[COMMITTEE PRINT]

SUMMARY OF DIFFERENCES BETWEEN THE SENATE VERSION AND THE HOUSE VERSION OF H.R. 2

TO PROVIDE FOR PENSION REFORM

PREPARED FOR THE USE OF

THE HOUSE AND SENATE CONFEREES ON H.R. 2

PART THREE

FIDUCIARY AND ENFORCEMENT

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FIDUCIARY RESPONSIBILITY

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1. Plans Subject to the Provisions

House bill.[1]—The fiduciary responsibility rules apply to all employee benefit plans established or maintained by: 21 (51)

(1) employers engaged in or affecting interstate commerce, and

(2) employee organizations representing employees engaged in or affecting interstate commerce.

Senate amendment.—The Senate amendment provides fiduciary responsibility rules under the Welfare and Pension Plans Disclosure Act and under the Internal Revenue Code. 525, 540 (51)

(1), (2) The amendments to the Welfare and Pension Plans Disclosure Act (hereafter referred to as "Labor Act" amendments) apply to the same plans as do the rules of title I of the House bill.

(3) The Internal Revenue Code amendments (hereafter referred to as "Revenue Code" amendments) cover qualified plans, annuities, and individual retirement accounts which are tax-exempt (under sec. 501(a) of the Code) or have at any time been determined to be tax-exempt.

Staff comment.—See Part One (page 47), Staff Comments Relating To Jurisdictional Matters, *Operational Stage Jurisdiction*, points (6) and (7).

2. Exceptions From Coverage

House bill.—The fiduciary provisions do not apply to: 21 (51)

(1) governmental plans (including railroad retirement plans);

(2) church plans which have not elected to be covered by the new vesting, etc., rules;

(3) workmen's compensation or unemployment compensation disability insurance plans;

(4) non-U.S. plans primarily for nonresident aliens; and

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† "Page numbers" outside parentheses are the numbers of the relevant pages in the print of H.R. 2 dated March 4, 1974. The first 353 pages of that print, in linetype, represent the bill as passed by the House of Representatives; the remaining pages of that print, in italic type, constitute the Senate amendment.

"Page numbers" inside parentheses are the numbers of the relevant pages in the comparative prints prepared by the staffs.

[1] The House bill provisions on fiduciary responsibility discussed in this portion of the summary are those of title I only. Title II does not deal with fiduciary responsibility as such.

(5) unfunded plans providing deferred compensation for management or highly compensated employees.

502, 534 (51) *Senate amendment.*—The Labor Act amendments do not apply to:

(1) governmental plans (however, the term "governmental plan" does not include railroad retirement plans);

(2) plans administered by a tax-exempt religious organization;[2]

(3) workmen's compensation plans: same as the House bill;

(4) non-U.S. plans for nonresident aliens where the situs of the plan fund is maintained outside the United States;

(5) management plans: no comparable provision;

(6) funds held by an insurance carrier unless they are held in a separate account;[3]

(7) funds held by an investment company regulated under the Investment Company Act of 1940.[4]

The Revenue Code amendments do not apply to:

545 (154) (1) governmental plans (the term "governmental plan" is not to include railroad retirement plans);

(2) plans of churches or conventions or associations of churches which are tax-exempt (under sec. 501(a) of the Code), unless the plan is covered by termination insurance;

(3) workmen's compensation plans: no comparable provision; these plans are excluded only if they are not qualified;

(4) non-U.S. plans: no comparable provision; these plans are excluded only if they are not qualified;

(5) management plans: no comparable provision;

(6) funds held by an insurance carrier unless held in a separate account; and

(7) funds held by a regulated investment company.

Staff comment.—The conferees may wish to consider adopting the following exclusions:

(1) governmental plans: the rule of the House bill;

(2) church plans: the rule of the House bill;

(3) workmen's compensation plans: the rule of the House bill;

(4) non-U.S. plans: with respect to the Labor Act amendments, the conferees may wish to adopt the rule of title I of the House bill excluding non-U.S. plans for nonresident aliens, but additionally require that, in order for the plan to be excluded, substantially all of

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[2] There also is an additional exemption for plans established or maintained by a church or convention or association of churches which is tax-exempt (under section 501(a) of the Internal Revenue Code), unless the plan is covered by termination insurance.

[3], [4] Although the House bill does not specifically exempt these funds from the fiduciary responsibility rules, the policy of the House bill is the same.

its participants and beneficiaries must be nonresident aliens. With respect to Revenue Code amendments, these plans would be excluded as nonqualified plans;

(5) management plans: the conferees may wish to agree to adopt the rules of the House bill, with respect to Labor Act amendments. With respect to Revenue Code amendments, these plans would be excluded as nonqualified plans;

(6) insured plans: the policy of both bills is the same (in addition, the conferees may wish to provide that surplus in insurance company separate accounts generally would be excluded from the fiduciary rules);

(7) regulated investment companies: the policy of both bills is the same.

3. Prudent Man Rule

House bill.—

(1) Fiduciaries are to act with the care, under the circumstances then prevailing, that a prudent man acting in like capacity and familiar with such matters would use in conducting an enterprise of like character and aims. 53 (109)

(2) Fiduciaries also are to act exclusively for the purpose of providing benefits to participants and beneficiaries and for defraying reasonable plan administrative expenses.

Senate amendment.—

(1), (2) The Labor Act amendments are substantially the same as the House bill. 526 (109)

(The Revenue Code amendments do not include a prudent man rule. However, present law under the Revenue Code requires that each qualified plan be maintained for the "exclusive benefit" of the participants.)

Staff comment.—

(1), (2) The conferees may wish to adopt the rules of the House bill.

The conferees may wish to provide that where an individual has control over the management of the assets in his account (as determined under regulations of the Secretary of Labor), his account is to be exempt from any Labor Act fiduciary rules.

The conferees may wish to provide that if a plan meets the prudent man rule under the Labor Act amendments, then it will be deemed to meet the prudent man elements of the exclusive benefit rule under the Revenue Code, with respect to the prudence of investment decisions.

4. Diversification of Assets

House bill.—Fiduciaries are to diversify investments in order to minimize the risk of large losses 53 (109)

unless under the circumstances it is prudent not to do so.

526 (109) *Senate amendment.*—(Diversification of investments is to be achieved through the prudent man rule.)

Staff comment.—The conferees may wish to require a fiduciary to diversify plan investments so as to minimize the risk of large losses unless under the circumstances it is "clearly prudent" not to do so.

The conferees may also wish to clarify in the conference report that in a suit brought against the fiduciary for violation of this rule, the plaintiff's initial burden of proof is only to demonstrate that there has been a failure to diversify. The defendant would then have the burden of demonstrating that this failure to diversify was clearly prudent.

5. Investment in Employer's Securities, etc.

House bill.—

54, 73 (116, 147) An exception from the diversification rule (Item 4 above) is provided for profit-sharing, stock bonus, thrift and savings, and money purchase plans designed primarily to invest in employer's securities if the plan specifically provides for the exception.

(1) In these cases, the diversification requirements do not apply to securities of the employer or of a corporation that is a member of a controlled group including the employer.

(2) Also, in these cases a plan may hold real property without respect to the diversification requirements if (a) a substantial number of the parcels are geographically disbursed, and (b) each parcel, and its improvements, are suitable or readily adaptable for more than one use. Also, (c) this real property may be leased to one lessee, who may be a party-in-interest.

(3) Plans would be allowed three years after enactment to dispose of investments to meet the diversification requirements.

Senate amendment.—

Under the Labor Act amendments:

527, 543 (116, 117, 163) (1) Pension plans can invest no more than 7 percent of plan assets in securities of an employer or an employer group. Profit-sharing, stock bonus, thrift and savings, and similar plans are not subject to this limitation if the plan documents so provide.[5]

(2) Leasebacks of real property (and related personal property) to employers or employer groups would be treated the same as employer's securities for purposes of these investment rules.

(3) Plans would be allowed ten years to divest themselves of excess securities and leases now held.

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[5] However, under other parts of the Labor Act amendments, plans would not be able to acquire employer securities from, or sell these securities to, an employer or other parties in interest.

The Revenue Code amendments prohibited transaction rules provide as follows:

(1) The Revenue Code amendments do not provide an exception with respect to acquisitions of employer's securities from parties in interest.

(2) However, the leaseback of real property and related personal property between a tax-qualified plan and the employer or employer group is allowed, to the extent allowed under the Labor Act amendments.

Staff comment.—

(a) With respect to the holding of employer securities by profit-sharing, stock bonus, and thrift plans, the House and Senate provisions are similar.

(b) Also, with respect to the holding of employer securities by defined contribution (but not defined benefit) pension plans, the conferees may wish to provide that employee stock ownership plans generally are to be treated the same as profit-sharing plans.

(c) With respect to leasebacks, the conferees may wish to follow the rules of the House bill for profit-sharing, stock bonus, etc., plans if the plan specifically provides for investment in this type of property.

(d) The conferees may also wish to provide that with respect to pension plans generally, these plans could invest up to 10 percent of plan assets in employer's securities provided that this met the general requirements as to diversification of assets. (In any event, the conferees may wish to provide that this limitation would be subject to the exception of paragraph (b) above.)

(e) With respect to transition periods, see item 6. *Staff comment.*

(f) If the conferees decide to generally adopt the prohibited transaction rules of the Senate amendment, they may also wish to allow acquisition and sale of employer securities (and leasebacks) between plans and parties-in-interest on an arm's-length basis for adequate consideration with no commission charged.

6. Prohibited Transactions—Party-in-interest Transactions

House bill.— 54

Fiduciaries may not: (111)

(1) Permit plan property to be transferred to or used by a person who is known to be a party-in-interest for any amount less than adequate consideration; or

(2) Permit the plan to acquire property or services from a person known to be a party-in-interest, for any amount more than adequate consideration.

Senate amendment.— 528, 529, 533

(1).(2) No comparable provision. (113)

(3) Under the Labor Act amendments, fiduciaries may not engage in a direct or indirect:

(a) sale, exchange, or leasing of property between the plan and a party-in-interest;

(b) lending of money or extension of credit between the plan and a party-in-interest;

(c) furnishing of goods, services, or facilities between the plan and a party-in-interest;

(d) transfer of plan assets to or use by or for the benefit of a party-in-interest; or

(e) deposit or investment of plan assets outside the United States unless authorized by the Secretary of Labor or unless the indicia of ownership remain within the jurisdiction of a U.S. district court.

(4) The Revenue Code amendments are essentially the same as point (3)(a)-(d), with respect to parties-in-interest.

Staff comment.—

(a) Some of the staff believe the rules of the House bill should be adopted; some of the staff believe the rules of the Senate amendment should be adopted.

540
(114, 149)

(b) Generally the staff believes that, regardless of the rules adopted, the excise tax on parties-in-interest method of enforcement should be included.*

(c) Some of the staff have proposed the following alternative:

(i) The basic rules of the House bill would be adopted.

(ii) In addition, the Secretary of Labor could investigate any transaction, and could require a showing that (A) adequate consideration was paid, (B) the transaction was prudent, and (C) the primary purpose of the transaction was to benefit the plan and its participants. If the Secretary was not satisfied that these criteria were met, he could order that transaction be rescinded; this would be subject to court review.

(d) Some of the staff have suggested the following alternative:

(i) The basic rules of the Senate amendment would be adopted.

(ii) However, a 10-year transition period would be allowed to phase out existing transactions involving holdings of assets and a 3-year transition period could be allowed for transactions involving the provision of services.

(e) If the conferees decide to adopt the prohibited transaction rules of the Senate amendment, they may wish to provide as follows:

*There was not complete staff agreement on this point.

(i) Parties-in-interest would be allowed to guarantee loans to an employee stock ownership plan where the loan is made by an independent third party.

(ii) All or part of plan assets could be invested in savings accounts, etc., of banks, savings and loans, etc., that act as the plan trustee, where the plan specifically requires such investment.

(iii) A life insurance company would be allowed to use its own separate account contracts to fund a pension plan for its employees. The same rule would apply with respect to an insurance company that is a wholly owned subsidiary of the employer if the insurance company does no more than 5 percent of its business with the employer. Also, a bank, savings and loan, etc., could act as the trustee of a plan for its employees.

(iv) Some staff believe that banks and brokerage houses should be able to perform "multiple services" for plans, and some believe this should be allowed only under a variance procedure (and that any variance should be consistent with any action taken by Congress with respect to the securities laws, generally).

(v) The Revenue Code amendment transition rules would be applied to the Labor Code amendments.

(vi) The exercise of conversion privileges, (*e.g.*, conversion of bonds into stock) would be allowed, pursuant to regulations.

7. Additional Prohibited Transactions

House bill.—Fiduciaries may not: 53

(1) deal with plan assets for their own account; (111)

(2) receive any consideration for their personal accounts from any party dealing with the plan in connection with a transaction involving plan assets; or

(3) act in any transaction (in any capacity) involving a plan on behalf of a party whose interests are adverse to the interests of the plan, its participants, or their beneficiaries.

Senate amendment.—With respect to these prohibitions, the Labor Act amendments provide: 529

(1), (2) substantially the same as the House bill; (113)

(3) fiduciaries may not represent any other party with the plan or in any way act on behalf of a party adverse to the plan or adverse to the interests of its participants or beneficiaries.

The Revenue Code amendments provide: 540

(1), (2) Same as Labor Act amendments. (114, 149)

(3) No comparable provision.

Staff comment.—

(1), (2) The conferees may wish to adopt the House bill.

(3) The conferees may wish to provide that a fiduciary may not act in any transaction (in any capacity) involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan, its participants or beneficiaries.

55
(119)

8. Exceptions From Prohibited Transaction Rules

House bill.—

Notwithstanding the prohibited transaction rules, a fiduciary may:

(1) receive benefits from the plan as a participant or beneficiary as long as the benefits are consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receive reasonable compensation for services rendered to the plan unless the fiduciary receives full-time pay from the employer or employee organization whose employees or members are plan participants;

(3) receive reimbursement for expenses incurred;

(4) serve as an officer, employee, agent, etc., of a party-in-interest.

530, 541
(119, 150)

Senate amendment.—Both the Labor Act and Revenue Code amendments provide the following exceptions from the prohibited transaction rules:

(1), (2), (3) Substantially the same as the House bill.

(4) The Revenue Code amendments are substantially the same as the House bill; the Labor Act amendments do not include this exception.

(5) Loans by the plan to parties-in-interest who are plan beneficiaries or participants where the loans are available on a nondiscriminatory basis, are specifically allowed by the plan, and are at reasonable interest and adequately secured.

(6) Payment by the plan to parties-in-interest for reasonable compensation for office space and other services necessary to operate the plan.

(7) Following specific instructions and authorizations in the plan governing document providing they are consistent with all the other fiduciary rules.[6]

(8) In addition, the Secretaries of Labor and Treasury together may establish additional exemptions from the prohibited transaction rules for individual fiduciaries, for transactions, or for classes of fiduciaries or transactions. Such an exemption must (a) be administratively feasible, (b) be in the interest of the plan, and (c) protect the rights of participants and beneficiaries. Also, an exemption is to be estab-

[6] Following the governing document, but consistently with the bill, also is required by both the House bill and the Senate amendment.

lished (d) by rule or regulation, and (e) after public notice that an exemption may be established.

Staff comment.—

(1), (2), (3) The rules are substantially the same; the conferees may wish to follow the House bill.

(4) The conferees may wish to adopt the rules of the House bill, which are the same as the Senate Revenue Code amendments.

(5), (6) If the Senate prohibited transaction rules are adopted, the conferees may wish to provide these exceptions.

(7) The policy of the two bills is substantially the same.

(8) If the conferees agree to adopt the Senate amendment prohibited transaction rules, they may wish to agree to allow the administering Secretary to establish additional exemptions as under the rules of the Senate amendment. However, the conferees may wish to allow exemptions only as to classes of transactions, and not as to individual cases.

9. Civil Liability

House bill.— 56, 58

(1) Fiduciaries who breach any of their obligations under the bill are to be personally liable to the plan for losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to other appropriate equitable relief, including removal. (121, 124)

(2) Fiduciaries are not to be liable for any breach committed before they became fiduciaries or after they cease to be fiduciaries.

Senate amendment.—This provision is included only in the Labor Act amendment. 532, 533 (121, 124, 128)

(1), (2) Substantially the same as the House bill.

(3) Additionally, parties-in-interest who knowingly participate in a prohibited transaction, or had reason to know it was a prohibited transaction, are to be personally liable for losses sustained by the plan or for profits they realized from the transaction.

Staff comment.—

(1), (2) Substantially the same in both bills.

(3) The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest.*

10. Excise Tax on Prohibited Transactions

House bill.—The House bill does not impose an excise tax on parties-in-interest who engage in prohibited transactions.

*Not all the staff agree with this suggestion.

539 (149)

Senate amendment.—This provision is included only in the Revenue Code amendments.

(1) Parties-in-interest who participate in prohibited transactions are to be subject to a 5 percent excise tax on the amount involved in the transaction.

(2) This tax is to be imposed for the taxable year in which the prohibited transaction occurs and for each subsequent taxable year (or part of a year) in which it is not corrected.

(3) Additionally, if the transaction is not timely corrected after notice from the IRS, the party-in-interest is to be subject to a 100 percent excise tax on the amount involved in the transaction.

(4) These taxes are nondeductible and payment will not relieve parties-in-interest from their duties to the plan or from correcting the transaction.

Staff comment.—The conferees may wish to adopt the excise tax sanction on parties-in-interest who engage in prohibited transactions whether the prohibited transaction rules of the House bill or those of the Senate amendment are chosen.*

In addition, the conferees may wish to make the excise tax sanction applicable, on a voluntary basis, for all prior years where there has not been a final determination of a prohibited transaction issue for the plan in question. In such a case, the excise tax sanction would be a substitute for the current sanction of plan disqualification.

11. Cooperation Between Agencies

154 (378)

House bill.—

(1) The Secretary of Labor is authorized to make arrangements for cooperation with other government agencies.

Senate amendment.—

537 (378)

(1) The Secretaries of Labor and Treasury are required to make necessary arrangements for cooperation and mutual assistance to prevent duplication of efforts in investigating fiduciary violations.

(2) The Secretary of Labor, in conjunction with the Secretary of the Treasury, is to establish regulations to enforce the prohibited transaction rules.

Staff comment.—See Part One (page 47), Staff Comments Relating to Jurisdictional Matters, *Operational Stage Jurisdiction*, points (6) and (7), and footnote 5.

12. Civil Liability—Statute of Limitations

58 (126)

House bill.—

Civil actions against fiduciaries may be brought within the earliest of:

*There was not complete staff agreement on this point.

(1) 6 years after (a) the violation occurs, or (b) in the case of an omission, the latest date on which the violation could have been cured, or

(2) 3 years after (a) the plaintiff had actual knowledge of the violation, or (b) the date of filing of a report from which the plaintiff might reasonably have been expected to have obtained knowledge of the violation.

Senate amendment.—Under the Labor Act amendments, civil actions may be brought: 572 (126)

(1) within 5 years after the violation occurs.

(2) No comparable provision.

(3) In the case of fraud or concealment, civil actions may be brought within 5 years of the date of discovery of the violation.

(The present statute of limitations would govern the Revenue Code amendments (see sec. 6501, *et seq.*)).

Staff comment.—

(1), (2) The conferees may wish to adopt the rules of the House bill.

(3) The conferees may wish to adopt the rules of the Senate amendment, but allow civil actions to be brought within 6 years of the date of discovery of the violation in the case of fraud or concealment.

13. Civil Liability—No Exculpatory Agreements

House bill.— 58

(1) The bill provides that exculpatory agreements are void as against public policy. (125)

Senate amendment.—Under the Labor Act Amendments: 533 (125)

(1) Exculpatory agreements would not relieve fiduciaries from any responsibility established by the bill.

(2) However, there may be agreements to allocate responsibilities among fiduciaries, and insurance coverage may be allowed, subject to regulations.

(Exculpatory agreements would have no effect under the Revenue Act amendments.)

Staff comment.—

(1) Substantially the same in both bills.

(2) With respect to allocation of responsibilities, see Item 15, below.

(3) The conferees also may wish to provide that:

(a) A plan may purchase insurance to indemnify losses resulting from a fiduciary breach, with the insuror maintaining the right of subrogation against the persons causing such loss.

(b) A fiduciary may purchase insurance to cover his potential liability from and for his own account.

(c) An employer or an employee organization may purchase insurance to cover potential liability of one

or more of its employees or officers who serves in a fiduciary capacity with regard to an employee benefit plan.

14. Structure of Plan Administration—In General

50, 51, 57 (106, 107, 122)

House bill.—

(1) Plans are to be established in writing.

(2) Each plan is to provide for a plan administrator. Plan administrators are deemed to have full authority and responsibility to operate the plan, including the authority to amend the plan and establish a funding policy.

(3) Plan assets (except for certain annuity contracts guaranteed by an insurance company) are to be held in trust by trustees who are named in the governing instrument or appointed by the plan administrator.

(4) Trustees are to have exclusive authority and discretion to manage and control plan assets, subject to the direction of the plan administrator under the terms of the plan and except to the extent that management, etc., is delegated to investment managers.

(5) Plan administrators may employ investment advisers and investment managers for the plan.

525, 532 (106, 122)

Senate amendment.—

(1) The Labor Act amendments require plans to be established in writing.

(2) No comparable provision.

(3) Under the Labor Act amendments, plan funds are deemed to be held in trust.

(4), (5) No comparable provision.

Staff comment.—

(a) Both the House and Senate provisions require plans to be in writing.

(b) The conferees may wish to provide that each pension plan is to provide a procedure for specifying a funding policy and the allocation of responsibilities with respect thereto. In addition, each plan is to specify the procedure for amending the plan. Also, plans may provide for plan administrators, selected in a manner consistent with the definition of "plan administrator" (see Item 19, below).

(c) The conferees may wish to provide that plan assets generally are to be held in trust by trustees. However, the conferees may also wish to provide that trusts would not be required:

(i) generally for plans funded by certain individual or group annuity contracts guaranteed by an insurance company;

(ii) where the Secretary of Labor exempts plans from the trust requirement (The Secretary of Labor could exempt pension plans not subject to the vesting, funding, or termination insurance requirements of the

Act, and could also exampt any welfare plans.); and

(iii) for Keogh plans and individual retirement accounts to the extent that the plan assets are held in custodial accounts that qualify under the Internal Revenue Code.

(iv) However, the fiduciary standards of the bill generally are to apply to the plans described in (i), (ii), or (iii), even though their assets are not held in trust.

(d) Trustees generally are to have exclusive authority and discretion to manage and control plan assets. Also, the employer that sponsors the plan may establish an investment committee (composed of officers or employees of the sponsor employer), and may establish a committee to direct and supervise benefit payments.

(5) Investment advisers and managers could be employed by the plan.

15. Structure of Plan Administration—Allocation of Responsibilities

House bill.— 51, 57 (107, 122)

(1) Where there are co-trustees, each must use reasonable care to prevent the other from committing a breach and they are to jointly manage and control the plan assets.

(2) Responsibilities may be allocated among trustees by agreement and in this event only the trustees to whom responsibilities have been allocated are liable for surcharge, unless the other trustees participate knowingly in the activity committing the breach.

(3) Where investment managers are employed:

(a) Trustees are not to be liable for acts or omissions of investment managers, and

(b) A plan administrator is not to be liable for acts or omissions of investment managers if the administrator chose the manager in accordance with the general fiduciary standards of the bill.

Senate amendment.—Comparable provisions appear only in the Labor Act amendments. 525, 532 (122)

(1) Fiduciaries who jointly undertake a duty must prevent other such co-fiduciaries from committing a breach of duty.

(2), (3) No comparable provision.

(4) No fiduciary is liable for the act of another if he objects in writing to the act and files a copy of the objection with the Secretary of Labor.

(Under the Revenue Code amendments, if more than one party-in-interest is liable for excise taxes with respect to prohibited transactions, then all are to be jointly and severally liable.)

Staff comment.—The conferees may wish to provide as follows:

(a) If there are several trustees, each trustee is under a duty to participate in the administration of the plan and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust.

(b) Generally, a trustee is under a duty not to delegate to others the acts which the trustee can reasonably be required personally to perform.

(i) However, the trustee can, in administering the plan properly delegate the performance of certain kinds of ministerial acts; in this case, the trustee is to be liable for the acts of the agent where the trustee has engaged in a breach of fiduciary responsibility;

(ii) Also where a trustee has properly allocated his duties to co-trustees, he is under a duty to exercise general supervision over their conduct.

(iii) Where a trustee delegates his discretionary duties to agents of other persons, he will not relieve himself of any responsibility.

(c) A trustee is to be liable for a breach of trust committed by a co-trustee in the following circumstances:

(i) if he participates in a breach of trust committed by his co-trustee;

(ii) if he improperly delegates the administration of the trust to the co-trustee;

(iii) if he approves or acquiesces in or conceals a breach of trust committed by his co-trustee;

(iv) if, by his failure to exercise reasonable care in the administration of the trust; he has enabled his co-trustee to commit a breach of trust; or

(v) if he neglects to take proper steps to compel his co-trustee to redress a breach of trust.

(d) Fiduciaries are responsible for carrying out their own duties in accordance with the fiduciary standards of the bill.

(e) A fiduciary (including a trustee) is to be liable for a breach of fiduciary responsibility committed by a co-fiduciary in the following circumstances:

(i) if he participates in a breach committed by a co-fiduciary;

(ii) if he approves or acquiesces in or conceals a breach committed by his co-fiduciary; or

(iii) if, by his failure to exercise reasonable care in the administration of his fiduciary responsibilities, he has enabled his co-fiduciary to commit a breach.

16. Return of Contributions

52 *House bill.—*

(108) (1) An employer's contributions to a plan may be returned to him within one year if it (a) was made as a mistake of fact, or (b) was conditioned upon ap-

proval of tax deductibility and the deduction was not approved.

Senate amendment.— 526, 546

(1) No comparable provision. (107, 155)

(2) Under the Labor Act Amendments, plan assets remaining on dissolution or termination of a fund are to be distributed ratably to the beneficiaries or, if the trust agreement so provides, to the contributors.

(3) However, plan assets attributable to employee contributions are to be distributed ratably to employee contributors.

(Substantially the same rules apply under the Revenue Code amendments.)

Staff comment.—

(1)(a) The conferees may wish to adopt the rule of the House bill.

(1)(b) The conferees may wish to provide that an employer's contribution can be returned to him within one year after denial of qualification, if it was conditioned upon qualification of the plan.

(2), (3) The conferees may wish to adopt the rules of the Senate amendment.

17. Definitions—Party-in-interest

House bill.— 9, 13

(1) A party-in-interest is any administrator, officer, fiduciary, plan employee, employer with employees covered by the plan, persons in a controlled group with the employer, officers or employees or agents of the employer, employee organizations with members in a plan, officers or employees or agents of such organizations, relatives and partners of those persons, etc. (14, 23)

(2) However, where plan assets are invested in shares of a registered investment company, the investment does not by itself cause the company or the company's investment adviser or principal underwriter to be deemed to be a party-in-interest or fiduciary.

Senate amendment.—

The Labor Act amendments provide:

(1), (2) Under the Labor Act Amendments, the definition of "party-in-interest" is substantially the same as under the House bill. However, under the Senate amendment the term means persons who are "known" or who "should have been known" to be parties-in-interest.[1] 501 (14)

The Revenue Code amendments provide:

(1) The term "party-in-interest" is not the same as under the Labor Act Amendments. Under the Revenue Code amendments, "party-in-interest" does not include employees and agents, except for highly compensated employees (earning 10 percent or more of the wages 546 (156)

[1] Under the House bill, some prohibited transactions are limited to dealings with persons "known" to be parties-in-interest.

paid by the employer). Also, there is no "knowledge" requirement under the Revenue Code amendments. Additionally, the Revenue Code amendments specify the degree of ownership that will give a person "control" of a corporation, etc., or which will cause a corporation, etc., to be "controlled."

(2) Substantially the same as the House bill.

Staff comment.—

(1), (2) The conferees may wish to adopt the provisions of the Senate amendment, with modification of the "knowledge" rule.*

(3) With respect to Revenue Code amendments, if the excise tax prohibited transaction sanctions are chosen, the conferees may wish to follow the Revenue Code definition of party-in-interest in the Senate amendment.

18. Definitions—Fiduciary

13
(23)

House bill.—

(1) A fiduciary is a person who exercises any discretionary authority or control regarding management of plan assets or plan administration, and a person who renders investment advice for compensation or who has authority or responsibility to do so.

(2) A registered investment company that is not otherwise a fiduciary does not become a fiduciary merely because plan assets are invested in its shares.

497, 500
(23, 48)

Senate amendment.—

Under the Labor Act amendments:

(1) A fiduciary is a person who exercises any power of control, management, or disposition with respect to any moneys or property of a plan or has authority or responsibility to do so.

549
(159)

(2) Substantially the same as the House bill.

Under the Revenue Code Amendments.

(1), (2) Substantially the same as the Labor Act amendments, but a fiduciary is not subject to the excise tax unless he benefits from a prohibited transaction.

Staff comment.—

(a) The House and Senate provisions are substantially the same except with regard to a plan advisor. In this regard, the conferees may wish to include all persons who advise pension plans for a fee as fiduciaries.*

(b) The conferees may wish to provide that persons who advise pension plans for a fee are to be treated as parties-in-interest under the excise tax provisions.

*There was not complete staff agreement on this point.

19. Definitions—Plan Administrator

House bill.—A plan administrator is defined as: 10
(1) The person designated as administrator by the (17)
terms of the plan, or

(2) If there is no such designation, the employer or the employee organization, or the joint board where there is a multiemployer plan.

(3) Additionally, a plan administrator is any other person who has the authority to amend the plan or to compel action under the terms of the plan on the part of any of the above persons.

Senate amendment.—The Labor Act amendments 496
provide: (17)

(1), (2) Substantially the same as the House bill.

(3) No comparable provision.

(The term "administrator" does not appear to be relevant to the fiduciary provisions in the Senate amendment.)

Staff comment.—The conferees may wish to conform their decision with respect to this provision to the decisions made with respect to the structure of plan administration, Items 14 and 15 above.

20. Definitions—Investment Manager

House bill.—An "investment manager" is a fiduciary 20
(other than a trustee or administrator) who has the (44)
power to manage, acquire, or dispose of any plan assets, who is registered as an investment adviser (or is a bank), and who has acknowledged in writing that he is a fiduciary with respect to the plan.

Senate amendment.—The Senate amendment has no comparable provision.

Staff comment.—The conferees may wish to conform their decision with respect to this provision to the decisions made with respect to the structure of plan administration, Items 14 and 15 above.

21. Definitions—Adequate consideration

House bill.—(1) "Adequate consideration" for a se- 11
curity traded on a registered national exchange is (20)
the price on that exchange.

(2) For other securities, adequate consideration is at least the offering price established by current bid and asked prices quoted by independent persons.

(3) Where the asset is not a security with a generally recognized market, adequate consideration is the fair market value as determined in good faith by the trustee or administrator pursuant to the terms of the plan.

Senate amendment.—The Labor Act amendments 497, 500
provide: (20)

(1), (2) Substantially the same as the House bill.

(3) Where there is no price quoted by independent persons, adequate consideration is to be the fair value determined pursuant to rule or regulation.

(The term "adequate consideration" is not used in the Revenue Code amendments.)

Staff comment.—

(1), (2) Substantially the same under both bills.

(3) The conferees may wish to provide that where there is no generally recognized market maintained by independent persons for the asset, adequate consideration is fair market value as determined in good faith by the trustee or administrator pursuant to the terms of the plan and in accordance with regulations.

22. Bonding

47 (102) *House bill.*—

(1) Generally, a fiduciary of a plan must be bonded within a specified dollar limit.

(2) Domestic corporations which act as plan fiduciaries, are subject to supervision and examination by government authority, are authorized to exercise trust powers or conduct an insurance business, and have capital in an amount provided by regulations (at least greater than $500,000) are to be exempt from the bonding requirements.

Senate amendment.—The Senate amendment does not include any bonding provisions. (However, a similar bonding provision is now included in sec. 13 of the Welfare and Pension Plans Disclosure Act.)

Staff comment.—The conferees may wish to adopt the rules of the House bill. Also, the conferees may wish to provide for aggregate bonding for plan advisers, putting them in an equal competitive situation with respect to banks.

23. Prohibition Against Certain Persons Holding Office

66 (397) *House bill.*—

(1) A person who has been convicted of certain specified crimes is prohibited from serving as a plan administrator, officer, trustee, custodian, counsel, agent, employee or consultant for five years after conviction or after the end of imprisonment, unless his citizenship rights have been fully restored or the United States Board of Parole determines that his service would not be contrary to the purposes of the bill.

(2) However, corporations or partnerships are not to be prevented from acting as plan administrators, etc., without a determination by the Secretary of Labor that such service would be inconsistent with the intention of this provision.

(3) Violations are to be punished with a fine of up to $10,000 or imprisonment of up to one year.

(4) The provision does not apply to conviction for a crime committed before the date of enactment.

Senate amendment.— 535

(1) The Senate amendment provisions (which are in the Labor Act amendments) are similar to those of the House bill. However, there are differences between the bills in the crimes which will prevent a person from holding office. (139)

(2) No similar provision.

(3) Substantially similar to the House bill.

(4) No similar provision.

Staff comment.—

(1) The conferees may wish to add the Senate provisions to the House provisions, with respect to the crimes that will prevent a person from holding office. In addition the conferees may wish to allow a person to hold office before the end of the 5-year period, but only if the U.S. Board of Parole determines that his service would not be contrary to the purposes of the Act.

(2) The conferees may wish to adopt the House bill only with respect to partnerships, but provide that the determination is to be made by the U.S. Board of Parole.

(3) The House and Senate rules are substantially the same.

(4) The conferees may wish to adopt the approach of the Senate amendment so that the provision would apply to persons convicted of a crime committed before the date of enactment.

24. Advisory Council

House bill.— 69

(1) A 15-member advisory council on employee welfare and pension benefit plans is to be established to advise and submit recommendations to the Secretary of Labor; these recommendations also are to be transmitted to Congress. (142)

(2) The advisory council is to have members from insurance, corporate trust, accounting, actuary, management, labor, investment management, and multiemployer benefit plan fields, and three representatives from the general public. Members are to be appointed by the Secretary of Labor.

(3) The bill provides for clerical, etc., services for the Council, and provides for members' compensation and expenses.

(4) Additionally, the Secretary of Labor is to submit a report to Congress covering his activities with respect to pension and welfare plans.

522
(142)

Senate amendment.—The basic rules of the Senate amendment are similar to the rules of the House bill with differences in details as follows:

(1) The Council is composed of 21 members, no more than 11 from any one political party.

(2) The Senate amendment would require that there be members of the Council to represent investment counsellors (the House bill would require representation for investment managers); the Senate amendment would require representation of persons currently receiving pension benefits and the House bill would not; the House bill would require representation of multiemployer plans and the Senate amendment would not.

(3) The Senate amendment provides the term of years for council members (generally 3 years), and the House bill has no similar provision.

(4) The Senate amendment provides that a majority of members constitutes a quorum, and action may be taken only by a majority vote of those present; there is no similar provision in the House bill.

(5) There are minor differences with respect to compensation to be paid.

Staff comment.—

The conferees may wish to provide:

(1) The Council would be composed of 15 members.

(2) The Council would have 3 representatives of the general public (at least one must be currently receiving retirement benefits), 3 representatives of labor (at least one from a multiemployer plan), 3 representatives of management (at least one from a multiemployer plan), one representative from each of the fields of insurance, corporate trust, actuarial counseling, accounting, investment counseling, and investment management.

(3), (4) The conferees may wish to adopt the provisions of the Senate amendment.

(5) The bills are substantially the same.

25. Effective Dates

71
(145)

House bill.—

(1) The fiduciary responsibility provisions are to take effect six months after the date of enactment.

(2) However, a three-year period is provided to dispose of assets to meet the diversification requirements, and the Secretary of Labor may provide additional time by rule or regulation.

537, 553
(145, 163)

Senate amendment.—

(1) The Labor Act amendments are to become effective January 1, 1974, except for the prohibited transaction provisions which are to become effective January 1, 1975. The Revenue Code amendments are to take effect on January 1, 1975.

(2) A ten-year period is allowed for a plan to dispose of employer securities to meet the limitations in the bill.

(3) In addition, transition rules are provided with respect to the excise tax on prohibited transactions where plans are now engaging in activities which do not violate current law, but would be prohibited under the amendments. Ten-year transition periods are available for the lease or joint use of property and for loans between a plan and party-in-interest under an existing contract. Additionally, where property is now under lease or joint use and qualifies for the ten-year transition rule, it could be sold at arm's-length terms to a party-in-interest.

Staff comment.—

(1) The conferees may wish to adopt an effective date of January 1, 1975; they may also wish to provide that the present Welfare and Pension Plans Disclosure Act is to apply until the new rules apply.

(2) See item 6 above.

(3) If the prohibited transaction rules of the Senate amendment are adopted, the conferees may wish also to adopt the transition rules of the Senate amendment.

ENFORCEMENT—CIVIL AND CRIMINAL ACTIONS, PREEMPTION, ETC.

1. Criminal Penalty

House bill.[1]— 147

(1) Any person who willfully (a) violates any provision in title I, (b) makes any statement in any application, report, etc., required to be filed or kept under the title knowing it is false or misleading in any material respect, or (c) forges or counterfeits or passes as true any document knowing it was forged or counterfeited for the purpose of influencing the action of the Secretary of Labor is guilty of a crime. (353)

(2) Punishment may be up to $10,000 and five years' imprisonment for individuals, and the fine on other persons may be $200,000.

Senate amendment.—No comparable provisions (but see sec. 9(a) of the WPPDA which provides a $1,000 fine and six months' imprisonment for willful violation of the WPPDA).

Staff comment.—The conferees may wish to follow the Senate amendment, and preserve existing law, but also increase the maximum penalty to one year's imprisonment and a $5,000 fine for individuals, and a maximum fine of $100,000 for other persons.

[1] These provisions relate to enforcement, etc., through the Labor Department and appear only in title I.

2. Civil Sanction

148 (354) *House bill.*—If a plan administrator fails or refuses to furnish a participant or beneficiary a copy of the latest annual report, etc., within 30 days after a request for it then the administrator may be personally liable to the participant for up to $50 a day from the date of failure, in the discretion of a court and the court may also order such other relief as it deems proper.

Senate amendment.—No comparable provision. (However, existing sec. 9(b) of the WPPDA imposes a similar liability.)

Staff comment.—The conferees may wish to adopt the provisions of the House bill but increase the maximum payment to the participant to $100 a day.

3. Investigations

148 (355) *House bill.*—

(1) The Secretary of Labor may, where he has reasonable cause, enter such places, inspect such accounts, and question such persons as he deems necessary in order to determine whether any provision of title I has been or is about to be violated.

(2) The Secretary may require the filing of supporting schedules of information.

(3) The Secretary may publish and report on such investigations to any interested person or official.

(4) No comparable provision.

518 (355) *Senate amendment.*—

(1) Similar to the House bill. However, the Senate amendment does not require the Secretary to have "reasonable cause" before he may enter and inspect records and accounts, etc., but provides that there may be no more than one examination of books and records per year, unless the Secretary has reasonable cause to believe the Act was violated.

(2) Similar to the House bill.

(3) No comparable provision. (However, existing sec. 10 of the WPPDA has been interpreted by the Labor Department to provide similar authority.)

(4) The Secretary of Labor and the Secretary of the Treasury are to make arrangements needed to prevent duplication of effort regarding investigation of violations relating to fiduciaries.

Staff comment.—

(1) The conferees may wish to follow the Senate amendment and provide that the Secretary of Labor may inspect records and accounts and question such persons as he deems necessary in order to determine whether any provision of the Act has been or is about to be violated, but limit such inspection to once

annually unless the Secretary has reasonable cause to believe the act was violated. In addition, the conferees may wish to provide that the Secretary of Labor may enter such places as he deems necessary to determine the facts relative to an investigation, but only where he has reasonable cause (as under the House bill).

(2) The conferees may wish to adopt the approach of the House provisions.

(3) The conferees may wish to adopt the House provisions with the limitation that information may be made available only to persons who are actually affected by the matter which is the subject of an investigation.

(4) See Part One, Staff Comments Relating to Jurisdictional Matters, *Operational Stage Jurisdiction*, p. 47, footnote 5.

4. Subpoena Power; Delegation of Power

House bill.—The Secretary of Labor is given the same powers of subpoena as are given to the Federal Trade Commission. 149 (357)

Senate amendment.—Similar to the House bill. In addition, to the extent he considers appropriate, the Secretary is to delegate his auditing and investigation functions with respect to insured banks acting as fiduciaries to appropriate Federal banking agencies. 518 (357)

Staff comment.—The conferees may wish to adopt the approach of the Senate provision.

5. Civil Actions by Participants and Beneficiaries

House bill.—Civil actions may be brought by participants and beneficiaries: 150 (358)

(1) to receive payments on account of a plan administrator's failure to furnish an annual report, etc.;

(2) to recover benefits due under the plan;

(3) to clarify rights to future benefits under the plan;

(4) for relief from breach of fiduciary responsibility; and

(5) to enjoin any act or practice which violates title I.

Senate amendment.— 567, 569 (359)

(1) No comparable provision but see sec. 9(b) of the WPPDA.

(2), (3), and (4) Similar to the House bill.

(5) Participants and beneficiaries may bring suit to enjoin a fiduciary breach.

Staff comment.—

(1)–(4) The conferees may wish to adopt the approach of the House provisions.

(5) See Part One, Staff Comments Relating to Jurisdictional Matters, *Operational Stage Jurisdiction*, p. 47, point (8).

6. Civil Actions by Secretary of Labor

150, 152 (358, 375) *House bill.*—The Secretary of Labor may bring suit:

(1) for breach of fiduciary responsibility, and

(2) to enjoin any act or practice which violates title I.

(3) The Secretary of Labor may also intervene in actions brought under the Act by participants and beneficiaries.

568, 571 (358, 375) *Senate amendment.*—

(1) The Secretary may petition the court for an order requiring the return of assets transferred from the fund, requiring payment of benefits to a participant or beneficiaries, restraining conduct violating the fiduciary rules, and granting other appropriate relief, including removal of a fiduciary.

(2) The Secretary may bring suit when he believes that an employee's benefit fund is being or has been administered in violation of the Act or documents governing the fund.

(3) Similar to the House bill.

Staff comment.— See Part One, Staff Comments Relating to Jurisdictional Matters, *Initial Stage Jurisdiction*, p. 46, point (7), *Operational Stage Jurisdiction*, p. 46, points (1), (2), and (3); p. 47, points (7) and (8).

7. Arbitration

House bill.—No comparable provision.

566 (365) *Senate amendment.*—

(1) Each pension plan is to provide a procedure for review of disputes between the plan administrator and participants and beneficiaries and an opportunity for arbitration of disputes.

(2) Civil actions may be brought by participants or beneficiaries in lieu of submitting the dispute to arbitration.

(3) Arbitration is to be governed by sec. 301 of the Labor Management Relations Act.

(4) The cost of arbitration proceedings is to be paid by the plan, unless the arbitrator determines the participant's allegations are frivolous and assesses all or part of the cost to him.

(5) If a dispute is subject to procedures established by collective bargaining for resolution of the dispute, the Secretary of Labor may waive the requirement for arbitration if he determines these procedures are reasonably fair and effective.

Staff comment.—

(a) Some of the staff believe the Senate provisions should be adopted, and other staff believe they should not be adopted.

(b) Some of the staff have suggested the following alternative:

(i) each plan would be required to provide a claims procedure, and would be required to explain this procedure to plan participants and beneficiaries;

(ii) if a claim was denied under this procedure, the denial would have to be in writing with an explanation of the reasons for denial;

(iii) individuals who were receiving benefits under the plan would have a voice in the decision-making process with respect to claims against the plan;

(iv) the question of an arbitration proceeding would be studied by the congressional task force, which would study portability, etc.

(c) Some of the staff have suggested that if the Senate provisions are adopted, then the revenues from the excise taxes on underfunding and on prohibited transactions would be used, through the Department of Labor, to finance the arbitration costs incurred by plans.

(d) Some of the staff have suggested that if the Senate provisions are adopted, the ability to claim arbitration should be limited. Arbitration would be allowed where 10 percent of the plan participants or 10 participants, whichever is less, request an arbitration on a uniform issue or issues. In this case the plan would be required to consent to arbitration and the plan agreement must so provide.

8. Service of Process, etc.

House bill.— 150

(1) Service of summons, subpoena, or other legal (368)
process of a court upon a trustee or plan administrator will constitute service on the plan.

(2) A plan may sue or be sued as an entity.

Senate amendment.—No comparable provision.

Staff comment.—The conferees may wish to adopt the rules of the House bill. In addition, the conferees may wish to provide (in accord with the provisions of S. 4) that if the plan does not effectively designate someone as agent, the Secretary of Labor is to be designated as the agent for service of process on plans in civil actions arising out of this Act.

9. Money Judgment

House bill.—A money judgment under title I against 150
a plan is to be enforceable only against the plan as an (369)
entity and not against any other person, unless that person's liability is established in his individual capacity.

Senate amendment.—No comparable provisions.

Staff comment.—The conferees may wish to adopt the rules of the House bill.

10. Jurisdiction of Courts, etc.

150 (370)

House bill.—

(1) Civil actions under title I may be brought in any State or Federal court of competent jurisdiction.

(2) Where participants or beneficiaries bring actions with respect to breach of fiduciary responsibility or to enjoin an act or practice violating the Act, the action *must* be brought as a class action if the jurisdiction allows it and the requirements for a class action are not unduly burdensome in the circumstances.

(3) Where an action is brought in a U.S. District Court it may be brought in the district where the plan is administered, where the breach took place, or where the defendant resides or may be found; process may be served in any other district where a defendant resides or may be found.

568, 570 (358, 370)

Senate amendment.—

(1) Suits generally may be brought in the same courts as under the House bill, except that suits by participants and beneficiaries may be brought without respect to the amount in controversy and without regard to the citizenship of the parties.

(2) Suits for breach of fiduciary duty, to enjoin acts or practices violating the Act, and for benefits *may* be brought as class actions.

(3) Similar to the House bill.

Staff comment.—

(1) The conferees may wish to adopt the rules of the Senate bill, but not allow suit under title I to be brought in State court. (Suit brought in State court could be based on breach of contract, but suit could be removed, by either party, to Federal court in actions involving an interpretation of this Act.)

(2) The conferees may wish to adopt the rules of the House bill.

(3) The House and Senate rules are the same.

11. Labor Department Attorneys

152 (372)

House bill.—Attorneys appointed by the Secretary of Labor *may* represent the Secretary in civil actions, except as provided in 28 U.S.C. § 518(a) (relating to suits before the Supreme Court and the Court of Claims).

570 (372)

Senate amendment.—Attorneys appointed by the Secretary of Labor *shall* represent the Secretary, except as provided in 28 U.S.C. § 518(a).

Staff comment.—The conferees may wish to adopt the rules of the Senate bill.

12. Jurisdiction of District Courts.

House bill.— 152 (373)

(1) U.S. district courts are to have jurisdiction, without respect to the amount in controversy, in actions brought by the Secretary of Labor on account of breach of fiduciary duty, or to enjoin any act or practice which violates title I.

(2) In actions brought by participants or beneficiaries to recover benefits, on account of breach of fiduciary duty, etc., the jurisdiction of U.S. district courts is subject to the requirements of 28 U.S.C. § 1331 (relating to civil actions where the amount in controversy exceeds $10,000).

Senate amendment.— 568, 570 (358, 360)

(1) The Secretary of Labor may bring suit in U.S. district courts having jurisdiction of the parties (or the U.S. District Court for the District of Columbia) for orders requiring return of assets to a fund, payment of benefits to a participant, restraining conduct of fiduciaries, etc.

(2) Participants and beneficiaries may sue for benefits, or to clarify rights, in any Federal court of competent jurisdiction (or the U.S. District Court for the District of Columbia) without respect to the amount in controversy and without regard to the citizenship of the parties.

Staff comment.—

(1) The House and Senate rules are similar (except to the extent that title I violations would be subject to injunctive relief).

(2) The conferees may wish to adopt the rules of the Senate amendment.

13. Attorney's Fees, etc.

House bill.— 152 (374)

(1) In actions by participants or beneficiaries, the court may allow reasonable attorney's fees and costs to either party, at its discretion.

(2) Except as to actions brought to recover benefits and actions brought by the Secretary of Labor, no action may be brought except on leave of the court obtained on verified application and for good cause shown; the application may be made *ex parte*.

Senate amendment.—No comparable provisions.

Staff comment.—

(1) The conferees may wish to adopt the rules of the House bill.

(2) The conferees may wish to follow the approach of the Senate amendment, and not adopt the rules of the House bill.

14. Annual Report of Secretary of Labor

153 (376) *House bill.*—(1) The Secretary of Labor is to report annually to Congress regarding his administration of title I.

(2) The report is to include: (a) an explanation of variances granted, (b) a status report on any plan operating with a variance and its progress in achieving compliance with the Act, (c) the projected date for terminating the variance, and (d) information, recommendations, etc., for further legislation in connection with matters covered by title I as the Secretary finds advisable.

Senate amendment.—No comparable provision.

Staff comment.—The conferees may wish to adopt the rules of the House bill as to matters covered by or affecting matters in title I.

15. Cooperation With Other Agencies—by Secretary of Labor

154 (378) *House bill.*—(1) The Secretary of Labor may make arrangements or agreements for cooperation or mutual assistance in performing his functions under title I as he finds practicable and consistent with law.

(2) The Secretary of Labor may use, on a reimbursable basis, the facilities or services of any department, etc., of the United States with the lawful consent of such department, etc.

(3) Each department, etc., in the United States is directed to cooperate with the Secretary of Labor and to the extent permitted by law to provide him such information and facilities as he requests in performing his functions under title I.

(4) The Attorney General is to receive from the Secretary of Labor for appropriate action evidence which he develops that warrants consideration for criminal prosecution under Federal law.

495 (378) *Senate amendment.*—(1), (2), and (3) Substantially the same as the House bill.

(4) No comparable provision.

Staff comment.—

(1), (2), and (3) The rules are substantially the same.

(4) The conferees may wish to accept the rules of the House bill.

16. State Agencies

155 (380) *House bill.*—(1) The Secretary of Labor may, on the application of a State, authorize the State to require the filing of annual reports for plans which are exempt from filing

with the Secretary of Labor because they have fewer than 26 participants, etc.

(2) When authorization is granted, the State may reject the filing in the same manner as may the Secretary of Labor and may use the same remedies as the Secretary of Labor with respect to plans domiciled in that State.

(3) The Secretary of Labor may appoint a State as his agent for the purpose of maintaining civil actions with respect to breaches of fiduciary duty, or for enjoining actions or practices that violate title I with respect to plans exempt from filing with the Secretary of Labor, as described above.

(4) The Secretary of Labor may use to a limited extent, on a reimbursable basis, the facilities or services of any State or political subdivision thereof with the lawful consent of the State, etc.

Senate amendment.— 495

(1), (2), and (3) No comparable provisions. (378)

(4) The Secretary of Labor may use, on a reimbursable basis, the facilities of any State, with its lawful consent. Under this provision the State could investigate individual plans or classes of plans, etc.

Staff comment. —

(1), (2), and (3) The conferees may wish to adopt rules similar to those of the House bill with respect to plans that have been exempted from filing pursuant to a waiver by the Secretary of Labor. (See Part Two, Reporting and Disclosure—Labor Department, Item 3, *Staff comment*, page 26.)

(4) The conferees may wish to adopt the Senate amendment to the extent that it would allow State agencies to investigate classes of plans on behalf of the Federal Government, on a reimbursable basis and at the request of the Federal Government.*

17. Administrative Procedure—Department of Labor

House bill.—The Administrative Procedure Act is to be applicable to title I. 156 (381)

Senate amendment.—No comparable provision (but see sec. 17(a) of the WPPDA).

Staff comment.—The conferees may wish to adopt the rules of the House bill.

18. Administration—Department of Labor

House bill.—No employee of the Department of Labor is to administer or enforce title I with respect to any employee organization of which he is a member or employer organization in which he has an interest. 156 (382)

Senate amendment.—No comparable provision (but the same provision is in sec. 17(b) of the WPPDA).

Staff comment.—The conferees may wish to adopt the rules of the House bill.

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*There was not complete staff agreement on this point.

19. Appropriations—Department of Labor

156 (383) *House bill.*—There are authorized to be appropriated such sums, without fiscal limitation, as may be necessary to enable the Secretary of Labor to carry out his functions and duties under title I.

365 (383) *Senate amendment.*—There are authorized to be appropriated such sums as may be necessary to enable the Secretary of Labor to carry out his functions and duties under the Act.

Staff comment.—The conferees may wish to adopt the rules of the Senate bill.

20. Separability

156 (384) *House bill.*—If any provision of the Act, or the application of any provision, is held invalid, the remainder of the Act or the application of the provision to other persons and circumstances is not to be affected.

Senate amendment.—No comparable provision.

Staff comment.—The conferees may wish to adopt the rules of the House bill.

21. Interference With Rights

House bill.—

156 (385) (1) It is unlawful for persons to discharge, fine, discriminate against, etc., a participant or beneficiary for exercising any right under the plan or title I or to interfere with the attainment of any right to which he may become entitled.

(2) A person who violates this provision may be fined $10,000 and imprisoned for five years.

Senate amendment.—

575 (386) (1) Similar to House bill. In addition, the Senate amendment provides that it is unlawful to discharge, etc., any person because he has given information, has testified, or is about to testify in an inquiry or proceeding relating to this Act.

(2) A person who violates this provision may be fined $10,000 and imprisoned for 1 year.

Staff comment.—The conferees may wish to adopt the provisions of the Senate amendment, and also provide that they are to be effective on the date of enactment.

22. Coercive Interference

157 (386) *House bill.*—

(1) It is unlawful for a person through the use of fraud, force, violence, etc., to restrain, coerce, intimidate, etc., any participant or beneficiary for the purpose of interfering with or preventing him from exercising any right to which he is or may become entitled to under the plan or title I.

(2) Persons willfully violating this section may be fined $10,000 and imprisoned for one year.

Senate amendment.— 576
(1), (2) Same as the House bill. (385)

Staff comment.—The conferees may wish to adopt the provisions of the Senate amendment, and provide that they are to be effective on the date of enactment.

23. Registration of Pension Plans With Department of Labor

House bill.— 157
(1) Plan administrators of pension plans to which the vesting, funding, or termination insurance parts of title I apply must file an application for registration of the plan with the Secretary of Labor. (387)

(2) The filing is to be within 270 days after the beginning of the earliest plan year to which the vesting or funding sections first apply to the plan. If a plan is otherwise required to file before December 31, 1975, the Secretary may postpone the initial filing until that date.

(3) When the application is filed, the Secretary of Labor is to determine whether the plan is qualified for registration under this provision and if it is qualified, the Secretary will issue a certificate of registration for the plan.

(4) If the Secretary of Labor determines that a plan required to qualify under this provision is not qualified, he is to notify the plan administrator of the deficiencies in the plan, and he must provide the administrator, etc., a reasonable time to remove the deficiencies in the plan.

(5) If the Secretary determines the deficiencies have been removed, he is to issue or continue the certificate of registration. If, after a hearing, he determines the deficiencies have not been removed, he is to deny or cancel the certificate and take such further action as may be appropriate under the enforcement provisions of title I.

(6) A pension plan is qualified for registration under this provision if it conforms to and is administered in accordance with the provisions of title I applicable to the plan.

(7) The Secretary of Labor may provide, by regulation, for the filing of a single report satisfying the reporting and registration requirements of title I.

(8) Where a registered pension plan is amended after filing, the plan administrator is to file with the Secretary of Labor a copy of the amendment and additional information as required so the Secretary may determine if there is continued compliance with these provisions.

Senate amendment.—No comparable provision. (Generally, under the Senate amendment, the vesting,

funding, etc., provisions apply to tax-qualified plans and are administered by the Secretary of the Treasury. As a practical matter it is anticipated that almost all pension plans will apply for a determination letter from the Secretary of the Treasury to ensure that they have met the requirements of the law governing tax qualification.)

Staff comment.—See Part One, Staff Comments Relating to Jurisdictional Matters, *Initial Stage Jurisdiction*, p. 45, point (4), and p. 46, point (5).

24. Enforcement of Registration With the Secretary of Labor

159 (390) *House bill.*—

(1) The Secretary of Labor may take action under this provision when

(a) he determines that a pension plan has not filed an application for registration when an application is required,

(b) he issues an order denying or cancelling a certificate of registration of a pension plan, or

(c) he determines in the case of a pension plan subject to the funding provisions that there has been a failure to make required contributions, or to pay other fees as are required under title I.

(2) In these cases, the Secretary of Labor may petition any U.S. district court having jurisdiction of the parties (or the U.S. district court for the District of Columbia) for an order requiring the employer or plan administrator to comply with title I as to qualify the plan for registration, or to take any action required of plan administrators under the enforcement of funding provisions of title I.

Senate amendment.—No comparable provision.

Staff comment.—See Part One, Staff Comments Relating to Jurisdictional Matters, *Initial Stage Jurisdiction*, p. 45, point (4), and p. 46, points (5) and (6).

25. Preemption of State Law

160 (391) *House bill.*—

(1) It is declared to be the intent of Congress that the provisions of title I are to supersede all State laws as they may now or hereafter relate to the reporting, disclosure, and fiduciary responsibilities of persons acting on behalf of any employee benefit plan to which the reporting, disclosure, and fiduciary provisions of title I apply.

(2) It is declared to be the intent of Congress that the vesting, funding, and plan termination insurance provisions of title I are to supersede all State laws that may now or hereafter relate to (a) the nonforfeitability of participant's benefits in plans covered by the vesting and funding requirements, (b) the funding

requirements of such plans, (c) the adequacy of financing such plans, (d) the portability requirements, and (e) the insurance of pension benefits under such plans.

(3) No person is relieved or exempted from any State law that regulates insurance, banking, or securities.

(4) Nothing is to prohibit a State from requiring that reports required to be filed with the Secretary of Labor are to be filed with the State.

(5) No employee benefit plan subject to title I (other than a plan established primarily for the purpose of providing death benefits), or any trust established under such a plan is to be deemed to be an insurance company or other insurer, bank, trust company or investment company, or to be engaged in the business of insurance or banking for purposes of any law of any State regulating insurance companies, insurance contracts, banks, trust companies, or investment companies.

(6) Nothing is to prohibit a delegation of authority by the Secretary of Labor to an appropriate State agency (see above, Item 16).

(7) Nothing in title I is to be construed to alter, invalidate, supersede, etc., any law of the United States or rule or regulation issued thereunder, except with respect to the repeal of the existing WPPDA.

Senate amendment.—(1) and (2) It is declared to be the intent of Congress that the provisions of this Act and the WPPDA are to supersede all laws of the States as they may now or hereafter relate to the subject matters regulated by this Act or the WPPDA. However, this is not to be construed to exempt or relieve any employee benefit plan not subject to this act or the WPPDA from any State law. 573 (391)

(3), (4) Same as the House bill.

(5), (6) No comparable provision.

(7) Substantially the same as the House bill.

Staff comment.—(1), (2), (3), (4), (7) The conferees may wish to merge the provisions of the House bill and the Senate amendment.

(5) Some of the staff believe the House provision should be adopted and other staff believe it should not be adopted.

Some of the staff have suggested that the House provision be adopted for a limited period of time, such as 3 years, and that during this period, there should be a study by a joint Federal and State commission to determine whether preemption in this area should be continued for more than 3 years. It is suggested that the commission members be appointed by the President with the advice and consent of the Senate and

that the commission include representatives of State insurance commissioners, the Secretaries of Labor and Treasury, and representatives of labor, management, and the general public.

(6) The conferees may wish to adopt the rules of the House bill.

26. Preemption of State Law—Jurisdiction of State Courts

House bill.—No comparable provision.

574 (393) *Senate amendment.*—(1) The preemption provision is not to prevent a State court from asserting jurisdiction with respect to an action for accounting by a fiduciary during the operation or on the termination of an employee benefit fund.

(2) Also, State courts may assert jurisdiction in actions by fiduciaries requesting instructions from the court or seeking an interpretation of the trust instrument or document.

(3) In any action for accounting or instructions, the provisions of this Act and the WPPDA are to supersede all State laws as they relate to the fiduciary and reporting and disclosure responsibilities, except insofar as they may relate to the amount of benefits due under the plan.

(4) The Secretary of Labor or a participant or beneficiary of a plan affected by this provision may remove a State court action for accounting or instructions to a U.S. district court if the action involves interpreting fiduciary or reporting and disclosure responsibilities.

(5) The jurisdiction of a State court is conditioned on

(a) written notification to the Secretary of Labor identifying the parties to the action, etc.,

(b) evidence that participants and beneficiaries have been adequately notified regarding the action, and

(c) the right of the Secretary of Labor or participants or beneficiaries to intervene in the action as interested parties.

Staff comment.—The conferees may wish to follow the approach of the House bill and also provide that State court jurisdiction with respect to employee benefit plans is to extend only to contract actions.

27. Actions Brought by Administrator or Fiduciary against the Secretary of Labor

House bill.—No comparable provision.

572 (395) *Senate amendment.*—Suits may be brought by a plan administrator or fiduciary in the U.S. district

court to review a final order of the Secretary of Labor, to restrain the Secretary from taking an action contrary to the Act, or to compel action required under the Act.

Staff comment.—The conferees may wish to adopt the rules of the Senate amendment.

28. Rules and Regulations

House bill.— 153

(1) The Secretary of Labor is to prescribe such rules and regulations as he finds necessary or appropriate to carry out the provisions of title I. (377)

(2) The rules and regulations may define accounting, technical, and trade terms; may provide for the keeping of books and records; and may provide for the inspection of books and records.

(3) Regulations for purposes of vesting and funding are to be effective for plan years beginning after December 31, 1975, only if approved by the Secretary of the Treasury.

Senate amendment.— 494

(1) Similar to the House bill. (377)

(2) and (3) No similar provisions.

Staff comment.—

(1) The two provisions are substantially the same.

(2) The conferees may wish to adopt the rules of the House bill, specifically provide that the rules may define actuarial terms, and also provide that the Secretary's authority to issue regulations is not to be limited by the items specified.

(3) See Part One, Staff Comments Relating to Jurisdictional Matters, p. 45.

29. Reliance on Administrative Interpretations

House bill.—A person is not to be subject to criminal liability for failure to comply with the reporting and disclosure provisions of the bill if he proves he acted (a) in good faith, and (b) in conformity with, and reliance on, a regulation or written ruling of the Secretary of Labor.

Senate amendment.—No comparable provision. (However, sec. 12 of the Welfare and Pension Plan Disclosure Act includes similar provisions and applies them to civil as well as criminal liability.)

Staff comment.—The conferees may wish to provide that a person is not to be subject to civil or criminal liability for failure to comply with the reporting, disclosure, and bonding provisions of the act if he proves than he acted (a) in good faith and (b) in conformity with and in reliance on a written ruling or interpretation of the Act by the Secretary of Labor.

30. Studies

145, 250 (350, A-126)

House bill.—Title I contains points (1) and (2). Both title I and title II contain points (3), (4), and (5).

(1) Title I provides that the Secretary of Labor is to undertake studies relating to private pension plans, including the cost impact of the bill on pension plans, the role of pension plans in providing economic security, the operation of pension plans, and methods of encouraging the growth of the private pension system.

(2) In addition, title I provides that the Labor Department is to make its resources fully available to the Congress, in connection with the Congressional study of governmental plans.

(3) The Committee on Education and Labor and the Committee on Ways and Means are to undertake studies of retirement plans financed or maintained by the United States, or by State and local governments.

(4) The studies shall consider the adequacy of participation, vesting, and fiduciary standards, as well as financing methods. In determining whether the funding standards of the bill should be imposed on governmental plans, the studies shall take account of the taxing power of the governmental unit maintaining the plan.

(5) The two committees are to report the results of the governmental studies to the House of Representatives by December 31, 1976.

Senate amendment.—

421, 520 (A-126, 350)

(1) The Secretary of Labor is authorized to undertake appropriate studies relating to employee benefit plans which are generally similar to the studies provided for under title I of the House bill.

(2) Under the Senate amendment, qualified governmental plans are subject to the participation and vesting requirements (although the effective date for the vesting requirements is postponed until plan years beginning after December 31, 1980).

(3) The Secretary of the Treasury, or his delegate, is to study the extent to which pension plans established or maintained by the United States, or by any State or local government, are adequately funded. The study is to take account of the taxing power of the governmental units.

(4) The Secretary of the Treasury is to report the results of this study to the Committee on Finance and the Committee on Ways and Means by December 31, 1976.

Staff comment.—

(1) The conferees may wish to agree to the approach of the House bill, with the studies being for the pur-

pose of providing statistical information and analyses with regard to pension, profit-sharing, etc., plans. To the extent possible, such information should be analyzed by earnings levels of covered employees, size of plans, type of businesses in which the covered employees are engaged, and extent to which the plans provide for participation, vesting, and funding in excess of the minimum statutory requirements.

(2)–(5) The conferees may wish to consider agreeing to the approach of the House bill, with the following additions:

(a) The Treasury Department, as well as the Labor Department, is to make its resources available to the Congress.

(b) The studies are to be conducted by all four committees (i.e., the Senate Finance Committee and the Senate Committee on Labor and Public Welfare, in addition to the above-mentioned House committees).*

31. Employees of Labor Unions as Plan Participants

House bill.—Title II provides that in the case of a qualified multiemployer plan, the participation, discrimination, exclusive benefit, etc., requirements are to be applied as if all employers who are parties to the plan are a single employer. 19, 213, 218 (12, A-69, A-80)

Senate amendment.—The rules are essentially the same.

Staff comment.—While the House and Senate rules are essentially the same, the House rules may be preferred from a technical standpoint. (See also, Part One, Vesting, Item 8, *Staff Comment*, page 14.) 441, 627 (42, A-69, A-80)

In addition, the conferees may wish to provide that, following current labor law (established by court decisions), employees of labor unions and of plans may participate in a multiemployer plan (negotiated by the union on behalf of its members), and that in this case also the participation, discrimination, exclusive benefit, etc., requirements are to be applied on an overall plan basis and not on an employer-by-employer basis. However, the conferees may wish to limit this rule to situations where the union (or the plan) as an employer meets the general breadth-of-coverage requirements of the Internal Revenue Code.

*Not all of the staff agree on studies by each of the four committees