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SUPERFUND REFORM ACT OF 1994

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Mr. MOYNIHAN, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1834]

The Committee on Finance, to which was sequentially referred pursuant to the order of February 7, 1994, S. 1834, to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, having considered the same, reports favorably thereon with a committee amendment and recommends that the bill as amended do pass.

I. SUMMARY

S. 1834 reauthorizes the Hazardous Substance Superfund program. Title IX of the bill provides a revenue source for the present-law Superfund program (as modified and extended by the bill) and for a new Environmental Insurance Resolution Fund (the "EIRF") program created under Title VIII of the bill to resolve disputes between parties potentially responsible for cleanup of Superfund sites and their insurance companies.

Title IX, as reported by the Committee on Finance (referred to as the "committee amendment"), generally extends the four present-law taxes that fund the Superfund program through the year 2000. These taxes are: an excise tax on petroleum, an excise tax on listed hazardous chemicals, an excise tax on certain imported chemical substances, and a corporate environmental income

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tax. The committee amendment conforms the Superfund expenditure purposes to the program as modified in S. 1834.

The committee amendment further imposes two new excise taxes and a special assessment on certain property and casualty insurance policies to fund the EIRF program. The two excise taxes are (1) a retrospective tax calculated with respect to insurance premiums on polices issued during the period from which much of present litigation arises, and (2) a prospective tax imposed on future policies of certain types of commercial insurance. The special assessment is imposed as an excise tax on insurance companies and is based on coverage limits of policies issued by them with respect to which the EIRF makes awards.

In addition, the committee amendment establishes a new Environmental Insurance Resolution Trust Fund (the "Trust Fund") in the Internal Revenue Code. This Trust Fund is to receive deposits of the gross receipts from the new EIRF excise taxes and the special assessment. Amounts in the Trust Fund will be available to finance the new direct spending authorized for the EIRF program. Further, the committee amendment provides Federal income tax exemption for the EIRF.

II. Legislative Background

S. 1834 (the "Superfund Reform Act of 1994"), the Administration's Superfund reauthorization proposal, was introduced (by request) by Senators Baucus and Lautenberg, on February 7, 1994. The bill was referred to the Committee on Environment and Public Works and the Committee on Finance for matters within their respective committee jurisdiction. Title IX of S. 1834, as introduced, extends the four present-law Superfund taxes generally through December 31, 2000, and makes conforming amendments to the Superfund Trust Fund expenditure purposes to authorize expenditures for the revised Superfund program.

S. 1834 was ordered favorably reported, with amendments, by the Committee on Environment and Public Works on August 3, 1994, and the report was filed on August 19, 1994 (S. Rept. 103–349). Title VIII of the bill creates a new Environmental Insurance Resolution Fund (the "EIRF") to settle disputes between insurers and their policyholders concerning certain environmental cleanup costs. The Committee on Environment and Public Works did not amend Title IX ("Taxes") of the bill.

On August 17, 1994, the Administration submitted to the House Committee on Ways and Means a proposal[1] for funding the EIRF program. The proposal would impose two new excise taxes and a special assessment (also imposed as an excise tax under the Internal Revenue Code) on persons issuing or bearing risks under certain property and casualty insurance policies.

The Committee on Finance held a public hearing on the Superfund revenue proposals on September 14, 1994. In connection with that hearing, the Administration submitted to the Committee

[1] This proposal was a substitute for a prior Administration proposal that was submitted on May 20, 1994.

on Finance a revised funding proposal for the EIRF. Subsequent revisions to the proposal were transmitted by the Administration on September 23 and 26, 1994.

The Committee on Finance ordered reported a committee amendment in the nature of a substitute revenue title (Title IX, the "committee amendment") to S. 1834 on September 28, 1994. The new excise taxes and the special assessment imposed by the committee amendment are to be incorporated in Title IX of S. 1834 as the financing source for the new Environmental Insurance Resolution Fund program.

III. EXPLANATION OF THE COMMITTEE AMENDMENT

A. EXTENSION OF CURRENT SUPERFUND TAXES AND TRUST FUND (SEC. 911 OF THE COMMITTEE AMENDMENT AND SECS. 59A, 4611, 4661, 4671, AND 9507 OF THE CODE)

Present law

Four different taxes are imposed under present law to fund the Hazardous Substance Superfund (the "Superfund") program. These are in general:

(1) An excise tax on petroleum, imposed at a rate of 9.7 cents per barrel, on domestic or imported crude oil or refined products;

(2) An excise tax on listed hazardous chemicals, imposed at a rate that varies from $0.22 to $4.87 per ton (see Appendix A);

(3) An excise tax on imported substances that use as materials in their manufacture or production one or more of the hazardous chemicals described in (2) above (see Appendix B); and

(4) A corporate environmental income tax equal to 0.12 percent of the amount of modified alternative minimum taxable income[2] of a corporation that exceeds $2 million.

Amounts equivalent to the revenues from these taxes are dedicated to the Superfund Trust Fund, established in the Trust Fund Code of the Internal Revenue Code. Amounts in the Superfund Trust Fund generally are available for expenditures incurred in connection with releases or threats of releases of hazardous substances into the environment as described in paragraphs (1), (2), (5), and (6) of section 111(a), section 111(c) (other than paragraphs (1) and (2)), and section 111(m) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (as in effect on the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986).

Spending from the Superfund Trust Fund is discretionary spending and subject to the discretionary spending caps established in the Budget Enforcement Act of 1990.

In general, the Superfund taxes are scheduled to expire after December 31, 1995. However, the taxes will terminate before then if

[2] Modified alternative minimum taxable income is defined as a corporation's alternative minimum taxable income, but determined without regard to the alternative tax net operating loss deduction and the deduction for the corporate environmental income tax.

either (1) the obligated balance in the Superfund Trust Fund exceeds $3.5 billion on December 31, 1994, and the Treasury Department estimates that the unobligated balance will exceed $3.5 billion at the end of 1995 (assuming no Superfund taxes are imposed during 1995), or (2) the Treasury Department estimates that more than $11.97 billion of revenues from these taxes will be credited into the Superfund Trust Fund before January 1, 1996.[3]

Explanation of provision

In general, the committee amendment extends the present-law Superfund excise taxes on petroleum, chemicals, and imported substances through December 31, 2000, and the present-law corporate environmental income tax through taxable years beginning before January 1, 2001. However, these taxes will terminate before then if the unobligated balance in the Superfund Trust Fund exceeds $3.5 billion on December 31, 1998, or December 31, 1999, and if the Treasury Department estimates that the unobligated balance will exceed this amount at the end of December 31, 1999, or December 31, 2000, respectively, if no Superfund taxes are imposed during such year. Also, no further taxes will be imposed if the Treasury Department estimates that more than $22.0 billion of these taxes have been credited into the Superfund Trust Fund before January 1, 2001.

The Committee amendment further conforms the expenditure purposes of the Superfund Trust Fund to authorize expenditures for the purposes provided under the accompanying authorizing provisions of S. 1834 (as that legislation becomes effective on the date of enactment of the bill).

B. ENVIRONMENTAL INSURANCE RESOLUTION TRUST FUND AND EXCISE TAXES (SECS. 901 AND 902 OF THE COMMITTEE AMENDMENT AND NEW SECS. 4691–4698, 7479, AND 9513 OF THE CODE)

Present law

No Federal excise tax is imposed on premiums paid for casualty insurance or reinsurance issued by domestic insurers. A Federal excise tax is imposed on certain premiums for insurance issued by foreign insurers and reinsurers, including casualty insurance and reinsurance. The rate of tax with respect to casualty insurance is four cents per dollar of premiums paid, and with respect to reinsurance is one cent per dollar of premiums paid (sec. 4371).

Revenues from the present-law excise tax on premiums paid to foreign insurers and reinsurers are deposited in the General Fund of the Treasury. There is no trust fund or other fund for Federally sponsored settlement of private environmental insurance claims.

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[3] Cumulative Superfund tax receipts through December 31, 1993, totalled $8.939 billion. After consultation wit the Environmental Protection Agency ("EPA"), the Treasury Department determined that the unobligated balance in the Superfund Trust Fund as of September 30, 1993, was $1.625 billion.

Explanation of provision

Overview

S. 1834 establishes a new Environmental Insurance Resolution Fund (the "EIRF") to resolve disputes between potentially responsible parties (persons potentially liable for cleanup of Superfund sites) and their insurers regarding liability for cleanup of Superfund sites. Under this program, awards will be made to potentially responsible parties in an amount equal to a statutory percentage of eligible cleanup costs actually incurred. The percentages will vary from 20 percent to 60 percent, depending on the State in which the sites are located and the litigation venue for the various sites. Potentially responsible parties electing to receive payments from the EIRF must waive all claims against insurance companies with respect to Superfund sites.

S. 1834, as reported by the Committee on Environment and Public Works, does not include funding provisions for the EIRF. The committee amendment, however, funds the EIRF through two new excise taxes and a new assessment generally imposed with respect to commercial insurance. These taxes are designed to raise a total of approximately $810 million per year, and are imposed as follows:

Years 1–4 (1995–1998)

A retrospective excise tax based on certain insurance and reinsurance premiums written during the period 1968 through 1985 raises approximately 69 percent of projected total revenues during this four-year period. Under this tax, approximately 46 percent of total revenues ($374 million per year) is collected through imposition of the tax on net direct insurance premiums written and 23 percent of such revenues ($188 million per year) is collected through imposition of the tax on net reinsurance premiums written. The remaining 31 percent of revenues ($248 million per year) is raised by a prospective tax on premiums written for direct insurance during these years. The tax rates established under the committee amendment to raise these revenues during the four-year period are described below.

The following limits ("caps") apply to the taxes imposed during this four-year period: (1) the revenues from the retrospective tax on direct insurance may not exceed $1.496 billion ($374 million times four); (2) the revenues from the retrospective tax on reinsurance may not exceed $752 million ($188 million times four); and (3) the revenues from the prospective tax may not exceed $992 million ($248 million times four).

In addition, separate caps apply to the retrospective tax collections with respect to foreign and domestic reinsurers. During this four-year period, the revenues collected from the retrospective tax on net reinsurance premiums written by domestic reinsurers may not exceed $444 million ($111 million times four) and the revenues collected from the retrospective tax on net reinsurance premiums

written by foreign reinsurers may not exceed $308 million ($77 million times four).[4]

Years 5–10 (1999–2004)

During this six-year period, the portion of the retrospective tax imposed on direct insurance terminates, and is replaced by an assessment on direct insurers designed to raise approximately 11 percent of total revenues ($85 million per year). The portion of the retrospective tax imposed on reinsurance continues at the same rate that applies during 1995–1998; thus, this tax will continue to raise 23 percent of total revenues ($188 million per year). The prospective tax is imposed at an increased rate to provide the remaining 66 percent of total revenues ($537 million per year).

The following caps apply to the taxes imposed during this six-year period: (1) the revenues from the retrospective tax on reinsurance may not exceed $1.128 billion ($188 million times six); and (2) the revenues from the prospective tax cannot exceed $3.222 billion ($537 million times six). As in the first four years, a separate cap applies to the retrospective tax collections from foreign and domestic reinsurers. During this six-year period, the revenues collected from the retrospective tax on net reinsurance premiums written by domestic reinsurers may not exceed $666 million ($111 million times six) and the revenues collected from the retrospective tax on net reinsurance premiums written by foreign reinsurers cannot exceed $462 million ($77 million times six).

Tax rates

The tax rates imposed under the committee amendment are:

[Percentage]

	Years 1–4	Years 5–10
Retrospective tax:		
Direct insurance	0.22	NA
Reinsurance	0.48	0.48
Prospective tax	0.37	0.69

Dedication of revenues

The gross revenues from these excise taxes and assessments will be deposited in the Environmental Insurance Resolution Trust

[4] The Administration believes, and the committee concurs, that the provisions of the committee amendment relating to foreign insurers and reinsurers are not inconsistent with the obligations of the United States under any existing income tax treaty or trade agreement or under the proposed General Agreement on Trade in Services. Foreign insurers and reinsurers are, or may elect to be, subject to the same taxes under the committee amendment as domestic insurers or reinsurers. Any differences in treatment between domestic and foreign insurers or reinsurers are the minimum differences necessary, in the view of the Administration and the committee, to ensure effective collection of tax and are not intended to place foreign insurers and reinsurers at a competitive disadvantage compared to domestic insurers and reinsurers. For example, aggregate liability for the retrospective tax is capped at separate levels for domestic and foreign reinsurers, set in proportion to the respective U.S. market shares of the domestic and foreign reinsurers during the years to which the tax relates, as determined on the basis of the best available data. In addition, the Administration believes, and the committee concurs, that any withholding taxes imposed under new Code sections 4694(f) and 4695 do not constitute covered taxes under any U.S. income tax treaty.

Fund (the "Trust Fund"), a new trust fund established for this purpose in the Trust Fund Code of the Internal Revenue Code (as discussed further below).

Retrospective tax

In general

The retrospective tax is imposed on any "assessable person" that engages in a trade or business (whether or not related to the current issuance of insurance) during the calendar year.[5] The retrospective tax is based on the net premiums written for direct insurance and reinsurance by the assessable person (or certain predecessors in interest) during the 18-year period from January 1, 1968, through December 31, 1985 (the "base period"), with respect to certain "qualified commercial policies" (and allocated reinsurance thereof) and certain "unallocated reinsurance", as discussed below. For purposes of determining the retrospective tax (and exemption amounts), the net premiums written in each base-period year are indexed for inflation and restated in 1985 dollars.

These inflation adjusted base-period premiums from direct insurance and from reinsurance are hereinafter referred to as "net direct base-period premiums" and "net reinsurance base-period premiums," respectively.

In general, a qualified commercial policy means any insurance policy: (1) with respect to hazards, risks, losses, or liabilities wholly or partly within the United States;[6] and (2) the premiums for which were reported in the applicable annual statement[7] (or would have been reported had an annual statement been filed) as relating to the commercial multiple peril or the "other liability" line of business. A qualified commercial policy, however, does not include any policy for which premiums were required to be reported as relating to the "other liability" line of business, if the policy either (1) did not provide any commercial coverage, or (2) did not provide any comprehensive general liability coverage or any environmental liability coverage. For example, premiums related to medical malpractice coverage are excluded; however, premiums related to commercial property damage insurance are not excluded from either the commercial multiple peril or the "other liability" line of business.

The retrospective tax on direct insurance generally is determined by multiplying 0.22 percent by the total net direct base-period premiums written by the assessable person (or certain predecessors in interest) in excess of an exemption amount of $200 million (subject to phase-out and related party provisions, discussed below). After

[5] A person is treated as engaged in a trade or business if a related person is engaged in a trade or business. For this purpose, related persons are persons treated as a single employer under Code sections 52 (a) and (b) (as determined on a worldwide basis).

[6] For purposes of the excise taxes and the assessment under the committee amendment, the United States generally includes Puerto Rico, and U.S. possessions and territories. The term "United States person," however, has the meaning in Code section 7701. Thus, for purposes of determining whether a person is a "United States person," the term "United States" does not include Puerto Rico, or U.S. possessions and territories.

The committee amendment provides that no amount of the EIRF excise tax or assessment revenues will be covered over to the treasury of any U.S. possession.

[7] The annual statement is the financial statement filed for State regulatory purposes, on the form approved by the National Association of Insurance Commissioners. The annual statement shall include any supporting documents filed at such time with the State.

1998, the retrospective tax is no longer imposed on direct insurance. For reinsurance, the retrospective tax generally is determined by multiplying 0.48 percent by the total net reinsurance base-period premiums written by the assessable person (or certain predecessors in interest).[8]

In general, the retrospective tax is imposed on a calendar-year basis and is payable in equal monthly installments during the calendar year. The monthly installments are due no later than the last day of each month.

Assessable person

An assessable person generally is defined as any person that has net direct base-period premiums or net reinsurance base-period premiums during the base period, and that is either (1) a United States person, or (2) any other person (a) that is engaged in a substantial trade or business within the United States during the calendar year and has substantial assets situated in the United States,[9] and (b) whose taxable income effectively connected with such trade or business is not exempt from net basis U.S. income tax under a treaty. For example, an assessable person includes a resident of a treaty country that has a permanent establishment in the United States.

Determination of net premiums written

The retrospective tax on direct insurance is imposed on the net premiums written during the base period from any qualified commercial policy providing direct insurance. The retrospective tax on reinsurance is imposed on the net premiums written during the base period from allocated reinsurance of any qualified commercial policy,[10] and 33 percent of the net premiums written during the base period from unallocated reinsurance.[11] For this purpose, premiums from reinsurance between members of certain "controlled groups" are treated as direct premiums rather than reinsurance premiums.[12] Also, in certain cases involving an agency relationship whereby an insurer who sells direct insurance must place such insurance with a reinsurer and such reinsurer must take any such

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[8] No exemption amount generally applies with respect to reinsurance. However, the Treasury Department has the authority to exempt base-period reinsurance premiums of a de minimis amount. In no case can the total net reinsurance premiums written for the base period be less than zero.

[9] The substantiality provisions were added by the committee as an anti-abuse measure to ensure that a foreign insurer or reinsurer that, by reason of engaging in a U.S. trade or business, is relieved of its obligation to either pay the alternative foreign excise tax or enter into a closing agreement (as described below) has assets subject to U.S. taxing jurisdiction that are substantial in relation to its liability for the retrospective tax and the assessment on direct insurers.

[10] Allocated reinsurance is any reinsurance for which the net premiums written were reported on the underwriting and investment exhibit of the annual statement (or would have been reported had an annual statement been filed) as relating to a specific line of business (i.e., other than the reinsurance line of business).

[11] Unallocated reinsurance is any reinsurance other than allocated reinsurance. During the base period, insurers could report net premiums written from reinsurance on a separate line for reinsurance and were not required to allocate such premiums by lines of business on the annual statement. The 33-percent rule applicable to this unallocated reinsurance is intended to approximate the amount of allocated reinsurance attributable to the commercial multiple peril and other liability lines of business.

[12] This determination is made as of the time that the relevant premiums were written. For this purpose, "controlled group" means all persons treated as a single employer under section 52(a) (as determined on a world wide basis).

reinsurance placed by the direct insurer, the Treasury has the authority to recharacterize such reinsurance premiums as direct premiums in order to reflect that, in substance, the premiums were directly written.

Net premiums written are only subject to tax to the extent that they are attributable to the coverage of United States risks. For policies covering both U.S. and foreign risks, where adequate documentation does not exist with respect to such policies, the committee intends that the Treasury Department will allow insurers to use any reasonable method, consistently applied, for allocating net premiums written to the coverage of U.S. risks.

The determination of the net premiums written for a year generally is based on the underwriting and investment exhibit of the annual statement filed for that year.[13] If no annual statement was filed for a given year, the net written premiums are determined on a basis consistent with the annual statement requirements applicable to such year. A person that was not required to file such a statement is treated as meeting the foregoing consistency requirement if it establishes to the satisfaction of the Secretary that, despite its best efforts, it has inadequate records to make determinations consistent with the annual statement reporting requirements,[14] and it provides a reasonable estimate, acceptable to the Secretary, of its determination of net premiums written. In considering whether a person's determination is reasonable, the Treasury may take into account the effort and expense required to obtain the information necessary to calculate base-period commercial net premiums, and the extent to which the necessary information is available from the person's records maintained in the normal course of business.

During the base period, ceded reinsurance was not required to be separately reported on the annual statement for purposes of determining the net premiums written for direct insurance and the net premiums written for reinsurance. Accordingly, the committee intends that taxpayers reduce premiums for direct insurance by the amount of any cession of the directly written insurance and that taxpayers reduce premiums for reinsurance by the amount of any retrocession of the reinsurance. In determining the net premiums written from direct insurance and from allocated reinsurance, actual identification of the insurance to which the ceded premiums relate is required. However, a reasonable and consistent allocation method acceptable to the Treasury Department will be permitted if the Treasury Department determines that actual identification is not feasible.

[13] If more than one annual statement was filed in a given year, the determination is based on the annual statement filed with any State that reports and identifies in the annual statement (and any supporting documents filed at such time with the State) the relevant premiums most specifically by line of business. For example, if on one annual statement, reinsurance premiums are reported in the reinsurance line of business, and, on a different State's annual statement, reinsurance premiums are allocated to specific lines of business, the second annual statement is applicable for determining net premiums written.

[14] To determine whether a taxpayer has adequate records, Treasury may take into account statements filed with foreign regulatory authorities, records relating to the insurance premiums excise tax imposed by Code section 4371, and currency records.

Special rules apply for determining a person's net premiums written during the base period where the person has engaged in acquisitions of dispositions, assumption reinsurance transactions, commutation of reinsurance, or other similar transactions.

Exemption amount

As stated above, each insurer generally receives an exemption amount of $200 million with respect to net direct base-period premiums. The exemption amount phases out dollar-for-dollar for every dollar of net direct base-period premiums written by the taxpayer (or related parties) in excess of $200 million. Thus, the exemption amount is completely phased out for any insurer having net direct base-period premiums of at least $400 million.

Related parties must share one exemption amount (reduced by the phase-out, if applicable). In the case of such related parties, the exemption amount is allocated to each such party in proportion to its respective total net direct base-period premiums. For this purpose, related parties are (1) persons treated as a single employer as of February 2, 1994, under Code sections 52 (a) and (b), as determined on a worldwide basis, and (2) persons participating in certain joint underwriting operations as of February 2, 1994.[15]

For example, if related parties had $275 million of inflation-adjusted net direct premiums written during the base period, such parties would share one exemption amount of $125 million (i.e., the $200 million exemption amount minus the $75 million phaseout).

Alternative tax on foreign insurance

A foreign person[16] that is not an assessable person, and that therefore is not liable for the retrospective tax, generally is subject to an alternative excise tax imposed on a prospective basis (herein referred to as the "alternative foreign excise tax"). The alternative foreign excise tax generally is imposed as a withholding tax on (1) any casualty insurance policy that covers hazards, risks, losses, or liabilities wholly or partly within the United States, and (2) any reinsurance policy with respect to such an insurance policy.[17] For this purpose, a casualty insurance policy is any insurance policy other than any "policy of life, sickness, or accident insurance, or annuity contract" as defined in Code section 4372(e).

The alternative foreign excise tax is an amount equal to one-half of one percent (0.5%) of the maximum limit of liability of the foreign insurer under the policy.[18] However, the total liability for the alternative foreign excise tax and the prospective tax, if any, with

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[15] For this purpose, certain joint underwriting operations are treated collectively as one entity. The committee intends that this provision cover all persons participating in joint underwriting operations that are subject to a closing agreement as of February 2, 1994.

[16] A foreign person is defined as any person other than a "United States person."

[17] The tax, however, will not be imposed on a policy of reinsurance covering a risk with respect to which the foreign reinsurer can demonstrate that the tax previously has been paid on a policy covering the same risk within the United States. For example, if a British insurer ceded a portion of a direct insurance policy or reinsurance policy covering U.S. risks to a German reinsurer, the German reinsurer would not be liable for the tax if it could demonstrate that the tax previously had been withheld and remitted with respect to the policy issued by the British insurer.

[18] If a policy covers risks both within and outside the United States, the maximum limit of liability is determined on the policy as a whole and not just on the portion attributable to U.S. risks. To avoid this result, a taxpayer may write separate policies covering the U.S. risks and the foreign risks.

respect to a transaction is limited to the total amount of premiums written and other consideration with respect to such transaction.

The term "maximum limit of liability" generally is defined as the total amount for which the foreign insurer (or reinsurer) would be liable if each person entitled to recover from the insurer (or reinsurer) under the policy were simultaneously entitled to the maximum recovery allowed under the policy. The maximum limit of liability under a policy is reduced by an amount of deductibles and self-insured retentions, but is not reduced by the amount of any reinsurance.

All persons having control, receipt, custody, disposal, or payment of any premium or other amount under the policy subject to the tax are personally liable for withholding and remitting the tax to the Treasury Department.

Foreign persons that are not assessable persons may elect to be subject to the retrospective tax and the assessment on direct insurers in the same manner as an assessable person (see discussion above), instead of the alternative foreign excise tax. Electing parties generally are required to enter into a closing agreement with the Treasury Department. The closing agreement must contain such provisions as the Treasury determines are necessary to ensure proper computation and payment of the retrospective tax and the assessment imposed on direct insurers. A closing agreement may not be entered into with any foreign person unless the foreign person establishes to the Treasury's satisfaction that all persons which are, or become, related to the foreign person and which have net direct base-period premiums or net reinsurance base-period premiums are also subject to the agreement.

Pending execution of such a closing agreement, the alternative foreign excise tax does not apply to any premium written by a foreign person if the following conditions are met: (1) the foreign person has in effect a binding election (meeting requirements prescribed by the Treasury) to be treated as an assessable person; (2) the person has posted a bond or other security (in the manner and amount required by the Treasury Department); and (3) the person satisfies such other requirements as the Treasury may impose, including but not limited to the waiver of treaty benefits and providing access to book and records. This exception applies only with respect to premiums written after the date that the foreign person has met the three requirements for the preliminary election described in this paragraph.

If a closing agreement is not finalized in a timely manner, the foreign person will be liable for the alternative foreign excise tax accruing from the date that the preliminary election was effective, together with any interest, penalties and additions to tax.[19] The Treasury may apply any security provided by the foreign person against the liability of the foreign person for such amounts.

In the case of a foreign insurer or reinsurer that is not subject to U.S. income tax on a net basis, that seeks to enter into a closing agreement with the Internal Revenue Service with respect to the retrospective tax and assessment, but that does not in fact enter

[19] Withholding agents are not liable for any amount of the excise taxes under Title IX that have become due with respect to prior transactions (that occurred after the date the preliminary election was effective) if the foreign insurer or reinsurer fails to conclude a closing agreement.

into a closing agreement, the committee amendment generally permits such an insurer or reinsurer to bring a declaratory judgment action in the Tax Court with respect to its retrospective tax liability. The taxpayer must exhaust administrative remedies in the manner required by the statute prior to seeking a declaratory judgment. If the court finds that the Internal Revenue Service's failure to approve the taxpayer's last written proposal was clearly unreasonable, it is to determine the taxpayer's liability for the retrospective tax on the basis of the taxpayer's last written proposal. If the court finds that the Internal Revenue Service's failure to approve the taxpayer's last written proposal was not clearly unreasonable, it is to determine the taxpayer's liability on the basis of the Internal Revenue Service's last written proposal (or, where the Internal Revenue Service made no written proposal, on the basis of the administrative record). The committee believes that it would not be clearly unreasonable, for example, for the Internal Revenue Service to fail to approve a proposal submitted without supporting documentation or other information that would enable it to evaluate the proposal. The committee expects that the Internal Revenue Service will be given a reasonable period of time to evaluate a written proposal before it is considered to have failed to approve the proposal. All judicial determinations are to be based solely on the administrative record.

A foreign person is not subject to the retrospective tax or the alternative foreign excise tax and thus need not enter into a closing agreement if such person establishes to the satisfaction of the Treasury Department that it (and any related persons) did not have net direct base-period premiums or net reinsurance base-period premiums (in excess of any applicable exemption amount). This exception to the alternative foreign excise tax terminates at such time, if any, that (1) the foreign person is found to have an assessable policy under the assessment on direct insurers, described below, or (2) the foreign person (or a related person) has net direct base-period premiums or net reinsurance base-period premiums written subject to the retrospective tax, in excess of any applicable exemption amount.[20]

Prospective tax

In general, the prospective tax is imposed on the direct premiums written by an insurer after December 31, 1994, with respect to certain commercial insurance policies that cover hazards, risks, losses, or liabilities wholly or partly within the United States.[21] The tax rate is 0.37 percent during the period January 1, 1955 through December 31, 1998, and 0.69 percent thereafter.[22]

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[20] Failure to enter a closing agreement at such time (and as to any assessable policies) renders the alternative foreign excise tax applicable to the foreign person.

[21] Thus, if a policy covers risks both within and outside the United States, the direct premiums written are determined with respect to the policy as a whole and not just on the portion attributable to U.S. risks. The committee believes that an allocation provision such as that included in the retrospective tax is unnecessary for the prospective tax. In writing the premiums to which the prospective tax applies, insurers generally will have the opportunity to take the prospective tax rules into account. The committee intends, however, that the Treasury Department may aggregate such separate policies in abusive situations.

[22] The effective date for application of the prospective tax to foreign insurers (as to which the tax is required to be withheld) is delayed until the end of the contingency period in Title VIII of S. 1834. Accordingly, the tax rate applicable to foreign insurers is 0.37 percent for the first 48 months following the delayed effective date and 0.69 percent thereafter.

Taxpayers generally are permitted an exemption amount of $5 million of direct premiums written per year. However, certain related parties are entitled to only one exemption amount, which they may allocate among themselves. For this purpose, related parties are (1) all persons treated as a single employer under Code sections 52(a) and 52(b) (as determined on a worldwide basis), and (2) all persons participating in any joint underwriting operation of insurance managed by one or more managing underwriters whereby they assume a portion of the business written and take into account the premiums, losses, expenses, and profits attributable to their participation.[23]

Covered lines of business

The lines of business that are subject to the prospective tax under the committee amendment are: fire, allied lines, commercial multiple peril, farmowners multiple peril, ocean marine, inland marine, products liability, other liability, commercial auto no-fault, other commercial auto liability, commercial auto physical damage, aircraft, surety, glass, burglary and theft, and boiler and machinery. Thus, lines of business that are not subject to the prospective tax (under current annual statement classifications) are: multiple peril crop, homeowners multiple peril, financial guaranty, mortgage guaranty, medical malpractice, earthquake, accident and health, workers' compensation, private passenger auto no-fault, other private passenger auto liability, private passenger auto physical damage, fidelity and credit.

The lines of business described above are based on the exhibit of premiums and losses for the 1993 form of the annual statement as approved by the National Association of Insurance Commissioners. The Treasury Department generally may not expand the lines of business subject to the prospective tax. The Treasury Department, however, is granted authority to preserve the inclusion of premiums for types of coverage intended to be subject to the prospective tax. For example, Treasury has the authority to respond to changes in the lines of business as listed on the 1993 annual statement form in subsequent years. This authority does not extend to the inclusion of any reinsurance coverage.

Premiums written for the following types of insurance policies are not subject to the prospective tax, even though the premiums for such policies are required to be reported on the annual statement as relating to a covered line of business: (1) directors and officers liability, (2) professional liability, (3) property damage and liability insurance for fire, other perils, or extended coverage of residential or farm owner-occupied housing units, (4) personal liability umbrella, (5) personal articles, (6) boats and aircraft held predominately for personal, nonbusiness use by the owner, and (7) property

[23] For this purpose, certain joint underwriting operations are treated collectively as one entity. The committee intends that this provision will cover all persons participating in joint underwriting operations that are subject to one closing agreement as of February 2, 1994.

damage and liability coverage purchased by associations of owners of condominiums held as personal residences.[24]

Determination of direct premiums written

The determination of direct premiums written for a year generally is based on the exhibit of premiums and losses of the annual statement for that year.[25] However, regardless of annual statement requirements that might be subject to change or different interpretation, and in the case of persons not required to file an annual statement, direct premiums written generally include the gross amount of premiums and other consideration, including advance premiums, deposits, fees, and assessments for a policy issued by a direct writer of insurance, increased or decreased for any return or additional premiums as a result of endorsements, cancellations, premium audits, or retrospective rating.

Administrative matters

The taxable period for the prospective tax is a calendar quarter;[26] however, estimated monthly deposits are required to be made by the 14th day following the end of the month in which the premium is included in direct premiums written. No deposits of tax are required, however, until such time as, and only to the extent that, the direct premiums written during the calendar year exceed the exemption amount.

A special withholding rule applies to policies issued by a foreign person unless the income from the premiums (or from other amounts paid for such policies) is effectively connected with a U.S. trade or business and is not exempt from net basis U.S. income tax under a treaty. Under this special rule, the tax generally must be withheld and remitted to the Treasury Department by any person who has control or custody over any payment of any premium or other amount under the policy. A person that fails properly to withhold and remit the tax is personally liable under that person can establish to the satisfaction of the Treasury that withholding is not required with respect to the foreign insurer.

Assessment on direct insurers

Beginning on January 1, 1999, a portion of the EIRP's revenues will be raised by an assessment on direct insurers (imposed as an excise tax under the Internal Revenue Code). The assessment imposed on a particular insurer is based on the EIRF awards paid with respect to policies issued by the insurer (or certain predecessors in interest) during a prescribed prior period. Each direct insurer's assessment is determined annually.

The assessment is determined by multiplying an insurer's annually-determined "EIRP-certified percentage" by $85 million. The EIRF-certified percentage of each insurer is determined by dividing

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[24] The committee understands that title insurance is not reported on the exhibit of premiums and losses of the annual statement form used for purposes of the prospective tax and intends that title insurance not be subject to the prospective tax.

[25] If an annual statement is not filed for such year, the determination of direct premiums written is made on a basis consistent with the annual statement requirements for such year.

[26] Quarterly returns (and any unpaid tax for the quarter) are due no later than the 30th day following each calendar quarter.

the coverage limits on all assessable direct policies of that insurer by the aggregate coverage limits on all such policies of all direct insurers. Generally, the coverage limit of an assessable direct policy is the aggregate limit on coverage under the policy. Special rules determine the coverage limit of a policy for which coverage is expressed (1) in annual limits; (2) on a per occurrence basis without an aggregate, or annual limit; or, (3) as excess coverage without an aggregate, annual, or per occurrence limit. In all cases, the coverage limit of a policy is determined without regard to deductibles or any self-insured retention.

An assessable direct policy is an insurance contract (1) that has been presented to the EIRF in connection with a claim for an award, (2) that the EIRF has determined to be a valid contract, and (3) with respect to which the EIRF has made one or more resolution payments to an eligible party (e.g., a potentially responsible party) during any of the four calendar years preceding the year in which the assessment is imposed.

The EIRF is required to identify to each insurer its assessable direct policies for each year, and to permit the insurer to identify which, if any, of those policies were reinsured. The coverage limit of any assessable direct policy generally is reduced by 80 percent of the amount of any reinsurance.[27] This reduction also is reflected in the aggregate limits on all assessable direct policies for purposes of determining the EIRF-certified percentage.

The ERIF is required to determine the EIRF-certified percentages and to report them to the Treasury Department no later than August 1 of each calendar year in which the assessments are to be imposed. The Treasury Department then is required to notify insurers of the amount of their assessments, which are payable no later than September 30 of each year.

The determinations made by the EIRF of EIRF-certified percentages are not subject to judicial review. Similarly, the EIRF-certified percentages are not subject to review by the Department of the Treasury in any administrative proceeding.

Regulatory authority

The committee amendment provides that each person liable for the taxes that fund the EIRF is to make such returns, and furnish such other statements and information to the Secretary, as the Secretary determines to be necessary to carry out the purposes of the legislation. The initial return made with respect to the retrospective tax is to include such information as the Secretary shall require by forms or otherwise for purposes of computing the relevant base-period premiums of the person making the return and for purposes of identifying certain reinsurers and reinsurance premiums.

The committee amendment also provides the Treasury Department with authority to prescribe such regulations as may be appropriate to carry out the purposes of the legislation, including such regulations as may be appropriate to prevent the avoidance of any

[27] This reduction will not be allowed in certain circumstances where the reinsurance premiums from such reinsurance arrangement are treated as direct premiums for purposes of determining the retrospective tax.

of the EIRF funding taxes, and such regulations as may be appropriate to treat joint underwriting operations or groups thereof as persons liable for these taxes.

Establishment of Environmental Insurance Resolution Trust Fund

The committee amendment establishes a new Environmental Insurance Resolution Trust Fund (the "Trust Fund") in the Trust Fund Code of the Internal Revenue Code. The Trust Fund will receive deposits of the gross receipts from the new excise taxes (including the assessments), as well as any regulatory filing fees authorized under Title VIII of S. 1834 and recoveries of certain amounts by the EIRF.

Amounts in the Trust Fund will be used to fund the new direct spending authorized for the EIRF by Title VIII and to repay any authorized borrowings, if any. Revenues available to the EIRF for expenditure are limited to an amount equal to the excise taxes, assessments, and other revenues deposited in the Trust Fund. Also, the Trust Fund is the sole source of payment for all activities of the EIRF.

The Trust Fund generally is not permitted to borrow from the Treasury. The Trust Fund, however, may borrow money as permitted by the Treasury solely for purposes of short-term cash management if the following conditions are met: (1) the Treasury Department approves the loan, including the rate of interest and the terms and conditions of the loan, and (2) the loan does not cause the total outstanding debt of the Trust Fund to exceed $350 million. The amount of any borrowing is to be treated as secured by all assets of the EIRF and the Trust Fund. The committee further intends that repayment of any borrowing will have priority over payment of all other obligations (both past and future) of the EIRF. No borrowing may remain outstanding after December 31, 2003.

As provided in Title VIII, the Federal Government will have no liability for obligations incurred by the EIRF that remain unsatisfied after the excise taxes expire and the Trust Fund has no remaining funds. It is the intent of the committee that sufficient financing be obtained from the property and casualty insurance industry for the Trust Fund to permit it to satisfy fully any carryover obligations of the EIRF after year ten. No inference is intended by the allocation in any year, or combination of years, among the retrospective tax, the prospective tax, and the assessment on direct insurers with respect to the structure of any tax assessment that Congress determines may be nceessary to enact in the future. Expenditures, if any, by the Trust Fund after the Trust Fund's tenth year are limited to no more than $810 million per year.

Clarification of treatment of certain financial instruments tendered in environmental settlements

Title IV of S. 1834 also expands settlement procedures available to potentially responsible parties. Under this provision, the Federal Government is authorized to accept ownership of a financial instrument such as an annuity contract running irrevocably to the benefit of the United States to conduct, or enable other persons to conduct, cleanup activities. The committee amendment requires that

receipt of any such financial instrument be approved by the Treasury Department before its acceptance.

In this context, the committee understands that the economic performance provisions of Code section 461(h) are satisfied with regard to the purchase of a financial instrument as part of a settlement agreement with the Environmental Protection Agency ("EPA") when three conditions are satisfied. The first condition is that the potentially responsible party makes payments to purchase the financial instrument. The second condition is that ownership of the financial instrument must be irrevocably transferred to the Federal Government. This condition is not satisfied to the extent that the potentially responsible party retains a right to a return or refund of the financial instrument or expects to participate in future remedial action at the site. The third condition is that the transfer of ownership of the financial instrument occurs as a part of a settlement agreement with EPA under which the potentially responsible party's obligation to undertake remedial action at the site is fully resolved and satisfied by transfer of the financial instrument based on the facts and liability known at the time of said settlement agreement (other than an obligation to make a future payment of cash or to transfer an additional financial instrument). When these three conditions are met, economic performance occurs. For example, if by the terms of a settlement, the Federal Government assumes ownership of a financial instrument at the time that payment is made to purchase the instrument, economic performance occurs when the payment is made. If, however, a potentially responsible party purchases a financial instrument to be subsequently transferred to the Federal Government, economic performance does not occur until such transfer is made.

If these conditions are met, economic performance occurs without regard to whether under the terms of the settlement the potentially responsible party may be required to satisfy an additional liability by making an additional cash payment or transferring an additional financial instrument at some future time.

Studies and reports

The Treasury Department is required to conduct a study in the eighth year of the EIRF program and to make recommendations to Congress with respect to the insurance industry's financing of the program after the tenth year. In conducting the study, the Treasury is required to consult with representatives of the insurance industry and its policyholders. The study must include an analysis of the distribution of the benefits of the EIRF program as well as an accounting of the various sources of financing.

Further, the EIRF is required to publish a biennial report estimating its incurred liabilities for eligible sites by eligible persons that have accepted offers as of the end of each applicable reporting period.

Finally, the Treasury Department is required to publish at least biennially the revenues received from each of the excise taxes and the assessment under Title IX, including a separate listing of the revenues received from foreign and domestic sources.

Effective dates

The retrospective tax (other than the alternative foreign excise tax) is effective on January, 1, 1995. The prospective tax on domestic insurers and foreign insurers subject to U.S. income tax on a net basis applies to policies for which direct premiums are written on or after January 1, 1995. The assessment on insurers is imposed in calendar years beginning after 1998. The alternative foreign excise tax and the prospective tax on foreign insurers not subject to U.S. income tax on a net basis apply to policies for which premiums are written after the close of the contingency period specified in section 816 of S. 1834. The contingency period must end no later than 225 days after the date of enactment of S. 1834.

Notwithstanding the preceding paragraph, none of the new excise taxes and assessments will be collected unless the EIRF program under Title VIII of S. 1834 is in effect on August 15, 1995, and the contingency period has expired by such date. Any amounts of the retrospective tax and the prospective tax that accrue prior to the end of the contingency period will be due and payable on the 14th day of the month following the end of the contingency period.

The EIRF program under Title VIII will terminate unless certain minimum participation standards are achieved by the end of the contingency period. If more than 20 percent of all eligible potentially responsible parties reject participation in the EIRF, the EIRF and the imposition of the excise taxes will terminate. If the rejection rate is between 15 and 20 percent of all eligible potentially responsible parties, the chairperson of the EIRF, in consultation with the EIRF board, may elect to continue or to terminate the EIRF. These determinations are required to be made by the end of the contingency period.

All of the new excise taxes (other than the alternative foreign excise tax and the prospective tax on certain foreign insurers) and the assessments will terminate after December 31, 2004. The alternative foreign excise tax and the prospective tax on foreign insurers not subject to U.S. tax on a net basis will terminate 10 years after the date on which such taxes first take effect.

C. TAX EXEMPTION FOR ENVIRONMENTAL INSURANCE RESOLUTION FUND (SEC. 903 OF THE COMMITTEE AMENDMENT AND NEW SEC. 510(1)(4) OF THE CODE)

Present law

Federal tax exemption for an instrumentality of the United States that is organized on or after July 18, 1984, may be provided only by an amendment to the Internal Revenue Code or by a provision enacted as part of a revenue act (sec. 501(c)(1)). Tax-exempt status has previously been granted to the following U.S. instrumentalities; (1) the Central Liquidity Facility; (2) the Resolution Trust Corporation; and (3) the Resolution Funding Corporation (sec. 501(*l*)).

Explanation of provision

The committee amendment provides an exemption from Federal income tax to the Environmental Insurance Resolution Fund under section 501(*l*) of the Code.

Effective date

The provision is effective on January 1, 1995.

IV. Votes on the Committee

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, following is a tabulation of each roll call vote taken during mark-up of this legislation.

1. Wallop Amendment to delete financing for EIRF, defeated 7–13:

Yeas: Conrad, Packwood, Dole, Durenberger, Grassley, Hatch, Wallop.

Nays: Baucus, Boren, Bradley, Mitchell, Pryor, Riegle, Rockefeller, Dashle, Breaux, Roth, Danforth, Chafee, Moynihan.

2. Grassley-Packwood-Dole amendment to provide a 25 percent deduction for health insurance costs of self-employed individuals, financed by repealing the Federal vaccine program, defeated 6–14:

Yeas: Packwood, Dole, Danforth, Grassley, Hatch, Wallop.

Nays: Baucus, Boren, Bradley, Mitchell, Pryor, Reigle, Rockefeller, Daschle, Breaux, Conrad, Roth, Chafee, Durenberger, Moynihan.

3. Roth amendment to provide a 25 percent deduction for health insurance costs of self-employed individuals, financed by denying the earned income tax credit for illegal aliens, defeated, 4–13:

Yeas: Conrad, Roth, Danforth, Chafee.

Nays: Baucus, Boren, Bradley, Mitchell, Pryor, Riegle, Rockefeller, Daschle, Breaux, Packwood, Durenberger, Grassley, Moynihan.

4. Dole amendment to allow farmers the option to recognize income in the year of a crop disaster, if they can prove that they would have received the income from the sale of crops in that year, financed by a correction to the indexing provision in OBRA–1993 relating to luxury automobiles, defeated 7–13:

Yeas: Conrad, Dole, Roth, Danforth, Grassley, Hatch, Wallop.

Nays: Baucus, Boren, Bradley, Mitchell, Pryor, Riegle, Rockefeller, Daschle, Breaux, Packwood, Chafee, Durenberger, Moynihan.

V. Budgetary Impact of the Bill

In accordance with section 308(a) of the Congressional Budget and Impoundment Control Act of 1974 and paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the committee states that inclusion of the Congressional Budget Office estimate of the bill as amended by the Committee on Finance and the Committee on Environment and Public Works is impracticable at this time, given the necessity to expedite the business of the Senate.

Following are the estimates of the Joint Committee on Taxation of the revenue provisions in the committee amendment:

ESTIMATED REVENUE EFFECTS OF S. 1834

[Fiscal years 1995–2004 in millions of dollars]

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	1995–2004
Provision:											
1. EIRF tax (net revenues) ..	424	609	617	601	592	597	607	617	627	605	5,897
2. CEIT extension	....	276	475	489	496	506	205	....	....	....	2,447
Net total	424	885	1,092	1,090	1,088	1,103	812	617	627	605	8,344

Note: Details may not add to totals due to rounding.

Source: Joint Committee on Taxation.

VI. Regulatory Impact of the Committee Amendment

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee states that inclusion of a regulatory impact statement is impracticable at this time, given the necessity to expedite the business of the Senate.

VII. ADDITIONAL VIEWS OF SENATOR WILLIAM V. ROTH

I am supportive of the Superfund reauthorization legislation (S. 1834). Superfund's failed liability scheme and cleanup process have demonstrated the need for fundamental reform this year. I believe that we have an opportunity to enact Superfund reform legislation to address the shortcomings of the current statute right now. One of the major goals of reforming the current superfund program is to eliminate the extensive litigation over who will pay for the clean-up costs at superfund sites. While I support the goal of eliminating wasteful litigation, I have concerns over how small insurers will be impacted. Although I appreciate efforts to increase the exemption for small insurers on the retrospective portion of the tax, I would like to continue our efforts to achieve a more equitable financing mechanism for superfund reform. I think we should look more closely at the relationship between the taxes being imposed and the benefits being provided for these small insurers.

WILLIAM V. ROTH.

VIII. MINORITY VIEWS OF SENATORS MALCOLM WALLOP, BOB DOLE, CHARLES GRASSLEY, AND ORRIN HATCH

In 1980, Congress initiated a legislative program designed to clean up our nation's hazardous waste disposal sites. The Superfund law was designed to address the real threat posed by environmental hazards quickly and economically by making polluters pay for response and clean-up costs. Regrettably, the program has been costly, cumbersome, and inefficient. It has cost the taxpayers billions of dollars for virtually no environmental gains. Fourteen years later, we are now poised to impose hastily and hurriedly another layer of financing which promises to be equally as costly and ineffective, the Environmental Insurance Resolution Fund, or so-called EIRF program.

We recognize that the EIRF is well-intentioned. Retroactive, joint, strict, and several liability has imposed much uncertainty and cost on the business community, local governments, insurance companies and individual citizens who are caught in the net of Superfund. Retroactive liability has generated significant and costly litigation between potentially responsible parties (PRPs) and insurance companies that should be addressed. Nevertheless, we do not believe that the Fund and its financing proposal appropriately, effectively and fairly address these concerns.

We have opposed the Senate Finance Committee title to S. 1834, the Superfund Reform Act of 1994, in part because of our concerns with the unfairness of the process by which the financing proposal was achieved. We take strong exception to Treasury's representation that the EIRF financing proposal is a consensus or even an equitable agreement negotiated by the insurance industry. We know that this cannot be true since certain important segments of the insurance industry, represented by the National Association of Independent Insurers, the National Association of Mutual Insurance Companies and the Alliance of American Insurers, did not participate in the development of the final agreement. Neither were Republicans at the table or even consulted during any negotiations. When the Administration's proposal reached the Committee for markup, a contingent agreement between the direct insurers and the reinsurers had collapsed, and more than fifty percent of the insurance industry—representing over 3,000 insurers and reinsurers—opposed the financing mechanism. Given the overall urgency on which the Committee was asked to act, we can only surmise that the Administration was fearful that too much examination would place the overall package in jeopardy.

Added to these concerns about the process, is that fact that the financing proposal appears to have been reached at the expense of those who were either not invited to participate in the discussions or whose voices were ignored. The taxes are clearly designed to

shift liability costs of large insurance companies currently in litigation to small and mid-sized property and casualty companies that have no environmental liability. This tax originally started as a 70 percent retroactive tax on companies who would have benefitted from the fund by having their liabilities reduced. But after the closed door negotiations, the tax is at least 50 percent prospective, paid by many companies with little or no Superfund liabilities.

Moreover, other alternative financing options were offered but dismissed out of hand and never fully considered on the merits.

One of our major concerns with EIRF relates to its budget implications. We are concerned that the $8.1 billion in new taxes proposed by this provision are so inadequate to meet the obligations of the Fund that it raises serious questions about the ability of the Fund to accomplish its goals. During our hearing on the EIRF, the Treasury Department testified that the EIRF will actually incur obligations of $40 billion based on clean-up costs of $100 billion. We doubt that is even accurate since the Office of Technology Assessment implies these costs cold actually be $500 billion, and others say they could be $700 billion. Using a 40 percent average settlement figure, the EIRF could be obligating itself to collect upwards of $280 billion in taxes.

These various liability numbers suggest that no one can predict how many claims will be filed with the EIRF and the total amount of the Fund's obligations. We only know that the obligations of this Fund continue well beyond the authorization period of this legislation. Without a fuller understanding of the EIRF, we are concerned that we will have established a costly, runaway entitlement system that will not significantly reduce litigation expenses. It has not been clearly demonstrated that the revenues paid out will in fact be used for clean-up costs and not by PRPs to further litigate other issues. A clear split of opinion on this point surfaced among the members of this Committee during the markup. Without time for careful reflection, analysis and examination of any proposal, let alone one that would impose an initial tax totalling $8.1 billion with no known limit, the result is likely to be bad law and bad tax policy.

We also have no appreciation at this time of the impact of EIRF and whether it will actually work. While the substance of the EIRF is not within the jurisdiction of this Committee, we believe that before any new taxes are assessed we should have a clear understanding of the program we are being asked to fund. Very little discussion appears to have occurred on the merits and the administrability of the EIRF. It is a complex and complicated mechanism that requires greater analysis than what has been so far occurred to date. The Joint Committee on Taxation may believe that the financing proposal is administrable, but they do not know and are unable to comment on whether the EIRF would actually perform as expected and whether the Fund itself could be administered.

Finally, we are concerned that the new "retrospective" EIRF taxes could be challenged on constitutional grounds. The Supreme Court's decision earlier this year in *U.S.* v. *Carlton,* certainly provides sufficient reason for concern. The *Carlton* decision held that the closing in 1987 of an unintended tax benefit created in 1986 was not unconstitutional because the retroactive legislation was

"supported by a legitimate legislative purpose furthered by rational means." The Court noted that (1) it was neither illegitimate nor arbitrary for Congress to correct what it reasonably viewed as a mistake in the original legislation and (2) "Congress acted promptly and established only a modest period of retroactivity."

However, the Court noted that earlier Supreme Court cases provide for a higher standard if the legislation created a "wholly new tax." Justice O'Connor's concurring opinion explicitly emphasized that a wholly new tax cannot be imposed retroactively, and emphasized that in every case where the Supreme Court had ruled a retroactive tax to be constitutional, "law applied for only a relatively short period prior to enactment." Justice O'Connor continued by saying, "A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional issues."

The retrospective EIRF taxes are "wholly new" taxes that have the same effect as if the effective date had been 1968 through 1985 with either a four or ten year period in which to pay the tax. The amount of the tax bears no relationship to the amount of premium income received in the future. It is calculated solely on the basis of past activity. It is a tax which is retroactive, not to the prior year, but to 27 years ago.

Whether or not the Senate is persuaded that retroactive taxes are a bad idea, we must anticipate that these taxes will be challenged on constitutional grounds. The Supreme Court's *Carlton* decision should provide sufficient reason to question the wisdom of enacting new retroactive taxes. This, of course, further leaves the adequacy of the funding of EIRF in question.

We hope that the Senate will reject the EIRF before we create a new spending program we can neither eliminate nor the American people can afford.

MALCOLM WALLOP.
BOB DOLE.
CHARLES GRASSLEY.
ORRIN G. HATCH.

IX. Changes in Existing Law

In accordance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, in the opinion of the committee, it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

APPENDIXES

APPENDIX A.—EXCISE TAX RATES ON CERTAIN CHEMICALS FOR THE HAZARDOUS SUBSTANCE SUPERFUND

Feedstock chemical (sec. 4661)	*Tax per ton*
Acetylene	$4.87
Benzene	4.87
Butane	4.87
Butylene	4.87
Butadiene	4.87
Ethylene	4.87
Methane	3.44
Naphthalene	4.87
Propylene	4.87
Toluene	4.87
Xylene	4.87
Ammonia	2.64
Antimony	4.45
Antimony trioxide	3.75
Arsenic	4.45
Arsenic trioxide	3.41
Barium sulfide	2.30
Bromine	4.45
Cadmium	4.45
Chlorine	2.70
Chromium	4.45
Chromite	1.52
Potassium dichromate	1.69
Sodium dichromate	1.87
Cobalt	4.45
Cupric sulfate	1.87
Cupric oxide	3.59
Cupruous oxide	3.97
Hydrochloric acid	0.29
Hydrogen fluoride	4.23
Lead oxide	4.14
Mercury	4.45
Nickel	4.45
Phosphorus	4.45
Stannous chloride	2.85
Stannic chloride	2.12
Zinc chloride	2.22
Zinc sulfate	1.90
Potassium hydroxide	0.22
Sodium hydroxide	0.28
Sulfuric acid	0.26
Nitric acid	0.24

APPENDIX B.—LIST OF TAXABLE SUBSTANCES SUBJECT TO THE EXCISE TAX ON CERTAIN IMPORTED (CHEMICAL) SUBSTANCES (SECS. 4671–4672)

Initial Items Listed [1]

TAXABLE SUBSTANCE

Cumene
Styrene
Ammonium nitrate
Nickel oxide
Isopropyl alcohol
Ethylene glycol
Vinyl chloride
Polyethylene resins, total
Polybutadiene
Styrene-butadiene, latex
Styrene-butadiene, snpf
Synthetic rubber, not containing fillers
Urea
Ferronickel
Ferrochromium nov 3 pct.
Ferrochrome ov 3 pct. carbon
Unwrought nickel
Nickel waste and scrap
Wrought nickel rods and wire
Nickel powders
Phenolic resins
Polyvinylchloride resins
Polystyrene resins and copolymers
Ethyl alcohol for nonbeverage use
Ethylbenzene
Methylene chloride
Polypropylene
Propylene glycol
Formaldehyde
Acetone
Acrylonitrile
Methanol
Propylene oxide
Polypropylene resins
Ethylene oxide
Ethylene dichloride
Cyclohexane
Isophtalic acid
Maleic anhydride
Phtalic anhydride
Ethyl methyl ketone
Chloroform
Carbon tetrachloride
Chromic acid
Hydrogen peroxide
Polystyrene homopolymer resins
Melamine
Acrylic and methacrylic acid resins
Vinyl resins
Vinyl resins, NSPF
1,3 butylene glycol

1,4 butanediol
2-ethyl hexanol
2-ethythexyl acrylate
2,2,4-trimethyl-1,3-pentanediol diisobutyrate
2,2,4-trimethyl-1,3-pentanediol monoisobutyrate
Acetic acid
Acetylene black
Adipic acid
Alpha-methylstyrene
Allyl chloride
Aniline
Benzaldehyde
Benzoic acid
Bisphenol-A
Butanol
Butyl acrylate
Decabromodiphenyl oxide
Dimethyl terephthalate
Diphenyl oxide
Diphenylamine
Di-n-hexyl adipate
Di-2 ethyl hexyl phthalate
Epichlorohydrin
Ethyl acrylate
Ethyl chloride
Ethylene dibromide
Formic acid
Glycerine
Hexamethylenediamine
Isobutyl acetate
Isopropyl acetate
Linear alpha olefins
Methyl acrylate
Methyl chloroform
Methyl isobutyl ketone
Monochlorobenzene
Normal butyl acetate
Normal propyl acetate
Ortho-dichlorobenzene
Ortho-nitrochlorobenzene
Para-dichlorobenzene
Para-nitrochlorobenzene
Para-nitrophenol
Parformaldehyde
Pentaerythritol
Perchloroethylene
Phenol
Poly (69/31 ethylene/cyclohexylenedimethylene terephthalate)
Poly (96.5/3.5 ethylene/cyclohexylenedimethylene terephthalate)
Poly (98.5/1.5 ethylene/cyclohexylenedimethylene terephthalate)
Polyalphaolefins
Polybutene
Polycarbonate
Polyethylene terephthalate pellets
Propanol
Sodium nitriolotriacetate monohydrate
Tetrachlorophthalic anhydride
Tetrahydrofuran
Terephthalic acid
Tetrabromobisphenol-A
Trichloroethylene
Trimethylolpropane
Vinyl acetate

[1] Items listed after enactment of the tax on imported chemical substances. The "initial" chemicals are specified in the Internal Revenue Code. The "additional" chemicals have been added to the list of taxable imported substances pursuant to the Treasury Secretary's authority.