.

Mr. Shapiro. Now since that time we have discovered that many of the multi-employer plans are in financial distress where that 50 cents premium is lower than it would appear that would be necessary to cover the termination insurance that is necessary. As a result of that, the recommendations have been to increase that amount.

The House bill increases the amount by providing an annual per participant premium that the increase to one dollar for two years after the date of enactment, and that one dollar would be increased by 40 cents every two years after that to a maximum of $2.60. That would come into effect the ninth year and any succeeding year.

The Senate Labor bill also increases the amount, but does it at a much higher rate than the House bill. Under the Senate bill the PBGC could accelerate the premium increases to $2.60 after five years, and then they could go up to $3.40 in the tenth and succeeding years.

This is also one that because of sensitivity of incŕeasing the rates, and the premiums that would be paid, the staff has several options that the committee wants to consider, depending on the concern the committee has with regard to the amounts that may be necessary.

The four alternatives that we have listed here is, first, that the House bill has their phase-in schedule getting up to $2.60 after the ninth year. The Senate Labor Committee has a phase-in which is a little bit faster. It goes to $2.60 after five years, but then allows the PBGC to go up to $3.40 in the tenth year.

Option C is one that we have suggested that you might want to consider. It is to take the schedule that is in the law that the Senate Labor Committee has, which is a phase-in of a $3.40 premium but give the PBGC discretion to increase the premiun up to $3.40 quicker, even than in the Senate bill, if it projects an actuarial deficit.

In other words, the PBGC would have a standard. If the fund would project an actuarial deficit, then the PBGC could increase the amount to $3.40 faster.

Senator Packwood. Mr. Chairman?

Senator Talmadge. Senator Packwood and then Senator Bentsen.

Senator Packwood. Mr. Chairman, on some of these multi-employer plans that are large and solvent, what they have been doing is lumped in for premiums with plans that are multi-employer but smaller and may be or may not be close to insolvency. There are a number of these big plans that are simply going to be overtaxed, if you want to call a premium that, and one of the ones is the Western Conference of Teamsters Plan, which is a sound plan. There is not a hint of scandal in it. It is solid and big. And it is not fair that they have to pay the size of a premium to subsidize other employers and other employees.

So I am going to suggest that if we are going to go above the $2.60 level that we put in the following scale of premium payments for plans that fit this description: that they will pay 100 percent of the premium for plans if they have up to 100,000 participants; 75 percent if they have between 100 and 200; 50 percent between 200 and 300; and 25 percent if they have 300,000 participants or more and if they meet the following qualifications: one, the participants are employed in ten or more states and two or more industries; two, no one employer makes more contributions greater than 5 percent of the total employer contributions; and, three, the plan has assets of at least $8 for each $1 of benefits paid during the year.

I might say this is not tailor-made for the Western Conference of Teamsters. There are other plans that will fit those categories. But with those standards there is no possibility those plans are going to be insolvent or that the beneficiaries are going to lose their pensions, and it is not fair, therefore, to tax those multi-employer plans to pay for shakier plans that don't meet those standards..

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Mr. Chairman, if I might comment on that? First, let me say that even if it was $2.60 and we did it tomorrow, we are not talking about a lot of money per individual employee. If you want to go to the movies it costs at least $2.60 to do it tonight. But we are talking about something to try to guarantee pension benefits to the employees, and that is a much more major objective obviously.

We are talking about a situation where the truckers right now are paying about $2300 a year for pension benefits per employee, $2300. So we got a big argument about going to $2.60 or a dollar, just raising it from 50 cents to a dollar.

Now if you try to make a subjective judgment and it finally gets to that, in deciding which pension is more solvent than the other, which one has better credit than the other, which one has better actuarial assumptions than the other, I don't know when you would end that.

If you are trying to take care of the situation of deposits in banks to safeguard those, or savings in savings and loan, you have a constant premium that you are charging regardless of the value of the loan portfolio or the solvency of the bank or the savings and loan.

I don't believe that you can make this thing work if you start varying the premium dependent on in how good or how bad a shape that particular pension is. I think that you have to have a constant and you have to have a set premium. And, frankly, I would almost be ready to go to the full $2.60 immediately, but understanding the problems and concerns of the Western Teamsters and some others I would propose that instead we go with the House version of a dollar the first year and on to a maximum $2.60, but then we put a fail-safe thing in there, that any year that the PBGC has assets less than plans, what was paid out in benefits the year before, that you have an automatic increase to the $2.60, automatic, that it is mandated.

See, none of us can really anticipate what the cashflow is going to be in this thing, and particularly when you get out there ten years. But if you had this kind of a triggering device that would help ensure that they immediately help take care of at least part of the deficit.

Senator Packwood. Mr. Chairman?

Senator Talmadge. Senator Packwood.

Senator Packwood. I don't mind the particular part that he is adding here, but when he uses the argument about going to the movies and paying more than $2.60, that is right. If I take my wife to the movie, it will cost me more than that. If I call up the movie theater and say I will guarantee that I will bring in 500 people a night, 14 nights a month, I will make you a bet I can get a substantially reduced price of the ticket, if I can guarantee that. And that is what the Teamsters can guarantee, and these other plans that fit these qualifications. And any insurance company that would write this kind of coverage, whether it is annuity coverage or health insurance coverage, with this kind of an experience rating, would give these kind of plans a reduced premium. And it is not fair to jam them into this plan on the same basis that everybody else is going to be jammed into it when their experience rating and their funding and their assets just don't justify it.

Senator Bentsen. Well, I know we had another Teamster fund that was supposed to be in pretty good shape, and now it is in terrible shape. So trying to anticipate the liquidity of those funds into the future and making what clearly is a subjective judgment in many instances as to the value of the assets, and if you take a look at some of these pension funds today that have a fine reputation and then you went to marketability of their assets and you started trying to sell off some of their bond portfolios, they in effect would be insolvent, even though book value they look like they are still actuarially sound.

I don't think we have the ability or capacity or the manpower to go in and start varying the premium based on what we hope will be the solvency of that particular pension fund.

Senator Packwood. Well, now, Mr. Chairman, if allegation is being made to another Teamster conference and the diminishment of their assets and some of the investments they have made and the way they have been carried on the books, I am not here to try to defend that.

I am saying that the qualifications that I have put into this amendment guarantee against that, short of criminality, and no matter what kind of a law we write we cannot guarantee that some people are not going to be criminals. But to say that because some people might or some people were or some people are, we are going to hold everybody to the standard of criminals is unfair. And there is nothing in these standards that I put down that would do anything other than guarantee the safety of the plan.

Senator Talmadge. Senator Moynihan sought recognition.

Senator Moynihan. Thank you, Mr. Chairman. I am going to speak out of a profound unacquaintance with most of the actuarial issues here, but some sense, I think, of the responsibility of government to be prudent. And I think that what Senator Bentsen has said seems to me to be to the prudent and responsible thing to do in a situation where we cannot much know the future, particularly as portfolio values change and as marketable values are almost unknown until you are nullible to some degree.

Without wishing to dissociate myself from any other proposal I would like very much to say that what Senator Bentsen has said appears to me to be the course of action which a fund committee should support. It is prudent and it speaks to the first purpose of this legislation, which is to guarantee retirement benefits.

Senator Talmadge. Senator Dole, then Senator Chafee.

Senator Dole. I just wanted to find out if the staff had an opportunity to take a look at Senator Packwood's amendment and whether or not PBGC has any views on the amendment. It seems to me to have some merit. I wonder if the --

Mr. Shapiro. I think I would like to have the PBGC comment for the simple reason that they are the guardian of the funds there and they have to pay the insurance. I think they would know in a better case having examined all these funds how much money they really need.

What we are really talking about here is how much money should be available and what they think is the equities as between a large financially solvent plan as opposed to one that may not be and how they assess it.

I don't have all the data, and they have been looking at this, and they may be in a better position to give a comment.

Senator Talmadge. Mr. Nagle, do you want to comment on it?

Mr. Nagle. Yes, Mr. Chairman. I think that the conditions that have been spelled out for this proposal do suggest that it would limited to solvent and reasonably well-funded plans.

I think that it does raise a question of equity though, as between that plan that would meet those particular conditions and other plans which might also have a good claim which has not yet been examined to softer premium requirements because they too may present less of a risk when their conditions are analyzed, less of a risk to the insurance system.

PBGC does have authority under the legislation to develop exposure-related premiums, and that perhaps could be done after a look has been given at the circumstances of a whole range of plans, not one that is just meeting these particular conditions.

So I can't say that this proposal offers any threat to the insurance system. On the other hand, I do think that it does present a question of equity, as between the funds that meet those particular conditions and others which might also present very little threat to the insurance system.

Senator Packwood. Well, I think what he is saying that there is no question that my amendment is not going to cause any risk to the fund. You are saying are there others that might have equally equitable arguments, perhaps on a different criteria, but equally equitable arguments.

Mr. Nagle. Yes.

Senator Packwood. And you may well be right, but that is no reason to then exclude this amendment, where indeed it does no damage to the solvency of any of the pension funds covered by these criteria.

Senator Chafee. Mr. Chairman, I have a feeling that we are moving into unknown territory here. After all, we are first applying the PBGC, mandatorily applying it to these multi-employer funds, and I would prefer to see a common premium for all the payers into the fund and then after we have more experience perhaps we can change.

Also, I would rather see the accent put not on a merit-rating system for the strength of the various funds and thus a reduction in their premium, but I would like to see more attention paid to monitoring the solvency of each of these plans so they don't get into trouble.

Now that is a separate question, but does that come up at all under this statute we are dealing with?

Senator Talmadge. Mr. Shapiro, can you answer the question?

Mr. Shapiro. I am sorry, I didn't get the first parts of it.

Senator Chafee. Well, are we paying any attention to monitoring the solvency of the various funds? We are going into an insurance system here, but do we just accept the insurance premiums and --

Mr. Shapiro. Oh, sure, I understand what you are getting at. Your point is a very valid one, and I can point out that the PBGC in my impression spends a considerable amount of time making assessments as to the solvency of the plans. They should comment on it, but my impression is that they have a continuing review of that because they are the insurance company in effect and they have the potential liability, so they have to see what their potential liability is, whether or not they have the funds to pay it and then if they need more or need any changes they have to make the recommendations.

Senator Chafee. Yes, but the accent doesn't seem to me should be so much on increasing the premiums or collecting premiums as to monitoring the risks involved and giving warning in case there is danger in sight in these various plans.

Mr. Nagle. Senator, the whole concept of plan reorganization that is built into this legislation is designed to do just that. When a plan meets certain tests that indicate that its present funding under the regular standards may not be adequate and that it may be approaching insolvency unless some more severe steps are taken, the reorganization provisions in this legislation are designed to trigger additional funding standards for those plans, and they have to report regularly on that.

Senator Talmadge. Senator Bentsen.

Senator Bentsen. Mr. Chairman, what we are trying to do here is reduce the law of averages to the individual plan, and if this set of premiums, any one of them, is a proper approach. Then if you start taking out the stronger pension plans, if you start giving them a lower premium, then obviously you affect this whole premium structure and you better raise it on all the rest of them, because they are the ones that apparently have more risk.

Now if you really get into that kind of a subjective judgment on each of these individual pension plans, you will be in real trouble.

Senator Talmadge. Let's see where we are, gentlemen.

Senator Bentsen. So I, therefore, recommend as the alternative to the Senator, I recommend that we adopt the House proposal of a dollar that goes to 2.60 but that in any year in which the assets of PBGC are less than twice of what the premiums, or benefits paid out the preceding year, that you automatically trigger it up to 2.60.

Senator Talmadge. You are offering that as a substitute for Senator Packwood's?

Senator Packwood. No, it isn't really a substitute because mine is a modification of his. I am not quarreling with yours.

I am going to offer to amend his by adding mine when you are ready.

Senator Talmadge. All right.

Senator Packwood. I want to make one last comment. When Lloyd and others talk about the strong and the weak, what you are talking about is changing what private industry would do if they were valuing every one of these plans and they were looking at them. If you had a weak industry, they might say to that industry your premium to do what you want to do is going to be $3.40 a year. And they would say to the Western Conference of Teamsters your premium is going to be $1.49 a year because of your experience and the strength and the diversity of the employers. And all I am suggesting is that we adopt the same rule that any kind of private insurance industry would do if they were underwriting these kind of plans.

Senator Talmadge. All right, you want to offer an amendment now to the Bentsen?

Senator Packwood. I am offering it as an amendment to Lloyd, which simply says this, and I will say it again: when the premium exceeds 2.60 then the premium will reduce the plan 75 percent of their premium if they have 100,000 to 200,000; 50 percent, 2 to 300,000; and 25 percent if they are 300,000 or above, if they meet the following three criteria: participants are employed in ten or more states and two or more industries, no one employer makes more than 5 percent of the contribution, and the plan has assets of at least $8 to each $1 of benefits paid during the year.

Senator Talmadge. Ready for the vote? All in favor?

Senator Chafee. Now the vote is on what?

Senator Packwood. It is on the amendment to Lloyd; it is not a substitute for Lloyd.

Senator Talmadge. We are voting on the amendment proposed by the senator from Oregon to the proposition proposed by the senator from Texas.

Senator Bentsen. I would just say one word in rebuttal. What the senator from Oregon is trying to do is apply individual insurance to what in effect is a group plan.

Senator Talmadge. All in favor of the Packwood proposal say "aye."

(A chorus of "ayes.")

Senator Talmadge. Opposed, "no."

(A chorus of "no's.")

Senator Talmadge. The Chair is in doubt. We will have a show of hands. All in favor of the Packwood proposal raise your hand.

(A show of hands.)

Contrariwise?

(A show of hands.)

It is rejected.

Now the question --

Senator Dole. Mr. Chairman?

Senator Talmadge. Senator Dole.

Senator Dole. I wonder if we could add to that amendment then maybe as the fallback position to direct the PBGC to come up with a proposal for graduated premiums based on risk. We are saying we are dealing with the unknown, and I still think there are such things as economies of scale and we could have that study presented to us within a year or something. Maybe there is no merit at all to graduated premiums.

Senator Talmadge. Any objection to that?

Senator Bentsen. I have no objections to it.

Senator Talmadge. Senator Bentsen modifies his amendment accordingly. The question arises on the Bentsen proposal. All in favor please say "aye."

(A chorus of "ayes.")

Senator Talmadge. Opposed, "no."

(No response.)

Senator Talmadge. The "ayes" have it. It is agreed to.

Senator Moynihan.

Senator Moynihan. Mr. Chairman, I hesitate to interrupt, but I have to leave for the first meeting of the Democratic Platform Committee.

Senator Talmadge. The senator took that up. We will take his amendment at this time if he does have to leave, so you will state it at this time, Senator Moynihan.

Senator Moynihan. On Tuesday, sir, I proposed two changes which had to do with the partitioning of plans that existed prior to the establishment of the PBGC. The ranking member, the senator from Kansas, asked had this been cleared on his side. We were under the understanding that it had been. We have since had discussions of the matter, and it is our understanding that the other side would be quite willing to accept the one essential provision, which would be an amendment to Section 4402(g) which simply says that the PBGC can still partition plans from which an employer or employers withdrew for the effective date of the bill.

This would match equivalent provisions in the legislation before us. It is my understanding that is acceptable to you, and if that is acceptable that is as much as we would --

Senator Talmadge. Senator Dole.

Senator Dole. As I understand, in other words, you would make it clear that the PBGC has the discretion to partition plans from which an employer and employees withdrew before the effective date of the bill. We make that clear.

Secondly, if they decide to partition such a plan and are forced to take on responsibility for the part of the plan that has become insolvent, the benefits of retirees at the time of partition would be guaranteed to the extent provided under the law in effect before enactment of this bill?

Senator Moynihan. Those are the two proposals I made, yes.

Senator Dole. Right, and PBGC understands that?

Mr. Nagle. Yes. My understanding is that what is being proposed is that this particular provision which was in the bill approved by the Labor Committee would be included in the bill.

Senator Talmadge. Is there any objection? Without objection it is agreed to.

Senator Moynihan. I thank the Chair.

Senator Talmadge. Go ahead, Mr. Shapiro.

Mr. Shapiro. The next item is on page 17, another big item, and that is the question of the guarantees. Under present law there are monthly benefits that are insured by PBGC to the extent of the lesser of $750, which is adjusted for inflation since 1974. That $750 is now at $1,159 in 1980, or a participant's average high five-year compensation. The insurance of the benefits is generally phased in over a five-year period.

The House bill made some modifications to the guarantees. First, it eliminates the PBGC guarantee of benefit levels in effect less than five years before a reduction of benefits by a plan in reorganization or before the termination of a multi-employer plan. Also the benefits that are eliminated or canceled because of the cessation of an employer's contribution to the plan are not to be guaranteed by the PBGC.

Under the bill there is also some modifications to the amount. Specifically, the first five dollars of monthly basic benefits earned in a year by participant service is to be generally fully guaranteed; that is, to the 100 percent, and then the next $15 of monthly benefits would be guaranteed to the extent of 70 percent. The percentage for excess benefits, however, is reduced from 70 to 60 percent if the plan does not meet specified funding requirements.

The guarantees under the House bill are also to apply only in the event of the insolvency of a multi-employer plan. In other words, that is when the PBGC comes in and starts making these guaranteed payments, and that is where there is insolvency of the plan.

Also, the House bill continues present law which does not extend guarantees to a plan benefits of certain substantial owners of an employer.

The Senate bill is substantially the same as the House bill, except that it makes modifications to the guarantee amount. The first five dollars is still guaranteed at 100 percent, but then the next $15 where the House bill has a 70 percent guarantee if they meet funding standards the Senate bill goes to 80 percent guarantee. So it is 80 rather than 70. If the plan does not meet a funding schedule, then the Senate bill goes to a 70 percent guarantee, whereas the House bill goes to a 60 percent.

So in each case the Senate bill is 10 percentage points higher.

The staff is suggesting that you may want to consider accepting essentially the House provision which is similar to the Senate, but make one modification; that is, in addition to guaranteeing a 100 percent of the first five dollars you take the next $15 and guarantee that at 75 percent. In other words, instead of having a two-tier, either at 60 percent or 70 percent in the House bill or a 70 and 80 percent in the Senate bill, just have a 75 percent guarantee of the next $15.

Senator Talmadge. Any objection?

Senator Packwood. Bob, what is wrong with the two-tier approach? I haven't heard any objections that it is unworkable.

Mr. Shapiro. Not that it is unworkable. It is just the feeling that just a level of complexity that when you make compromises that the figures are arbitrary right now between the House and Senate. You have got 60 percent and 70 percent in the House, 70 and 80 in the Senate. So you have got two before you.

You can go to a variation of the two tiers, or what we are just suggesting is that since you have two different approaches before you now and they are both arbitrary amounts, that you may just want to go to 75 percent, which is also arbitrary and apply it to both.

Senator Packwood. Well, the objection I have there is that you had the Pension Guarantee Board which had a 60 percent guarantee but without any two-tier. Then you had the House which had 70 and 60. You had the Senate Labor Committee which had 80 and 70, but in any event, none of them had higher than 70 percent on whether they had one tier or two tiers.

Now you are suggesting going to 75 percent all the way across, which will be higher than anybody else has suggested on a two-tier approach; and considering the fact that both the House and the Senate committees adopted the two-tier approach I think we ought to stick with it. I thought the Senate Labor Committee went higher than it ought to be at 80 and 70. I would rather have the House's 70 and 60, but I would settle for a 75 and a 65, but I thought the two-tiered approach was a good idea.

Senator Talmadge. What do you recommend?

Senator Packwood. I would recommend 75 and 65.

Senator Talmadge. The question on the Packwood amendment. All in favor please say "aye."

(A chorus of "ayes.")

Opposed, "no."

(No response.)

The "ayes" have it. It is agreed to.

Mr. Shapiro. On page 18 is a new item that was added because of a concern that came to the attention of the staff when we were talking to a number of the outside groups, and that deals with an actuarial standard.

Under present law it is not clear whether actuaries are required to disclose the events which may have a material adverse effect on plans and trends which are not assumed to continue in the future. This is a concern that Senator Chafee had and other senators as to try and to recognize problems before they come so that we can anticipate them and maybe make some modifications.

As you know, the accountants have to make certain certifications on the financial reports of companies, attorneys have to give opinions, and although actuaries do have to give opinions it is not clear that whether they are required to disclose material of adverse impacts that they may see or a trend that they may see in a plan, a trend being, for example, that you have more retirees coming in a plan but not a lot of new employees so that sometime in the future that particular plan may have a problem. Some actuaries may very well do it.

The staff is suggesting, however, that the committee might want to adopt a rule to require an actuary to actually disclose the events which could have a material adverse impact on a plan or any trends which are not assumed to continue in the future.

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

Now we passed over an item, I believe, for Senator Durenberger.

Mr. Shapiro. That is correct, and that is on page 6.

Senator Talmadge. Is Senator Durenberger here? He was a moment ago.

Senator Dole. He will be back in just a minute. He had to run out to another committee.

Senator Talmadge. All right, Senator Bradley wanted to propose an amendment, and then the Chair has one, and then Senator Packwood has one I know, Senator Baucus. Senator Bradley.

Senator Bradley. Thank you, Mr. Chairman. This goes to the question of the responsibility of a parent company for the subsidiaries' unfunded pension liabilities and particularly to the tax deduction that is available for assuming those unfunded liabilities.

Under the bill presently, when a subsidiary goes belly-up, the PBGC can assess a certain payment from the parent company up to 30 percent of the net worth of the company. This payment is then tax deductible.

What I would like to do is simply broaden this a little bit to apply to a very specific situation, where the state is taking over a private transit system, in the State of New Jersey. And the state will not accept the responsibility for the unfunded pension payments. The private corporation that is selling it says that they will. I just want to nail down that when the state takes over the stock of the company and the private company says they will continue to assume the liability for the unfunded pension payments, that when they make those payments they will be able to get that tax deduction.

Senator Bentsen. Mr. Chairman, that certainly appears to be equitable.

Senator Talmadge. Any objection? Without objection it is agreed to. Now, Senator Packwood I believe had something.

Senator Packwood. My amendment relates to Senator Durenberger's presentation, and I will wait until he comes back.

Senator Talmadge. All right. Now I have one. I will state it very briefly. This is cosponsored by Senator Bentsen and Boren, working closely with representatives of 27 major church denominations from across the nation. I introduced this 1090 and its companion tax bill, S. 1091, to protect the viability of church retirement plans.

The problem that church plans face is one of definition. Under current law, both ERISA and the Internal Revenue Code, define such plans to include not only church plans covering church employees but also plans covering employees of church-affiliated organizations.

For example, the church plan might cover the employees of a church-related hospital, university or retirement home. As you might expect, this is a common practice of many churches throughout the United States. However, unless we act to preserve the longstanding definition of church plans, the law as it currently reads will phase out this definition beginning in 1983.

S. 1090 and S. 1091 make the amendments necessary to continue the current church plan definition. The definition would also be expanded to include church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church.

In addition, the definition of the term "employee of a church" would be expanded to include a church minister in the exercise of his or her ministry regardless of the source of compensation, as well as certain former church plan participants.

The bills would also create a notice and correction procedure for the amendment of a church plan.

Senator Dole.

Senator Dole. I just want to say as a cosponsor I support everything you said.

Senator Talmadge. Any objection? Mr. Halperin of the Treasury Department.

Mr. Halperin. Mr. Chairman, we have objected to certain provisions of that bill, and let me just point out what we see as the most serious concern.

What that bill would permit, it would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to provide no retirement benefits unless they work until age 65, for example.

So it could deny benefits for people who might have 20 or 30 or even more years of service with the school or the hospital. Now maybe they don't want to go that far, and we have had conversations with these people for a number of years and we have always offered to talk about each particular provision of ERISA and find out which of them create problems for them because it certainly would be reasonable to modify some of them to deal with the particular problems of churches. But to say that the vesting provisions, the eligibility provisions do not apply across the board so that we can return to the situation where long-service employees get no pensions seems to us to be objectionable, Mr. Chairman.

Senator Talmadge. I think we have got a question of separation of church and state here, number one, gentlemen, and, number two, I don't believe we ought to get a row with every religious faith in the country -- Jewish, Catholic, Protestant, and otherwise.

All in favor please say "aye."

(A chorus of "ayes.")

Opposed, "no."

(No response.)

The "ayes" have it, and the amendment is agreed to.

Senator Dole. Mr. Chairman?

Senator Talmadge. Senator Dole.

Senator Dole. I was going to propose, I don't see it in the staff recommendations, and that would be a sunset date on this legislation of June 30, 1983. I think what we are looking about we talked about sunset legislation in the general sense. I am not certain this legislation will answer all the concerns we have. It will force Congress to take another look at it, give us time to see how it works, and give us time to make any necessary changes. I might add that 1983 is a nonpolitical year.

We want to make certain that we provide income security to employees, but if employers cannot survive, then we are going to have a question of PBGC paying substantial benefits. This may require very high premiums or could even in some circumstances lead to going to the general revenues for funding.

I haven't discussed this amendment with the staff or with PBGC, but I think what we need to --

Senator Talmadge. What date in 1983 do you suggest, Senator Dole?

Senator Dole. June 30.

Senator Talmadge. I think it is a good idea. Frankly, I think what we have got, we are dealing with an impossible law here. It is presently on the books, and we are passing what I think is an inequitable law, probably it is better than an impossible one, is the way I see it. I can foresee that this is going to place some very grave burdens on some people who are going to be hurt in matters where they have absolutely no control. The recession, depression, imports. And they will be absolutely helpless in the face of those adverse circumstances.

Any objection to the Dole amendment?

Without objection it is agreed to.

Now Senator Durenberger is here. Let's take up his, and then Senator Baucus.

Mr. Shapiro. With regard to sunset I would like to make one observation. There are a lot of things that may have interacted. I am assuming the committee is giving the staff the authority to make the appropriate modifications to carry out the sunset based on what the suggestion was.

Senator Talmadge. I would suggest that we give the staff authority to make any and all technical corrections. Is there objection? The Chair hears none.

Senator Bentsen. Let me say, Mr. Chairman --

Senator Talmadge. Senator Bentsen.

Senator Bentsen. -- I can understand the deep concern over this piece of legislation, because I share it, but I also share the hopes and aspirations and the objectives of what we are trying to do with ERISA on multi-employer plans to make sure that these savings don't turn to dust for these employees and for these retirees.

So I go along on this sunset with the understanding that we are not talking about doing away with multi-employer insurance. We are talking about putting something in effect that requires a restudy of what has happened, to look at some of these imponderables, to try to force a reevaluation at that time as to any corrections.

Now I have an amendment, if I may, Mr. Chairman.

Senator Talmadge. All right, you may proceed. I thought we would hear Senator Durenberger next.

Senator Bentsen. Oh, I beg your pardon.

Senator Talmadge. A provision in the bill went over at his request Tuesday.

Senator Durenberger.

Senator Durenberger. Thank you very much, Mr. Chairman. I appreciate your putting this matter off until --

Senator Talmadge. What page are we on, Mr. Shapiro?

Senator Durenberger. Well, I guess we can go back to page 5.

Mr. Shapiro. Page 5 is the item that we took up. The staff recommendation was at the top of page 6. The issue was that there was a special provision in both the House and Senate bills that dealt with providing a rule that where you had the construction industry, for example, that ceased to do business in an area and they were covered by collective bargaining agreements, they would not be subject to withdrawal liability.

The assumption there is that someone in the construction industry may build a project and then they would leave some of the employees would go with somebody else in the area, and that was a unique situation.

The House bill just had the special rule for the construction and entertainment industry. The Senate bill gave the PBGC discretionary authority to provide this type of treatment to other situations that may come up that would involve either a single case or an entire industry.

The Senate bill had a four-year delay. We are suggesting that you may want to agree to the Senate provision that to allow the PBGC to have the discretion to extend this rule to other cases without a four-year delay, and that is what Senator Durenberger wanted to reserve on the committee's consideration, the staff's suggestion at that time.

Senator Talmadge. Senator Durenberger.

Senator Durenberger. Thank you very much. Mr. Chairman, I approach this issue with a small amount of experience with these kinds of plans and some reliance on a congressman from Minnesota, who is probably the conferee on this bill, who was the major proponent of what turned out to be the Erlenboin amendment on the

House side to exempt all multi-employer plans from the implications of Title IV.

But dealing realistically, as Senator Bentsen has, with the need to make a better bill out of an impossible situation, as you have alluded to, I have tried to come up with some kind of constructive alternative to shipbuilders coming in from Hawaii, truckers coming in from Minnesota, which is where I intended to come in, and to suggest that it might be difficult for employers to have the kind of confidence, if you will, in PBGC to make some of these discretionary judgments in the next couple or three years that they ought to have, and to respond to that lack of confidence with some sort of assurance that there are those who fall in the category of partial withdrawal through no particular design on their own part, but who will suffer penalties of one kind or another by reason of falling in that partial withdrawal category.

The trucking industry, I could explain at some length, has a lot of situations very, very comparable to the construction industry, and, unfortunately, it looks like everybody is piggybacking on an awful lot of work that the construction industry people put in to trying to work this out. But the fact of the matter is the trucking industry is one which is made up principally of small employers. There is a characteristic mobility of employers, as all of you know, in and out of all of these funds. And I could give you specific examples from my own state or specific examples from Philadelphia of the number of withdrawals from a plan. But usually don't get out of the plan. An employer may but the people are still going to work for some other trucking company someplace else and in some other plant.

So to make a long story short here and perhaps add to the inadequacy of the explanation, my proposal is simply this: that we apply the construction industry exceptions to plans in any industry or parts thereof, in which, as in the construction industry, the plan itself will suffer no damage to its contribution base, providing that a withdrawing employer in such industry will post an adequate bond not to exceed withdrawal liability and at the end of five years, if there is no substantial injury to the contribution base, the bond shall be canceled.

Now the discretion in determining what is appropriate withdrawal liability would be with PBGC. The discretion in determining whether at the end of five years no substantial injury to the contribution base has occurred, so that the bond can be canceled, will be with PBGC.

That in essence, Mr. Chairman, is my proposal. If it fails, then I suppose Sparky on behalf of shipbuilding and I on behalf of trucking and perhaps others will be in here trying to lay the same groundwork for industries we feel strongly that the construction industry has been able to lay for itself.

But personally I would prefer not to get into that special exemption category. But I just think this is a system with which employers will have more confidence than one in which we all agree there is some doubt here about where we are going in which we give all the discretion to PBGC to make these exemptions.

Senator Talmadge. Any objection?

Senator Bentsen. I would like to hear what the staff thinks.

Mr. Shapiro. If I understand what Senator Durenberger is saying, it dovetails to part of what the staff is suggesting. We are saying that instead of taking industry by industry you give the PBGC the discretion, and Senator Durenberger is setting forth standards as guidelines on which they should make that discretion in items that we can put in the committee report, on the basis of which the committee expects the PBGC to make those discretionary determinations.

Senator Durenberger. I wish I had put it that way, but you are more effective putting it.

Senator Packwood. Do I understand, Dave, that what you are putting in is simply directionary language? You are not writing anything into the bill? You are asking for the report to suggest certain standards that you just enunciated which will guide PBGC?

Senator Durenberger. No, I would like this into the bill so that the only discretion on their part is in determining withdrawal liability in a particular situation or substantial injury, but they aren't going to be making the decision.

Senator Packwood. Well, Mr. Chairman?

Senator Talmadge. Senator Packwood.

Senator Packwood. I may vote with him, I am not sure. Ever since we passed carryover basis, I have been hesitant to jump into anything where I don"t have some grasp of what it is. I have no idea what your language will do or accomplish, and it may be good. But I hope we don't come back if we adopt it in two or three years trying to unwind something we didn't grasp the implications of when we passed it.

Senator Bentsen. Well, I share Senator Packwood's views on this, because what Senator Durenberger proposes, frankly on its surface, appears it is a pretty good standard, but I can't anticipate --

Mr. Shapiro. Well, I think the difference of what I thought he said is that I was suggesting that the committee, those committee report standards because in case something turns out that we don't anticipate now the PBGC can just use these as guidelines. If you put them in the law, and I haven't had a chance to fully assess it, it may be very well, and yet I can't be in a position to tell the committee that it is because we haven't even seen it or gone over the language.

If it turns out that there are some problems in the language and that PBGC is required to do it because the statute says it, it may turn into some problems that we haven't anticipated because we haven't had a chance to study it. That was the reason why, I thought Senator Durenberger was saying, and we had suggested that you might want to use these as guidelines, let the PBGC take into account the discretionary authority but they are not necessarily bound to them because we haven't had the opportunity at this stage to know the full ramifications of the guidelines.

Senator Talmadge. Ready for the vote, gentlemen?

Senator Dole. How are we doing it, the guidelines or the bill?

Senator Durenberger. Well, I would like these two elements to be nondiscretionary guidelines.

Mr. Shapiro. See, the difference is that the committee has to determine whether or not you want Senator Durenberger's two standards now to be nondiscretionary, that they are mandated. What staff was suggesting is that these type of things were discretionary. In other words, they are guidelines that the committee wants the PBGC to take into account, but they are not necessarily mandating.

The only reason why the staff is saying this is because we can't give the committee a reliance that the standards don't cause some problems. They may be fine, but we just haven't had an opportunity to look at them. So as a result of that, we are not in a position to recommend that they would work.

Senator Durenberger. In effect, if they meet the substantial industry determinations, excuse me, if they meet the withdrawal liability determination by PBGC, if they meet the no-substantial injury determination by PBGC, then there is no discretion on the part of PBGC to deny them the right to post the bond or to cancel the bond after five years.

Senator Dole. Does that cause any problems?

Senator Talmadge. Mr. Nagle.

Mr. Nagle. I think that it might. We, and I guess I have to say that I am in the same boat that Mr. Shapiro is in in terms of trying to anticipate just the full implications of the proposal, which comes to us rather new. It sounds to me that until these determinations were made, plans and employers would be making a judgment themselves as to whether they, as to how it would turn out and how they would eventually be found to fit under these standards, and I think it would create a period of tremendous uncertainty for the plans, not knowing whether they were going to be collecting withdrawal liability from particular employers in the final analysis or not.

I am not sure that the standards that are proposed -- they sound at first blush to be appropriate, but I am not sure that we would find that to be the case in the final analysis. The standards that were fixed with the construction industry were done with the particular circumstances of that industry very much in mind, and I am not sure that we would be in a position to say offhand that similar determinations could be made on the basis of the standards that have been proposed for all other industries or all other segments of industries.

Senator Talmadge. The question occurs on the Durenberger amendment. All in favor please say "aye."

(A chorus of "ayes.")

Opposed, "no."

(No response.)

The "ayes" have it.

Senator Baucus.

Senator Baucus. I have a very simple amendment which would give the Secretary of Labor discretionary authority to exempt contributions from employers from assets to retired personnel.

Right now, under the law as it is interpreted, contributions, supplemental contributions by employers out of assets to retired personnel prior to 1976 are not defined as coming under ERISA. But the contributions by employers to retired personnel outside of assets, supplemental contributions, are now prohibited if they come subsequent to the end of 1976.

The amendment very simply would give the Department of Labor authority to on a discretionary basis through rules and regulations rule or allow supplemental voluntary contributions of employers to retired personnel subsequent to the end of 1976 to not be defined as ERISA contributions.

There are several companies who participate in ERISA that make their contributions to the plan, but they also want to make supplemental contributions. They can now if the contributions are to retired personnel who retired prior to the end of 1976.

They cannot now if those same personnel or other personnel retired subsequent to the end of 1976.

The amendment very simply would allow those contributions to be made.

Senator Talmadge. Any discussion?

Senator Dole. Does the staff have any objection to that?

Senator Baucus. It is my understanding that the staff looked at this and they have no objection now.

Senator Talmadge. Mr. Shapiro, have you studied this amendment?

Mr. Lieber. I have been told about the amendment. I understand that Ian Lanoff from the Department of Labor may have, who would be administering this, may have some views.

Mr. Lanoff. The Labor Department has no objection to it.

Mr. Lieber. No objection to it?

Senator Talmadge. Any objection? Without objection it is agreed to.

Senator Dole.

Senator Dole. We had a question raised the other day, I think, by Senator Matsunaga. He is here. And that is the protection of personal assets of a sole proprietor. Has that been taken care of?

Mr. Shapiro. That is the one issue that is left that the committee passed over on our handout sheet.

Senator Dole. And there is another one on vesting, the vesting regulations proposed on April 9, 1980 by the Treasury. I think there is some question, I think Senator Matsunaga has some question, at least I understand, on those regulations, and what the timeframe may be.

Mr. Shapiro. The last issue that we have open that is on the multi-employer handout is on page 9; however, the staff has given you a new handout today because the committee instructed the staff to go back and put together a proposal taking into account the concerns the committee members had. You should have this as a single sheet in front of you which is headed "Dollar Limitation on Withdrawal Liability." So the sheet is "Dollar Limitation on Withdrawal Liability" and I think it is coming around right now.

Now this is a new recommendation based on the concerns the committee expressed last Tuesday when we discussed it. The staff did not have a recommendation at the time because of the problems involved, but at the hearing the committee members discussed it, and talking with the various staffs afterwards a recommendation was put together to take into account the concerns that the committee members expressed as well as the staff had discussed with the committee staff.

This is the case where when you have withdrawal liability is there any dollar limitation on that liability. Under present law there is a provision that was put in in 1974 that has a 30 percent of net worth limitation.

However, neither the House bill nor the Senate Labor Committee bill has any limitation. In other words, they eliminated that 30 percent net worth limitation that was in present law, and the effect of that is to say that an employer that leaves the plan would not have any limitations liability. And the committee seemed to want some limitation on the liability so that an employer could rely on it, and also a concern about if an employer were to sell his business, or in the case that Senator Matsunaga brought up, a sole proprietor, how do you deal with that.

The staff recommendation that you have before you has three parts to it. The first part, and this is 3-A, provides that where a withdrawal liability is incurred and the employer is liquidated in an insolvency proceeding their liability would be limited to net worth.

Clearly, when you are liquidating in an insolvency proceeding the employer is going out of business, and the limit there is on the net worth.

The second case, B, that deals with the one that Senator Matsunaga brought up before, is to provide a limitation of sole proprietor. This provides in the case of an individual, which is either a sole proprietor or a partner, the liability would not reach any personal assets. That means the personal residents, for example. And these are the personal assets that are exempt under the bankruptcy law.

So whatever the Congress has already provided to protect a sole proprietor in the case of bankruptcy, that same protection would apply under this limitation. It was believed to be appropriate that coordination.

The third item, number C, deals with the case where you have all or substantially all the assets of an employer is sold to an unrelated party. In that case withdrawal liability would be limited to the greater of either 30 percent of the selling price or to the liability attributable to the employers, employees, for the sales of five million or less. And that means that the employer's own liability with regard to his employer, employees I mean, that is what is referred as the attributable liabilities, he be limited to just those liabilities if the sales are five million or less.

If the sales exceed $5 million, that 30 percent limitation would be gradually increased so that it would reach 80 percent of sales exceeding 18 million. That is an arbitrary test. It provides some limitation. I will say there is a concern about any limitation in this by certain of the outside groups; however, expressing the concerns that the committee members had, that is to provide some limit on an employer's liability, seemed to be the best that the staff could do based on the consensus that we had on the situation.

Senator Dole. The staff recommendation would be to recommend A, B, and C, not one or both?

Mr. Shapiro. A, B, and C. All three.

Senator Dole. All three in fact?

Mr. Shapiro. That is correct.

Senator Bentsen. Mr. Chairman?

Senator Talmadge. Senator Bentsen.

Senator Bentsen. This is trying to resolve what is really a most difficult problem, and the concern that there be a true deterrence on withdrawal from the plans, and yet we not in effect just wipe out the company in the process. And this is a rough cut at justice. I would go along with it.

At another point do we get to general creditors as to preference? Is that at another point?

Mr. Shapiro. The limit on the net worth has the effect of doing that, Senator.

Senator Bentsen. Oh, that takes care of it? All right.

Mr. Shapiro. We have combined that in there.

Senator Talmadge. Any objection? Mr. Nagle.

Mr. Nagle. Mr. Chairman, if I might just state, we have had considerable discussions with staff on this problem and there is no question it is a very difficult issue and very hard to find a resolution to that everybody would feel comfortable with.

We do think that the numbers in C are really too high. I think there is a very substantial opportunity for a business through this device shed its share of the unattributable liabilities, in effect sell the business to someone else and in the transaction the unattributable liabilities would be tossed back on the remaining employers in the plan and increase the burden on them.

We thought that the concern of the committee was perhaps mainly with the small, largely sole proprietor, who would build up his business and then when he was ready to retire want to liquidate it and have something out of it, not have it all to go to the plan and withdrawal liability. And if that was the concern, we think the numbers should be considerably smaller.

We would suggest something more on the order of starting with one million dollars to apply the 30 percent to and also limit it to a situation where the business has been substantially owned by a single person, because we thought that was the concern.

Otherwise, this can apply to large corporations who have no -- it can apply to multimillion dollar corporations who are selling off a small operation.

Senator Bentsen. Mr. Chairman?

Senator Talmadge. Senator Bentsen.

Senator Bentsen. If you go down to a million dollars of sales you are almost talking about a MacDonalds. This is a franchise.

Mr. Nagle. We were suggesting a million dollars in net worth.

Senator Bentsen. I thought you were talking about C in sales.

Senator Talmadge. What is the pleasure of the committee? Do you want to modify it in accordance with the suggestion Mr. Nagle has made? Is there objection to modifying the proposal?

Senator Bentsen. Let me understand now, which part are you modifying now on the net worth? Which one of these are you modifying?

Senator Talmadge. All right, Mr. Nagle.

Mr. Nagle. C.

Mr. Halperin. Senator Bentsen, the proposal here in C would say that the selling price were $5 million, that the 30 percent limitation would apply, so that the maximum that could go to the insurance fund or to the plan would be 30 percent of 5 million and that the employer would be able to hold onto 70 percent of 5 million, and then it is phased down.

What Mr. Nagle suggested was that the 5 be changed to 1 so that the seller would keep 700,000 out of the first million and keep some smaller portion out of the rest until you reach the full amount of the liability.

Senator Talmadge. Is that agreeable, Senator Bentsen?

Senator Nelson. Is there any adjustment for inflation? That figure would be cut in half at current rates in five or six years. What do you do about that?

Senator Dole. What, on inflation?

Senator Nelson. Yes.

Senator Dole. It allows you adjustment for inflation.

Senator Bentsen. Well, he has moved it quite a ways going from the 5 to 1. Why don't we try to arrive at some compromise on that?

Senator Dole. Three.

Senator Bentsen. Yes, that is fine.

Senator Talmadge. Are there suggestions?

Senator Bentsen. Why don't we meet him partway and go to three?

Senator Dole. You are not worried about the $18 million figure?

Senator Talmadge. Without objection, three is agreed to, and without objection it is agreed to as modified.

Senator Bentsen. I think he had another reservation.

Senator Talmadge. Oh, another one?

Mr. Nagle. Well, we would suggest that that would be the limit and not go on above to the 18 million at all.

Senator Bentsen. All right.

Mr. Lieber. I would like to point out that if you do that you may be limiting the value of a lot of businesses, because if the value of the business exceeds $1 million and you sell it for more than 1 million the plan would take -- or 3 million rather, the plan would take the entire excess. There would be no incentive to sell at a very high price.

Senator Bentsen. I think we ought to stay with the staff recommendations as far as --

Mr. Lieber. That was the reason that we had the phase-out.

Senator Talmadge. Mr. Halperin?

Mr. Halperin. The other point that Mr. Nagle made was the question as to whether you want to apply this to a sale of a widely held business; and as we had understood, the case that people were concerned with was taking away the life savings of people and having it all go to the plan.

As Mr. Nagle pointed out, we are talking about who is going to pay for the liabilities that are there, the employer that is withdrawing or the remaining employers that stay in the plan. And when you look at the equities between them, it seems to us that if you are not dealing with essentially individually owned businesses you may well be going too far in this case. Of course you could apply it to the sale of a large corporation.

Senator Bentsen. Well, I think there still has to be equity also for stockholders.

Senator Talmadge. Without objection then the staff recommendation is agreed to.

Senator Bentsen. Mr. Chairman, I have one --

Senator Talmadge. Senator Bentsen.

Senator Bentsen. -- that I believe is a noncontroversial one, and this deals with the question of where employers have mistakenly made payments thinking that specific employees were a part of a plan and later they might be found to be management and therefore the contributions should not have been made. The courts have interpreted this not just as a mistake of fact but a mistake of law, and I would like to see this amended, so where the mistake is found that at the date of discovery of the error the period of time begins to run and that the contributions can be returned in those instances to the employer.

I believe this has been discussed with staff and perhaps with Treasury and I know of no objections to it.

Mr. Lieber. I just wanted to clarify something. Are you referring to both a mistake of fact and a mistake of law?

Senator Bentsen. Yes.

Mr. Lieber. There is one problem that arises with a mistake of law, the situation being that the plan might have been disqualified in operation. And where that might occur and the service comes in and disqualifies the plan say as of five years ago, the employer would then say that is great, I can take all my contributions out for the last five years.

Senator Bentsen. I see. Well, all right, let's modify it to take care of that kind of situation.

Senator Matsunaga. Will the senator yield?

The problem arises where the IRS has excluded from the term "mistake of fact" miscalculations made by the contributor. So this will be taken care of, I take it, by this amendment?

Mr. Lieber. Yes. It is my understanding the courts have done that.

Senator Matsunaga. Oh, the courts have? That is right. They have interpretationA So this will take care of that situation?

Mr. Lieber. That is right.

Senator Bentsen. Mr. Chairman, then I move the amendment with the understanding that it will be corrected to take care of the instance Mr. Lieber has referred to.

Senator Talmadge. Senator Dole.

Senator Dole. My staff is trying to tell me something. I don't understand it, but this would take care of that, Rich?

Mr. Belas. That does, that takes care of the problem.

Senator Dole. What was the problem you were raising there?

Mr. Belas. The one other problem I want to raise is that to make sure that we were speaking of any mistake of law that would have this effect, not only Section 302 of the Labor Relations Act.

Senator Dole. Yes.

Senator Talmadge. Any objection? Without objection it is agreed to.

I want to clarify the fact that this church amendment that I proposed is permanent legislation and not subject to the sunset provision. Any objection?

Senator Durenberger.

Senator Durenberger. Yes, Mr. Chairman. My proposal is a clarification of action that we took on Tuesday relative to the rules for partial withdrawal, and I have discovered that we have a particularly, I guess, peculiar situation on the Great Lakes that is going to impact adversely on at least one shipping company, Cleveland Cliffs, and there are several lake shipping companies operating on the Great Lakes. But Cleveland Cliffs over the last, I think, eight years from 1972 to 1980 built up a fleet of smaller ships in the 600-foot class vessels when the Republic Steel's mining operation went into effect in Silver Bay. At the same time there was a design to phase out, eventually phase out the 600-foot ships and replace them with fewer 1000-foot vessels, which will happen in 1981, but by another shipping company, Moore-McCormick.

Now the neatness of this situation is that while everybody else is phasing down on their activities and Cleveland Cliffs was building up, now Cleveland Cliffs is going to go down and somebody else is going to come on-line. But as far as the employees are concerned, the Marine Engineers Beneficial Association Pension Fund to which all of the employees participate is funded by allocating the total cost of the vessel operators by using a man-hours work formula, and as a result, the larger fleets such as those owned by Cleveland Cliffs have been paying during the last eight years in particular an increased portion of the pension costs to offset the reduced man-hours lost because other fleets were grinding down.

As of 1981 they go down and others start up, and if we impose both the February 27, 1979 date or an alternative 1980 date on them we are going to hit them in effect with both having absorbed extra pension costs during the 1970's and requiring them to pay again during the 1980's at a time when their fleets and therefore their employees are reduced.

Senator Dole. Do you want to change 70 to 75?

Senator Durenberger. Well, I want to do two things. To make it specific, there is a provision in the present law for the Great Lakes maritime industry. You know, so it is aimed at this particular situation, and change it to 1985. In effect, the language would read this way: notwithstanding A of the Section 4201(c)(1) through the plan year ended 1985, there shall only occur a partial withdrawal of an employer in the Great Lakes maritime industry from a plan on the last day of the plan year when there is a 75 percent contribution decline, as described in paragraph (3)(a).

Then there is a comparable amendment where we add the (3)(a); there is a 75 percent contribution decline described in this paragraph applicable to the Great Lakes maritime industry. And I think we adopted 70 percent here on Tuesday.

Senator Talmadge. That is correct.

Senator Durenberger. In effect, they are going to be right at about the 75 percent decline, but it isn't going to start until after 1981.

Mr. Shapiro. Right. What you are suggesting then is to

Tape 2
A

keep the committee's rule of 70 percent in general but to have a special provision for Great Lakes shipping, in which case that rule would be the 75 percent under the circumstances you outlined?

Senator Durenberger. Right.

Senator Nelson. May I ask a question of the staff?

Senator Talmadge. Senator Nelson.

Senator Nelson. This is all complicated business, so I am insecure about my position on many of these things. Two questions: is this proposal a matter of equity; is it equitable to do this because of what happened during the period involved; and, two, does it in any way adversely affect the pension fund?

Mr. Shapiro. Well, I would like to take a quick stab and then have PBGC, who is in a better position, make a fuller analysis.

As far as the effect on the fund, any time where you would have had partial withdrawals come into play, meaning that the employer would have to make payments for the fund, and when you waive that for whatever reason, it is going to have an effect on the fund that payments would otherwise be waived.

The next question, is it equitable to do it --

Senator Nelson. Well, but on this obligation involved here it is the fund, as I understand it, that is going to be shared by the other shippers as a matter of equity because they were beneficiaries previously from the contributions of this company, is that correct?

Mr. Shapiro. Yes. But yet if they back out and have a partial withdrawal in which there is no payment and if they don't come back in and they don't have to make the payments, that means that the other employers that are still there may have to pick up their liability.

Senator Nelson. Well, I am assuming that this proposal would require that that liability be picked up, is that correct?

Mr. Shapiro. That is the effect of it, but what Senator Durenberger is saying is that this is a unique situation, that they have a temporary situation, whereas that they are going to a 75 percent decline rate is not a permanent change, it is on a temporary basis, because of the uniqueness of the situation they have in the Great Lakes shipping, and that it is just in that limited case because of their unique situation, that where they have a 75 percent decline they would not be required to make any of these payments under the partial withdrawal rules because of their special circumstances.

Senator Nelson. Now the other question is, among all of the shippers in this circumstance is the proposal made by Senator Durenberger an equitable, fair burden to be shared by all of them?

Mr. Shapiro. If, and I am not sure if I know about it to comment it; let me make an initial reaction and see if PBGC can comment on it.

If the companies that would be covered under this proposal would be on a temporary situation, come in with 75 percent withdrawal, but later they would come back in because the temporary situation has ceased and they start making their, they continue making their contributions and they are paying their fair share to the fund, it is only a temporary situation in which case the other employers may not have to make any payment on behalf of the employers that have pulled back.

Now I am not sure if my analysis is complete.

Mr. Lieber. I understand, I think I have got the facts right, that other companies have been doing this in the past, have in effect been revising their fleets and that in the past years other companies have reduced their employment on this temporary basis.

Senator Durenberger. And the employees are moving over here in the fleet.

Mr. Lieber. Right. And the point would be that the remaining companies that haven't yet done that would be subject to the withdrawal liability where those who had done it in prior years wouldn't. And I assume under the amendment that it is intended to allow all of them to get to the same basis.

Senator Nelson. Well, that is what I want to get clear. Is it correct then that among all these shippers this is fair and equal treatment and sharing with all of them, is that correct? In the past the others have been beneficiaries to this company's situation and now they would be beneficiaries, is that correct?

Mr. Lieber. Bob, maybe you want to get --

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

Mr. Cole. We have not been told of this situation prior to it just coming up, so I do not know about that particular plan in particular. It might be the type of situation which sometimes exists in maritime in which the agreement is to fund the plan on an actuarial basis, and then that is apportioned among all employers according to their levels of employment. If this is the situation, as I think Mr. Durenberger indicated, where the employees who work for one employer are now going to switch over to another employer, then you are really talking about the burden following the particular work force from employer to employer and in essence following the business. And it wouldn't seem to be a problem.

I think there is a spirit of something like that provided for or some exceptions provided for in the House bill which calls for the reduction of partial withdrawal liability or the abatement of it under some circumstances where the contribution base of the individual employer comes back in the future or where the plan is not harmed.

I am not sure that those are very technical provisions. You would have to look at them to see if they would apply to this particular case and provide the relief that Senator Durenberger is asking for. They may or they may not.

But if it is just a case where the employees are shifting around and the business is shifting around and the total contribution base of the plan is not impacted at all, this type of amendment, this type of provision should not harm the plan or pose a risk for the insurance system.

Senator Talmadge. Ready for the vote? The question is on the Durenberger amendment. Without objection it is agreed to.

Now Senator Matsunaga.

Senator Matsunaga. Mr. Chairman, following the Durenberger amendment we have a somewhat similar situation in Hawaii where in the seagoing industry we have in the West Coast Seagoing Multi-Employer Plan three substantial employees have withdrawn since May 3, 1979, when the measure was first introduced. Pacific Far East Line has gone into bankruptcy. State Steamship has gone into reorganization. Prudential Lines has chartered its ships through a nonparticipating employer.

Now these three employers were responsible for 45 percent of the contribution. The withdrawal has doubled the unfunded liabilities for the remaining two employers; that is Mattson Navigation and American President Line. These two companies now face liabilities of $185 million instead of $90 million. The annual contributions have increased by 75 percent. These companies serve Alaska, Washington, Oregon, California, and

Hawaii.

The increase of unfunded liabilities will greatly burden these companies and be passed on to consumers eventually. Now this increase in the liabilities is, I believe, unfair, and the burden should be shared by the withdrawing substantial employers as well.

So I propose, Mr. Chairman, that withdrawal liability be imposed retroactively back to May 3, 1979 for substantial employers in the seagoing industry.

Senator Talmadge. Any objection?

Senator Dole. I object.

Senator Talmadge. Ready for the vote? All in favor please say "aye."

Senator Bentsen. We just did it the other way an hour ago.

Mr. Lieber. My understanding is that Senator Matsunaga is quite correct. What has happened is you have had a major line that left, and I believe there are only two large lines in that plan, supporting the plan. And the one company that left recently I understand is in Chapter 11 under the Bankruptcy Act.

Senator Bentsen. Where did they get the money then?

Senator Matsunaga. Well, there are still two other remaining.

Mr. Lieber. The effect of the amendment would be that the line that withdrew and is now in Chapter 11 would be subject to withdrawal liability retroactively, is my understanding correct?

Senator Matsunaga. Now this is unlike the earlier situation brought up by Senator Packwood. This is not to exempt the shipbuilding industry from liability during the off-season period. This is something else.

Now, Bob, I think you have something else in mind.

Senator Dole. I supported that. In other words, somebody is going to have to dig up $80 million, is that it?

Senator Matsunaga. Right now those remaining are liable, would be liable, and those who withdrew in anticipation of this situation would not be liable.

Senator Dole. One is in reorganization and one is in bankruptcy. Where is the other one?

Mr. Lieber. Well, there are two lines that are still solvent and are operating. The third line is the one that withdrew in 1979 because they are in reorganization under the Bankruptcy Act. And the problem is a very difficult one. If you don't impose the liability retroactively on the employer who withdrew you are imposing it on the employers who remain. On the other hand, the creditors and the owners of the line that is in reorganization would have this burden if you do impose it on them.

Senator Talmadge. Any objection? Senator Dole.

Senator Dole. Nobody wants anybody to have the liability. I don't disagree, but you either are going to keep it where it is or transfer it to someone else. It just seems to me that --

does the staff have a recommendation? PBGC have a recommendation?

Mr. Cole. Under current law a 10 percent, or a substantial employer that withdraws from the plan must post a bond or place an amount in escrow equal to its potential termination liability.

Now the problem with that of course is that that bond or escrow only becomes used in the event the plan is terminated. So in the case in question here the current law is inviting the remaining employers to terminate the plan and to shift the liabilities onto the insurance system in order to capture the liabilities from the withdrawn employer.

Senator Matsunaga is proposing that the withdrawn employer instead of posting a bond or putting an amount in escrow pay that money to the plan in order to help the remaining employers carry the plan.

I think you have taken care of some of the problems and the concerns about credit by subordinating the plan's claims, so that in the case of this Chapter 11 company, if it were liquidated, the creditors of that company would come before the plan in terms of getting paid. But for the ongoing employers, the question here is one of whether the liability is passed on to the remaining employers or whether the remaining employers seek to terminate the plan in order to capture the liability from the withdrawn employers or whether you impose some liability on the withdrawn employers so the remaining employers can continue the plan.

Senator Dole. I understand that, but what is the fair solution of it? Are we getting in somebody's lawsuit here? Are there suits pending on this?

Senator Matsunaga. No, suits are not pending.

Mr. Cole. We favor Senator Matsunaga's proposal.

Senator Dole. Are you going to end up paying it?

Mr. Cole. Well, let me put it this way. I think if Senator Matsunaga's proposal is not adopted, there is a very good chance we will end up picking up a large liability in this case. If it is adopted, that significantly reduces the chance of that $90 million falling on the insurance system.

Senator Dole. Unless those who are then liable go into reorganization or bankruptcy. I don't know anything about them. I don"t know even who they are, whether they have got any funds or not.

Senator Matsunaga. The fact is, Bob, liability was incurred at the time that those who withdrew were members of the plan. In other words, by withdrawing they escaped the liability.

Senator Dole. I know that, but we had that question of retroactivity earlier.

Senator Bentsen. We sure did.

Senator Talmadge. Senator Boren.

Senator Matsunaga. I am limiting this now strictly to the seagoing industry; that is, those employees who are on board ships and working aboard ships in the shipping industry, seagoing industry.

Senator Boren. Let me ask this question, Mr. Chairman, because I am opposed to retroactive activity as a general principle here. I think it ought to be the effective date that has been decided on earlier.

But I wonder if we could put in report language making it clear, I wouldn't want this to be seized upon in conference as a precedent to say, well, we ought to extend retroactivity to everything, I wonder if we could put language in to say that it should be made clear that this doesn't set a precedent, this takes care of a very specific problem.

Senator Matsunaga. I have no objection to that, Mr. Chairman.

Mr. Shapiro. That could be done.

Senator Boren. Then I would so suggest that we modify Senator Matsunaga's proposal to include the report language, and I can certainly support it.

Senator Matsunaga. I have no objection.

Senator Talmadge. The question is on the Matsunaga proposal as modified. Any objection?

Senator Dole.

Senator Dole. Well, I don't want to object to a colleague's proposal, but it seems to me that maybe Senator Boren's language would be helpful. We have just dealt with the general issue of retroactivity, and you stick this into the bill, then you are going to open up the whole question again, I assume, in conference.

Senator Bentsen. You sure are.

Senator Dole. We could sink the whole thing instead of a couple of ships.

Senator Talmadge. Ready for the vote. All in favor please say "aye."

(A chorus of "ayes.")

Opposed, no.

(A chorus of "nays.")

The "ayes" have it. The motion is agreed to. Senator Dole.

Senator Dole. I want to be recorded as voting "no."

Senator Talmadge. Senator Dole will be recorded in the negative.

Senator Dole. Did you have a question on vesting, Senator Matsunaga?

Senator Matsunaga. Oh, yes, I have.

Senator Talmadge. Senator Matsunaga.

Senator Dole. The regulations that Treasury proposed.

Senator Matsunaga. Right, right, proposed regulations. Mr. Chairman, I would like to pose several questions to Deputy Assistant Secretary Halperin on an issue of deep concern to me in many --

Senator Bentsen. Senator, let me interrupt. I will have to be recorded in the negative on that previous vote too, because I just opposed the retroactive business.

Senator Talmadge. Senator Bentsen will be recorded in the negative. Senator Matsunaga.

Senator Matsunaga. So, Mr. Halperin, Section 411(d)(1) of the Code has two focuses. It prescribes the patent of abuse, tending to discriminate in favor of officers, shareholders or the highly compensated. It also prescribes actual --

Senator Talmadge. Please suspend briefly, Senator Matsunaga. While we still have some senators here, any objection to reporting the bill as amended, and we have senators offer further amendments? Is there any objection? Without objection it is agreed to.

Mr. Stein. Mr. Chairman, that would specifically be S. 1076. The House bill is being held at the desk.

Senator Talmadge. It would be the Senate bill.

Senator Matsunaga. I understand that the motion just now would permit additional amendments?

Senator Talmadge. Oh, yes, you are in order.

Senator Matsunaga. Yes. Well, I have a colloquy here, Mr. Chairman, relative to the question raised by Senator Dole, and of course we have answers and questions prepared. Of course to save time I would ask unanimous consent that my questions be included in the record in full.

Senator Talmadge. You want to submit the questions and the answers to the record, or do you want the answers now?

Senator Matsunaga. Yes. Well, some of the answers have not been put in writing as yet. So I would ask that those questions which have not been put in writing be responded to now.

Senator Talmadge. The questions and the answers will be put in the record.

(The information referred to follows:)

COMMITTEE INSERT

Senator Talmadge. You may proceed, Senator Matsunaga.

Senator Dole. Are you suggesting a freeze on the regulations or not?

Senator Matsunaga. No. We have worked out a compromise on this so that we are not asking for the freeze now because the Treasury has withdrawn considerably to satisfy those who were opposing to the bill.

Senator Dole. I think the concern is if they are going to do it that ought to be done while we are in session and we have some time --

Senator Matsunaga. That is correct. That is one of the principal concerns.

Senator Talmadge. I agree fully.

Senator Bentsen. Mr. Chairman, I share that concern, and I want to be very much a part of what is finally resolved here.

Senator Talmadge. So do I, and I want to put a statement in the record.

There has been a great deal of concern over these proposed vesting regulations. I and many other senators have received a great deal of mail pointing out that the content of the proposed regulations does not seem consisten with the conference report under ERISA. That conference report appears to assure employers of a safe harbor under the "4/40" vesting schedule. But the Treasury and the IRS seem to have taken a different stand under the first draft of these proposed regulations.

It is heartening to see that these regulations are now being reconsidered. And I sincerely hope that the legitimate concerns of employers will be heard and, more importantly, will be reflected in the final regulations. However, if we permit the administrative procedure to take its course, as the Treasury has requested, and if these regulations still do not accurately reflect the intent of Congress, we may have to legislate in this area.

If these regulations were to go into effect in their current form, they would pose several problems. Because employers have reasonably relied on the guidance provided in the ERISA conference report, thousands of companies with existing retirement plans might think these plans have to be amended to meet the more restrictive vesting requirements of these regulations. This provides yet another incentive to terminate retirement plans in an area already overburdened with government regulation. We should spare employers this aggravation and expense. In addition, the regulations provide very little in the way of examples as to just how the newly proposed discrimination tests would be administered. The resulting uncertainty provides yet another disincentive to the establishment of maintenance of retirement plans.

These new regulations should provide many more examples to give guidance to employers. Therefore, examples should be provided of situations in which "4/40" vesting will work.

Similarly, examples should be given of situations in which a graduated 10 percent per year vesting schedule will and will not work.

I share the view that no final regulations should be adopted until Congress has an opportunity to review them.

Senator Matsunaga.

Senator Matsunaga. Mr. Chairman, I join in your concern, and it is my understanding that the three major concerns of those who are involved, councils as well as businessmen, the accommodation which the Treasury proposes would be acceptable if, one, final regulations will be issued only while Congress is in session to have adequate time to respond; two, there will be no retroactive disqualification of a plan unless discrimination is egregious example, purpose, both firing or no vested benefits to rank and file after ten years in plan; and, three, examples will be provided addressing the small plans and one or more examples will contain "4/40" and 10-year gradual vesting after one-year delay.

Moreover, inasmuch as I have already obtained the unanimous consent to insert the colloquy into the record, perhaps because of the concern expressed by the members Secretary Halperin might go into a general explanation as to what it proposes to do, and as I understand it, there is to be a hearing in July sometime.

Mr. Halperin. Senator, I can certainly agree to the three particular provisions that both you and Senator Talmadge have mentioned: first, that we would agree that no final regs will be issued except when Congress is in session; second, that we are certainly interested in giving as much guidance as possible and we will develop, hopefully with the participation and advice of the people involved, further examples, including examples as to when "4/40" vesting would be acceptable and when so-called graduated vesting of 10 percent a year with a year delay would be acceptable.

In addition, we will deal with the potential impact on plans that are already in existence and have already received a ruling, and we certainly can agree with what Senator Matsunaga just said, that no qualification will be effective retroactively except in the case of intentional firing or really egregious situations. The example that you gave was no one but the owners of the business getting benefits after ten years of operation. And other than that that any effect on plans would be prospective only.

As you also said, there is a hearing scheduled in the IRS on July 10th. We are certainly considering all comments that have been made. We are trying to balance the interest of protecting antidiscrimination rules which have been in effect for 40 years. We are certainly aware of the potential impact on plans, and we believe that the information that will be developed in the administrative process will enable us to reach a reasonable solution, and we think the administration process should properly be given an opportunity to work.

Senator Matsunaga. Thank you very much. I have two brief matters which staff already --

Senator Talmadge. Senator Matsunaga and then Senator Dole.

Senator Matsunaga. -- knows about.

Senator Dole. Could I just say on this matter? Is it on a different matter?

Senator Matsunaga. Yes, on a different matter.

Senator Talmadge. Senator Dole.

Senator Dole. You are going to do it while Congress is in session. I think there ought to be one addition to that. It shouldn't be the last day of session. We ought to have time to act. I hope that is going to be understood. Don't give it to us on August 12th and we leave the 13th.

Mr. Halperin. I think we understand that. You are going to come back in any event. I don't think that, obviously, unless whatever we are going to do is going to last --

Senator Dole. Yes.

Mr. Halperin. Analysis be acceptable to you or we are not going to be able to accomplish that, and I think we understand that.

Senator Dole. Right, fine.

Senator Talmadge. Senator Matsunaga.

Senator Matsunaga. Mr. Chairman, the staff is familiar with this matter, with reference to exempting Hawaii and California from the preemption of ERISA. And if the staff wishes to explain this. It is a matter which the Labor Department supports and which the Committee on Labor and Human Resources have accepted. They have a wide proposal.

My proposal would be narrowing it down to Hawaii and California.

Mr. Lieber. Yes. If I understand the situation correctly, the statute in ERISA itself has a preemption provision, so that it preempts state law relating to welfare plans. And a federal court has found that the Hawaiian law, which mandates certain health benefits for employees, has been preempted. Also, I believe the California law.

My understanding of Senator Matsunaga's amendment would be to permit the State of Hawaii to retain that law and the State of California to retain its law despite the ERISA preemption provision.

Senator Matsunaga. And the court has stated, Mr. Chairman, that this is a matter for the Congress to handle and not the courts, and it is for that reason we offer the amendment.

Senator Dole. Is that going to be limited to reporting disclosure and fiduciary responsibility?

Senator Matsunaga. No. You see, Hawaii had the law prior to the adoption of ERISA, and Hawaii is the only state in the union today which has a compulsory health insurance plan which covers practically 100 percent of the population. As a matter of fact, the Department of Labor has to a large extent looked at it and looked upon it as a model for the rest of the nation.

Senator Dole. The staff has no objections to it?

Mr. Lieber. The only concern that has been raised with respect to it is as to whether the amendment would permit the state to tax premiums or to tax the benefits. There were some who were concerned that if the preemption were opened too broadly that might happen, and I assume that Senator Matsunaga does not wish that result.

Senator Matsunaga. Definitely no.

Senator Talmadge. You will modify it accordingly, will you, Senator Matsunaga?

Senator Dole. That is the point I raise.

Senator Talmadge. Do you modify your amendment accordingly?

Senator Matsunaga. Yes, we modify it.

Senator Talmadge. The senator modified his amendment. Any discussion? Any objection? Without objection it is agreed to.

Anything else, Senator Matsunaga?

Senator Matsunaga. Yes. This is a very brief matter. We can take it up in just two or three minutes here. This is relative to the effective enforcement, the effective collection of delinquent payments. And as you know, Mr. Chairman, it is essential to maintain these plans. The House bill strengthened civil enforcement proceedings by allowing permissible liquidated damages and interest on the delinquent payments. If the enforcement proceeding is not strengthened effectively, delinquent payers will prolong litigation in amount and settling for a lesser amount.

I propose that the committee adopt a mandatory measure similar to the House provision for liquidated damages. Then the staff has some recommendation on this.

Senator Talmadge. Mr. Lieber.

Mr. Lieber. Yes. My understanding is that it was intended really on the House side that a court -- again there is a preemption problem -- a state court or even a federal court would be required to approve liquidated damages if the pension plan provides for it in the case of delinquent employer contribution situations where the employer has agreed to make contributions to the plan and just has not done it, so that in effect the other employers are being asked to bear the burden.

This would serve as an incentive for the employers to pay up promptly.

Senator Talmadge. Any objection? Without objection it is agreed to.

Senator Matsunaga. Mr. Chairman, I ask unanimous consent that my statement in support of the earlier preemption amendment be inserted into the record.

Senator Talmadge. Without objection.

Senator Matsunaga. Mr. Chairman, in support of my amendment to exempt the Hawaii Prepaid Health Care Act of 1974 and the California Knox-Keene Health Care Service Plan Act of 1975 from the preemption provisions of ERISA, I wish to point out that the hearing records of this committee and the Committee on Labor and Human Resources over the past three years clearly show that the preemption of these uniquely innovative state laws was never envisioned or intended by Congress during the consideration of the ERISA legislation in 1973-74.

In fact, the respective legislative histories of these three laws parallel each other. Moreover, the enactment of the Hawaii Act preceded the passage of the ERISA legislation by Congress in 1974 and the California Act was enacted shortly after the enactment of the ERISA legislation.

While it is the intent of ERISA to limit the number of laws which would be exempted from its preemption provisions, as the committee is aware, three state-administered employment laws dealing with unemployment compensation, worker's compensation and disability compensation, were specifically exempted from ERISA's preemption provisions in 1974.

The Hawaii Prepaid Health Care Act is the only mandatory, statewide, comprehensive, employer-based, basic health insurance law in existence today in the United States. It is administered by the Disability Compensation Division of the Hawaii State Department of Labor and Industrial Relations, which also administers the state's labor laws. The California Act is a similar but restricted employer-based health insurance law.

The enactment of this amendment would specifically nullify a suit filed by Standard Oil Company of California against the State of Hawaii, which is currently pending appeal in the Ninth Circuit Court in San Francisco. The federal District Court, in its decision rendered in 1977, clearly stated that the appropriate remedy for this oversight in the federal law lies with the Congress and not the courts.

Since its enactment in 1974, the Hawaii Prepaid Health Care Act has effectively increased the basic comprehensive prepaid health insurance protection coverage for the residents of the state from approximately 90 percent of the population to 98 percent of the population, thereby making Hawaii the nation's first state with nearly universal, basic, comprehensive prepaid health insurance protection.

The primary beneficiaries of the enactment of the Hawaii Prepaid Health Care Act were by and large nonunionized workers at the lower end of the wage scale. Prior to the passage of the Hawaii Act, these workers were typically either not covered by health insurance at all, offered inferior coverage, or offered coverage at premium rates beyond their means.

Today, a full-time, 40-hour per week employee in Hawaii who earns the minimum wage of $3.10 per hour, receives good basic health insurance coverage at an annual premium cost, which in no event may exceed 1.5 percent of the worker's annual wages. This amounts to a maximum expenditure of about $100 per year for a full-time, minimum wage employee for basic, comprehensive health insurance protection and about $50 per year for the 20 hour per week minimum wage worker. When the Hawaii Act was implemented in January 1975, it extended this health insurance coverage to 46,000 employees in the state.

Hawaii's experience with this community-based prepaid health insurance coverage has been unparalleled in quality, efficiency, and economy throughout the nation. Moreover, the Hawaii Act has been cited in a study completed by the Department of Health and Human Services in 1978 as a model for the implementation of an efficient and economical national health insurance program. It is interesting to note that because of Hawaii's uniquely structured health care delivery system, health care is one of a very few services which cost less per capita in the state than it does in the rest of the country.

As reported from the Committee on Labor and Human Resources, Section 155 of S. 209, the ERISA Improvements Act of 1979 would permit an exemption from preemption under ERISA for any state law which mandates the provision of health care services to employees or to employees and their dependents. However, a number of multi-state industry and labor representatives have expressed reservations on the potential for increased administrative costs for having to comply with a number of different requirements for health insurance protection and other employee benefits among several states. The Department of Labor has also expressed reservations on the granting of such a broad exemption from preemption before the issue has been thoroughly studied.

According to the Hawaii State Department of Labor and Industrial Relations in their testimony before the hearing conducted by the Subcommittee on Private Pension Plans and Employee Fringe Benefits last December, the administrative costs of complying with the Hawaii Prepaid Health Care Act requirements have been minimal.

Moreover, since 1974, the Hawaii Prepaid Health Care Advisory Council, which was established by the act to review employee health insurance coverage to assure conformance with the community-based health insurance standards in the act, has approved over 1000 health insurance plans offered to employees in Hawaii as meeting the requirements of the act. These plans are sponsored by insurance carriers based throughout the United States.

My colleagues will be interested to learn that the suit filed by Standard Oil Company of California is the only significan complaint that has been received to date by the Hawaii State

Department of Labor and Industrial Relations on the administration of the Hawaii Prepaid Health Care Act. Curiously, the suit was filed in 1976, two years after the enactment of the Hawaii Act, and shortly after the Hawaii State Legislature passed legislation to include drug abuse and alcoholism treatment benefits in the required services under the Hawaii Act.

While I do not believe that, if enacted, the costs of compliance with this exemption provision would necessarily be prohibitive or unreasonably complex, I am sympathetic to the concerns expressed by the multi-state industry and labor representatives and by the Department of Labor. I therefore would like to propose the adoption of a more restricted version of Section 155 of S. 209 than that proposed by the committee.

My amendment would narrowly exempt only the Hawaii Prepaid Health Care Act and the California Health Care Service Plan Act, since only these state laws have been ruled by the courts to be preempted by ERISA. It would also direct the Department of Labor, in close cooperation with the States of California and Hawaii, to make a thorough study of the effect of these two exemptions on the administration of the ERISA program, the improvement in health insurance protection among the employees affected by the state health insurance laws, and the effect of any subsequent preemption of the laws by Congress.

The department would report back to Congress, specifically this committee and the Committee on Labor and Human Resources, within two years of the date of enactment of the amendment with its findings and further legislative recommendations on whether the exemption should be continued or extended to other states with health care or health insurance laws for employees and their dependents.

As indicated in the Pension Subcommittee's hearings of December 5-6, 1979, on miscellaneous pension bills, this version of the exemption from preemption by ERISA would be entirely acceptable to the State of Hawaii. I would also like to add that the Department of Labor supports the granting of this exemption for the Hawaii and California laws, provided that a study of the scope and duration I have outlined would be conducted on the exemptions.

The enactment of this amendment would provide a much needed clarification of the intent of Congress on the preemption of these two innovative state health insurance laws by ERISA. It is being offered as a reasonable and prudent compromise of the broad exemption provision adopted by the Labor and Human Resources Committee on S. 209. To my knowledge, Hawaii and California are the only states with mandatory health insurance laws for employees which have been preempted by ERISA. I therefore urge the adoption of my amendment.

Senator Talmadge. Senator Dole.

Senator Dole. I just wanted to know if we couldn't get the PBGC to make a study and give them a couple of years if necessary, whether employers and unions should be required to bargain over both contribution levels and benefit levels. Right now it is my understanding most bargain only over contribution levels, and the reason we find a lot of problems, or going to find a lot of problems down the road, is because nobody ever considers the benefit levels. The trustee of the plan sets the benefit levels, and I think what we are going to be finding here are increased unfunded benefits over which the employer has no control and in many cases is going to bring about insolvency and doesn't help the employees.

I would like to have some study, and I don't know of any objection to that.

Senator Bentsen. Mr. Chairman, I strongly support that. There has to be some correlation of benefits and contributions, and in too many cases we have seen abuses of that.

Senator Talmadge. Without objection it is agreed to. Anything further?

Mr. Shapiro. Along with that study, Senator Talmadge, you have mentioned earlier about the concern about union-mandated withdrawals as to whether or not there should be some rules dealing with circumstances where the unions find it to their advantage to terminate a multi-employer plan or to withdraw from a bargaining unit, and we would like to suggest that you may want to require the PBGC to study that same subject as to whether or not there should be some special rules if the union decides to withdraw from a plan or to withdraw from a bargaining unit.

Senator Talmadge. Any objection? Without objection it is agreed to.

Anything further? Thank you very much, gentlemen, and thank the staff.

(Whereupon, at 12:05 p.m., the committee was recessed, to be reconvened at the call of the Chair.)