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WELFARE AND PENSION PLANS DISCLOSURE ACT AMENDMENTS OF 1962

G. Robert Blakey*

Publicity is justly commended as a remedy for social and industrial diseases. Publicity is said to be the best of disinfectants; electric light the most efficient policeman.

Louis D. Brandeis, *Other Peoples' Money* 92

A. THE GROWTH AND OPERATION OF WELFARE AND PENSION FUNDS

Underlined by a dramatic shift in the character of our population, making us both older and younger,¹ private welfare and pension plans sought as an alternative and a complement to Social Security have truly become mid-century phenomena. Minimal until the early forties, these programs — involving employee health, retirement, and death benefits — today number about 200,000,² have total assets, including insurance reserves, of approximately 60 billion dollars,³ and cover directly or indirectly over one half of the population of the United States.⁴

Unfortunately, the growth of these plans has been somewhat marred by various abuses, ranging from inept management and questionable insurance practices to outright bribery and embezzlement. Documented in detail by federal⁵

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1 The rate of increase in the number of persons in both the youngest and oldest age groups of the population between 1950 and 1960 was five times that of the groups in the intermediate ages. Persons under 18 increased by 37% and the number 65 and over increased by 35%. The increase in the age group 18 to 64 was only 7%. *THE WORLD ALMANAC AND BOOK OF FACTS*: 1962 at 251.

2 The Department of Labor estimated there were between 190,000 and 200,000 operating welfare and pension plans in the United States in 1961. *Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 1st Sess., 138 (1961) [hereinafter cited as *House 1961 Hearings*]. In September 1962, the Department had on file nearly 165,000 benefit plan descriptions, 8,000 of which were estimated to represent inactive plans, and was receiving additional plan descriptions at the rate of approximately 10,000 per year. Address by Frank M. Kleiler, Director of the Department's Office of Welfare and Pension Plans, at Denver, Colorado, Sept. 10, 1962, reprinted at 3 CCH LAB. LAW RPTR. ¶ 8111 (1962).

3 The Department of Labor estimated the 1961 value of these funds, including insurance reserves, at around \$58 billion. *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 87th Cong., 1st Sess., 8 (1961) [hereinafter cited as *Senate 1961 Hearings*].

4 Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare, *Final Report on Welfare and Pension Plan Investigation*, S. REP. No. 1734, 84th Cong., 2d Sess. 6 (1956) [hereinafter cited as *DOUGLAS REPORT*]. See generally, Holland, *The Pension Climate*, N.Y.U. 10TH ANN. CONF. ON LAB. 1 (1957). Although the Committee made the estimate in 1956, there is no reason to assume the picture has changed.

5 Federal investigations of employee benefit funds go back to 1954. The 83rd, 84th and 85th Congresses conducted, on varying scales, such investigations. S. REP. No. 1440, 85th Cong., 2d Sess. 2-3 (1958). The *DOUGLAS REPORT* is perhaps the most comprehensive study published on the federal level.

and state⁶ investigations, the political pressures stemming from the exposure of these abuses soon produced some state legislation,⁷ and, on the federal level, the Welfare and Pension Plans Disclosure Act of 1958.⁸ Few people were satisfied with the 1958 Act, however, and its passage by no means dissipated the pressure for reform on the federal level. In fact, a drive to amend the statute began with the presidential message approving it. On March 20, 1962, that drive culminated when President Kennedy signed Public Law 87-420, the Welfare and Pension Plans Disclosure Act Amendments of 1962.⁹

Many factors — economic, social, medical and legal — have contributed to the phenomenal growth of the benefit plan. During the later part of the nineteenth century a number of unions established benefit programs for their own members, and certain enlightened employers also established pension or profit-sharing plans.¹⁰ At this time, however, many union leaders were hostile toward employer financed plans, seeing them as a departure from traditional union goals of better wages, hours, and working conditions.¹¹ The tremendous growth of welfare and pension plans which has occurred in the last half century did not begin, then, until the early 1940's. Events during the depression days of the early and late thirties convincingly demonstrated that the husbandry of an individual is unimpressive compared with the various sources of insecurity which the economy foists upon him.¹² A series of legal developments then occurred which made the benefit plan particularly attractive.¹³ High corporate taxes during and after World War II and the Korean conflict, coupled with the allowability of deductions for contributions to these programs under the Revenue Act of 1942,¹⁴ made their establishment feasible at a relatively low net cost. Wage stabilization programs during this same period froze wages but permitted increased employee compensation where it took the form of a "fringe" benefit.¹⁵

6 See, e.g., STATE OF NEW YORK INS. DEPT., PRIVATE EMPLOYEE BENEFIT PLANS—A PUBLIC TRUST (1956).

7 Six states have enacted legislation aimed specifically at the welfare and pension fund. MASS. ANN. LAWS ch. 151D, §§ 1-10 (Supp. 1961); N.Y. BANKING LAW §§ 60-75; N.Y. INS. LAW §§ 37-37(q); WASH. REV. CODE ANN. §§ 48.52.010-.080 (1961); WIS. STAT. ANN. §§ 211.01-.17 (Supp. 1962); CONN. GEN. STAT. ANN. §§ 31-78 to -89 (1960). California's law expired June 30, 1960. Cal. Stats. 1957, ch. 2167, § 1, at 3841. See Note, 34 NOTRE DAME LAWYER 403-17 (1959).

8 72 Stat. 997 (1958).

9 76 Stat. 35 (1962), 29 U.S.C.A. §§ 301-09 (Supp. 1962). Hereinafter the amended Act will be referred to by section number only.

10 STAFF OF SUBCOMM. ON WELFARE AND PENSION FUNDS, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 84th Cong., 1st Sess., INTERIM REPORT WELFARE AND PENSION PLAN INVESTIGATION 3-6 (1956).

11 Dubinsky, *Safeguarding Union Welfare Funds*, American Federationist, July 1954, p. 10 (reprinted 100 CONG. REC. 10318 (1954)).

12 See Tilove, *Social and Economic Implications of Private Pensions*, 14 IND. & LAB. REL. REV. 24 (1961).

13 DOUGLAS REPORT at 12.

14 Int. Rev. Code of 1939 § 165, added by ch. 619, § 162, 56 Stat. 862 (1942) (now INT. REV. CODE OF 1954, § 401).

15 Exec. Order No. 9250, 7 Fed. Reg. 7871 (1942), froze wages. See AARON, THE EMPLOYMENT RELATION AND THE LAW 694 (1957). The National War Labor Board subsequently decided fringe benefits were not illegal increases in wages, and employers quickly took advantage of the decision. See Neenan, *Pension Funds and the Equity Market*, 7 LAB. L.J. 552 (1956).

The whole question took on a collective bargaining character, moreover, after the Taft-Hartley Act was construed to require good faith bargaining on the issue.¹⁶

Today welfare plans provide workers and their dependents with such benefits as group life insurance, disability payments, medical care, and accidental death, dismemberment and unemployment compensation. Modern pension plans, on the other hand, provide for profit sharing or retirement benefits. Statistics relating to pension plans indicate they have grown from approximately 2,000 in 1940¹⁷ to a now estimated 25,000.¹⁸ Welfare funds have experienced a similar growth.¹⁹ Total contributions to both types of plans amounted in 1959 to 10.2 billion dollars, and benefits paid to 5.5 billion dollars.²⁰ It is estimated, moreover, that their total assets, now around 60 billion dollars, will continue to grow until by the end of the decade they will amount to 100 billion dollars.²¹ The significance of these funds is further illustrated by the sobering observation that by 1954 uninsured corporate pension funds alone purchased more common and preferred stock than such financial giants as the life insurance companies, property and liability insurance companies, and open-end investment companies.²²

The welfare and pension plan transcends the narrow confines of labor-management problems. Union representatives actually participate in the administration of plans covering only a few employees.²³ A slight majority of all employees, moreover, are covered by plans which were not even the product of collective bargaining.²⁴

The method by which the plans' benefits are financed varies greatly from plan to plan. Some plans are noncontributory, *i.e.*, the benefits are underwritten solely by the employer. Other plans are contributory, *i.e.*, both the employer and the employee jointly finance the plan. Finally, a few plans are supported entirely by the employees. Retirement plans tend to be noncontributory and welfare plans contributory.²⁵

16 *Inland Steel Company*, 77 N.L.R.B. 1, *aff'd*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). The Board found the term "wages," over which employers were required to bargain in good faith, included pension and insurance benefits, which would accrue to employees out of their employment. *Accord*, *W. W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875 (1st Cir. 1949). It is ordinarily now an unfair labor practice to institute, *General Motors Corp.*, 81 N.L.R.B. 779 (1949); *revoke*, *Cummer-Graham Co.*, 90 N.L.R.B. 722 (1950); or *modify*, *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096 (1949), a benefit plan without first notifying the employee organization.

17 DOUGLAS REPORT at 13.

18 *House 1961 Hearings* at 45.

19 The growth of welfare funds is, more or less, reflected in the growth of group insurance. See DOUGLAS REPORT at 13.

20 *House 1961 Hearings* at 45.

21 *Senate 1961 Hearings* at 8.

22 S. REP. No. 1280, 84th Cong., 1st Sess. 95 (1955).

23 92% of the welfare plans and 86% of the pension plans are unilaterally employer administered. Only 7% of the welfare and 13% of the pension funds are jointly administered. The rest are unilaterally union administered. DOUGLAS REPORT at 14.

24 See S. REP. No. 1440, 85th Cong., 2d Sess. 8 (1958). The Douglas Committee estimated in 1956 that approximately 60% of the workers covered for pension benefits and about 40% of those covered by welfare programs were under a plan which had been collectively bargained. DOUGLAS REPORT at 12.

25 S. REP. No. 1440, 85th Cong., 2d Sess. 7 (1958).

While important, the source of the financing is not as significant as the method of its management. Here plans are either funded or unfunded. The unfunded plan meets current liabilities on a pay as you go basis, making no attempt to provide for future obligations.²⁶ On the other hand, the funded plan makes such an attempt, as the term implies, by setting up a separate fund. Depending on the type of administration, contributions are made to administrators or joint trustees who in turn either manage the corpus themselves²⁷ or negotiate an insurance contract to underwrite the fund's liabilities.²⁸ Most welfare plans are insured with a commercial carrier or on a Blue Cross or Blue Shield basis.²⁹ Pension plans, on the other hand, tend to be self-insured.

While the vast majority of the various programs have had excellent administration, many plans have become a "hunting ground of the unscrupulous."³⁰ More irregularities and perhaps a higher incidence of abuses have occurred in the jointly administered funds.³¹ Abuses, on the other hand, have been uncovered in all types of plans.³² They have ranged from embezzlement to simple bad bookkeeping.³³ The investment of the corpus and selection of the insurance carrier, however, have been the critical areas of fund administration where most of the more serious abuses have occurred. Intense competition associated with group coverage has resulted in high commissions and service fees to "influential" persons performing no services, kickbacks to trustees, and "switching" among carriers to obtain the higher first year commission. On the other hand, while self-insured funds have been relatively free from criticism, it is clear that access to these funds for investment purposes has often depended upon a willingness to kick back part of the broker's fee to the administrator or fund trustee. Kickbacks in this area, moreover, have increasingly taken on highly sophisticated forms.³⁴ Although some action on the state and federal level has been taken to deal with these abuses, the need to surround these funds with more than token protection has been recognized for some time.

B. WELFARE AND PENSION PLANS DISCLOSURE ACT OF 1958

Following the submission of the final report of the Douglas Committee in 1956, a number of bills were introduced in the Eighty-Fourth and Eighty-Fifth Congresses, designed to deal with the abuses uncovered by the committee's

26 Of the 118,660 welfare and pension plans reporting under the 1958 Act only 5,460 welfare and 1,470 pension plans were unfunded. *House 1961 Hearings* at 44.

27 2,070 reporting welfare plans out of a total of 94,530 and 13,090 pension plans out of a total of 24,130 were self-insured. *Id.* at 44. Unsettled is the question whether these plans are "insurance" within state regulatory statutes. See, e.g., Note, *Employee Welfare Plans*, 31 NOTRE DAME LAWYER 276 (1956).

28 85,850 reporting welfare plans and 7,130 pension plans were insured. *House 1961 Hearings* at 44.

29 S. REP. NO. 1440, 85th Cong., 2d Sess. 7 (1958).

30 DOUGLAS REPORT at 6.

31 *Id.* at 7.

32 An excellent summary of the Douglas Committee's findings can be found in the statement of Senator Douglas in support of the 1962 amendments. 108 CONG. REC. 1761-83 (daily ed. Feb. 7, 1962).

33 Inadequate records seem to be an almost universal finding of both state and federal investigations. See, e.g., *Senate 1961 Hearings* at 174.

34 See S. REP. NO. 908, 87th Cong., 1st Sess. 14-15 (1961).

investigation.³⁵ Not a single Congressman or Senator during the extensive debate in both houses argued against the existence of some federal responsibility. Debate instead centered on coverage of employer managed "level of benefit" plans.³⁶ A general understanding, however, was reached between the Administration and Democratic leaders to include all funds, and this was more or less finally embodied in S. 2888, known as the Douglas bill, which, accompanied by *Senate Report No. 1440*, was favorably reported to the Senate, unanimously adopted, and referred to the Committee on Education and Labor in the House.³⁷

Embodying a policy of wide disclosure, S. 2888's coverage, based on both the commerce and the taxing power, was virtually as broad as Congress's power to legislate. Administrators of all types of plans were required to register and file annual reports with the Secretary of Labor, which were to be made available to beneficiaries and other interested parties. The Secretary was authorized to issue regulations, make appropriate investigations and studies, and have civil compliance suits filed in his behalf. Criminal penalties were provided for false statements, embezzlement, bribery, and willful violations of the Act.

The unanimous approval given by the Senate made it appear that S. 2888 would be *the* bill. Just a month before the Eighty-Fifth Congress adjourned, however, H.R. 13507 was introduced by Congressman Teller of New York, and shortly thereafter, accompanied by *House Report No. 2283*, was favorably reported to the House.³⁸ H.R. 13507 differed from S. 2888 primarily in the powers to be given to the Secretary of Labor and in its criminal provisions. The Secretary's role was reduced to that of a custodian.³⁹ Under the view that existing criminal statutes were adequate,⁴⁰ enforcement of the statute was left to the beneficiaries themselves, although a willful failure to comply with the filing provisions of the Act was made criminal. After the passage of H.R. 13507 by a voice vote,⁴¹ the text of H.R. 13507 was substituted for S. 2888, and a conference with the Senate was requested.

What emerged from the conference committee was largely H.R. 13507. Apparently it was H.R. 13507 or no bill at all.⁴² Senator Kennedy, although dissatisfied, recommended acceptance of the conference report⁴³ to insure the passage of some legislation.⁴⁴ Why the House members were so adamant in their opposition to S. 2888 does not appear on the record. However, as William

35 The major bills introduced were S. 1122 by Douglas (Ill.), S. 1145 and S. 2175 by Smith (N. J.), S. 1813 by Goldwater (Ariz.), and S. 2137 by Allot (Colo.). See *Hearing before the Subcommittee on Welfare and Pension Plans Legislation of the Senate Committee on Labor and Public Welfare*, 85th Cong., 1st Sess., 2-22 (1957) [hereinafter cited as *Senate 1957 Hearings*].

36 The distinction between the so-called "level of benefit" and the "fixed cost" plan occupied much of the debate on the original Act. It is no longer significant. Both types are now included in the Act. The views of the spokesmen for both sides of the controversy are set out in detail in S. REP. NO. 1440, 85th Cong., 2d Sess. (1958).

37 104 CONG. REC. 6886 (daily ed. April 29, 1958).

38 104 CONG. REC. 14037 (daily ed. July 28, 1958).

39 104 CONG. REC. 15053 (daily ed. August 6, 1958).

40 *Id.* at 15057 (daily ed. August 6, 1958).

41 *Id.* at 15075 (daily ed. August 6, 1958).

42 104 CONG. REC. 16512 (daily ed. August 16, 1958).

43 H. R. REP. NO. 2656, 85th Cong., 2d Sess. (1958). The Report was agreed to by the House on August 19, 104 CONG. REC. 16951 (daily ed. Aug. 19, 1958).

44 The Senate agreed to the Report on August 16. 104 CONG. REC. 16513 (daily ed. Aug. 16, 1958).

Isaacson has observed: "One need not be a cynic to suspect that strong political pressures, not wholly apparent in the debate, manifested themselves in the final results."⁴⁵ Not being able to prevent the passage of all legislation it was guaranteed that what did pass would be ineffective.

On August 28, President Eisenhower reluctantly signed the bill.⁴⁶ He did so solely because it established "a precedent of Federal responsibility," and noted it would "require extensive amendment at the next session of the Congress."⁴⁷ A drive to amend the statute thus began with the presidential message approving it.

C. THE 1962 AMENDMENTS

Although the President's criticism was followed by some action,⁴⁸ the drive did not begin in earnest until Congressman Powell of New York, the new chairman of the House Education and Labor Committee, introduced H.R. 4929 during the first session of the Eighty-Seventh Congress.⁴⁹ On May 19, 1961, the new Administration followed suit and sent its proposals to Congress.⁵⁰ Hearings were held in late May and early June before a House Education and Labor Special Subcommittee chaired by Congressman Roosevelt of California.⁵¹ A Senate Labor and Public Welfare subcommittee, headed by Senator McNamara of Michigan, held a single day of hearings in July.⁵² Both the House and the Senate full committees made substantial changes in the original proposals. H.R. 8723 and S. 2520, embodying these modifications, were respectively both introduced⁵³ and reported to the House and Senate on August 18⁵⁴ and September 8.⁵⁵

Favorable action did not come, however, until the second session of Congress. Following the President's economic message, which again emphasized the need for the amendments, the House⁵⁶ and the Senate⁵⁷ on February 6, 1962, took up respectively H.R. 8723 and S. 2520. Debate in both chambers lasted only two days. The principal opposition in the Senate came from Senator

45 Isaacson, *Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights*, 59 COLUM. L. REV. 96 (1959).

46 104 CONG. REC. APP. A. 8373 (daily ed. Sept. 12, 1958).

47 N.Y. Times, Aug. 30, 1958, p. 16, col. 1 and 2.

48 Senator Hugh Scott of Pennsylvania, for example, introduced S. 567 on January 20, 1959, to "restore teeth" to the Act. 105 CONG. REC. 834 (daily ed. Jan. 20, 1959). Secretary of Labor Mitchell also issued in August 1960 a highly critical report on the first 18 months' administration of the Act. See 107 CONG. REC. 7468 (daily ed. May 15, 1961).

49 107 CONG. REC. 2559 (daily ed. Feb. 27, 1961).

50 See S. REP. No. 908, 87th Cong., 1st Sess. 11-13 (1961). The proposals were introduced in the Senate as S. 1944, 107 CONG. REC. 8013 (daily ed. May 23, 1961), and in the House as H. R. 7234 and H. R. 7235, 107 CONG. REC. 8004 (daily ed. May 22, 1961).

51 See Note 2 *supra*.

52 See Note 3 *supra*.

53 H. R. 8723 was introduced in the House by Congressman Smith on August 15, 1961. 107 CONG. REC. 14805 (daily ed. Aug. 15, 1961). S. 2520 was reported as an original bill by the Committee on Education and Labor. 107 CONG. REC. 17499 (daily ed. Sept. 8, 1961).

54 107 CONG. REC. 15253 (daily ed. Aug. 18, 1961). H. R. 8723 was accompanied by H. R. REP. No. 998, 87th Cong., 1st Sess. (1961).

55 107 CONG. REC. 17499 (daily ed. Sept. 8, 1961). S. 2520 was accompanied by S. REP. No. 908, 87th Cong., 1st Sess. (1961).

56 Debate was conducted pursuant to House Resolution 538 under which the House resolved itself into the Committee of the Whole House on the State of the Union to consider H. R. 8723. 108 CONG. REC. 1557 (daily ed. Feb. 6, 1962).

57 Debate was conducted under a unanimous consent agreement. 108 CONG. REC. 1662 (daily ed. Feb. 6, 1962).

Tower of Texas. He felt that the legislation was not needed, but, if it was to pass, its administration should be entrusted to the Securities and Exchange Commission instead of the Department of Labor.⁵⁸ Opposition in the House was also vocal, led by Congressman Goodell of New York. Primarily, however, it took the form of a demand that certain amendments be accepted before passage, not that no bill should be enacted. Unfortunately, although some of the amendments unquestionably made the final product better legislation, many of them manifested a profound distrust in the Office of the Secretary of Labor and the Department itself. While Senator Tower had little success in the Senate,⁵⁹ Congressman Goodell secured the acceptance of a number of his suggestions. On February 7 both Houses passed their respective bills; the Senate by a voice vote, and the House by a vote of 191 to 85.⁶⁰

After a procedural entanglement was straightened out, a conference was requested and conferees were appointed. By March 12 agreement was reached and a formal report was filed in the House.⁶¹ On March 15, the Senate approved the report, again by a voice vote.⁶² After defeating a motion to recommit the bill, aptly described by Congressman O'Hara as an attempt to defeat the whole bill "by raising a totally extraneous issue,"⁶³ the House adopted the report by a vote of 284 to 108.⁶⁴ President Kennedy gave the bill final approval on March 20.

D. ANALYSIS OF THE AMENDED ACT

The Welfare and Pension Plans Disclosure Act of 1958 received at that time little critical comment. For this reason, the following analysis will not be limited to the 1962 Amendments.

Finding and Policy: Section 2 (29 U.S.C.A. § 301)

The amended Act retains the original finding and policy statement. Briefly, they note the growth of the benefit plan and acknowledge the need to protect the security of the various participants by requiring full and adequate disclosure of the financial affairs of the various plans.

Definitions: Section 3 (29 U.S.C.A. § 302)

The amended Act also retains most of the original definitions. They give

58 108 CONG. REC. 1753-54 (daily ed. Feb. 7, 1962). Senator Tower's amendment which would have transferred the administration of the Act to the Securities and Exchange Commission was defeated 57 to 25. *Id.* at 1759. The Senator also proposed an amendment which would have exempted all plans having fewer than one hundred participants. It was also defeated 57 to 25. *Id.* at 1750.

59 It is interesting to note that Senator Tower's main arguments were drawn from a letter written from Archibald Cox, then a professor of law, to the then Senator from Massachusetts, John F. Kennedy. 108 CONG. REC. 1753 (daily ed. Feb. 7, 1962). The letter is reprinted in full in *Senate 1957 Hearings* at 651-54. The Senate originally considered and rejected this proposal in 1958, largely because the Commission itself was reluctant to undertake administration of the Act. S. REP. NO. 1440, 85th Cong., 2d Sess. 21 (1958). This reluctance was reiterated in 1962. 108 CONG. REC. 1756-57 (daily ed. Feb. 7, 1962).

60 108 CONG. REC. 1784 (daily ed. Feb. 7, 1962); *id.* at 1850.

61 108 CONG. REC. 3481 (daily ed. March 12, 1962).

62 108 CONG. REC. 3859 (daily ed. March 15, 1962).

63 *Id.* at 3899.

64 *Id.* at 3903.

technical meaning to such terms as "employee welfare benefit plan" and "employee organization." Although no change in substance was intended,⁶⁵ to avoid possible misunderstandings "industry or activity affecting commerce" was re-defined to parallel the definition in the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).⁶⁶ A new definition for "party in interest" was also added; its significance will be noted below in connection with section 7(f)(1)(C).

Coverage: Section 4 (29 U.S.C.A. § 303)

Although an attempt was made to rewrite the constitutional basis of the Act along the lines of the original Douglas bill,⁶⁷ the only changes which were made did little more than clarify the original intent of the section. Plans established by employers or employee organizations in industries affecting commerce are made subject to the Act. Four special categories of plans, however, are totally exempt: (1) where the administration is by a governmental unit, (2) where the plan was established solely to comply with workmen's compensation legislation, (3) where the administration is by a tax exempt fraternal benefit society not representing its members in collective bargaining, or (4) where the plan covers not more than 25 participants.

Duty of Disclosure and Reporting: Section 5 (29 U.S.C.A. § 304)

Under the Act as previously written the "administrator" — defined as the individual or individuals designated or actually in ultimate control of the assets of the plan — was required to publish as specified by section 5: (1) a description, and (2) an annual financial report of the plan. Unfortunately, Professor Patterson's cogent criticism of the definition of "administrator" was not heeded.⁶⁸ The ambiguity which results when the language is applied to plans such as the Ford Motor Company's, negotiated in September 1958, remains.⁶⁹ The problem is not insolvable, however, since careful draftsmanship in any plan can include a "designated person," and section 5(a) now provides that the Secretary of Labor can give authoritative advice in otherwise doubtful situations.

The description and report must now contain the information required by sections 6 and 7 "in such form and detail as the Secretary [of Labor] shall by regulations prescribe."⁷⁰ The Secretary is also given broad power to prescribe, after notice and hearing, other periods or modes of publication where the required information cannot be practicably ascertained, made available, or would, if published, be duplicative or uninformative.⁷¹

65 S. REP. NO. 908, 87th Cong., 1st Sess. 17 (1961).

66 73 Stat. 520, 29 U.S.C. § 402(c) (Supp. III, 1962).

67 See text following note 37 *supra*. S. 1944 and H. R. 7234 and H. R. 7235 all contained an alternative on which coverage would be obtained.

68 *House 1961 Hearings* at 67.

69 PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS 105-06 (1960).

70 Section 5(a). The need for interpretative regulations is perhaps best illustrated by the testimony of former Secretary Goldberg that the Department of Labor received 27,000 inquiries into the meaning of the Act in only two and one-half years. *Senate 1961 Hearings* at 10.

71 The Secretary has issued regulations governing procedures for application, consideration and decision concerning petitions for a variation as to the manner or period of publishing descriptions or annual reports under § 5(a) of the Act. 27 Fed. Reg. 5742 (1962), adding 29 C.F.R. §§ 1303.1-20.

Description of the Plan: Section 6 (29 U.S.C.A. § 305)

Ninety days after the establishment of a welfare or pension plan a description must be published under section 8. The description must contain: the name and address of the administrator; his official position under the plan; his relation, if any, to the employer or employee organization; other offices or positions held by him; the name, address and description of the plan and its type of administration; the schedule of benefits; the names, titles and addresses of trustees other than administrators; if the plan is mentioned in a collective bargaining agreement; copies of the plan itself or other instruments, if any, under which it was established and operates; the sources of financing and the identity of any organization through which benefits are provided; the details of the basis on which the records of the plan are kept; and the procedures for presenting and appealing claims. Under the Act as now amended any change in this information must be reported to the Secretary within sixty days after it becomes effective.

Annual Reports: Section 7 (29 U.S.C.A. § 306)

(a) Duty to file

All administrators of benefit plans required to file descriptions also had to file annual reports under the old Act. Now, under a Senate amendment, only plans covering one hundred or more participants must file the annual report. Plans covering fewer than one hundred must still file the description and comply with the various other provisions of the Act as amended;⁷² they are also subject to the new criminal provisions.⁷³ The 100 participant exemption was included at the suggestion of the insurance industry.⁷⁴ It will have the effect, in all likelihood, of excluding 60 to 70 per cent of the plans subject to the Act, although fewer than 5 to 7 per cent of the employees covered by all plans will be affected.⁷⁵ From an administrative viewpoint, it seems to be a worthwhile improvement. The Secretary may, moreover, require, after investigation, even these plans to file the annual report.

All annual reports must be published as required under section 8 within 150 days of the end of the plan's record (calendar or fiscal) year. The Act formerly required the report within 120 days; the thirty-day extension was also added at the suggestion of the insurance industry.⁷⁶

(b) Basic information

The report must be signed by the administrator and include the following information: the amount contributed by each employer and by the employees; the amount of the benefits paid or furnished; the number of employees covered; a statement of assets specifying the total amount of cash, Government bonds,

72. Administrators of such plans are required to file, within 150 days after the end of the plan's record year, an identification of the plan and information relating to the greatest number of participants covered by the plan at any one time during the reporting year. If at any time during the year more than 100 are covered, the annual report exemption does not apply. 27 Fed. Reg. 10291 (1962), adding 29 C.F.R. §§ 1304.3-4.

73. S. REP. No. 908, 87th Cong., 1st Sess. 18 (1961).

74. *House 1961 Hearings* at 263.

75. *Id.* at 270.

76. *Id.* at 263.

non-Government bonds and debentures, common stocks, preferred stocks, common trust funds, real estate loans and mortgages, operated real estate, other real estate, and other assets; a statement of liabilities, receipts, and disbursements of the plan; and a detailed statement of the salaries, fees and commissions charged to the plan.

Largely out of deference to the objections of several large corporations,⁷⁷ neither the 1962 amendments nor the original Douglas bill required full disclosure of the assets and liabilities of the various plans. Despite the forceful testimony of the Securities and Exchange Commission,⁷⁸ the argument was advanced that to do so would harm the plan's competitive position in the capital market. For this reason, the original Act only required a "summary" statement of assets, liabilities, receipts, and disbursements. Although under the amended Act the term "summary" is omitted, there is no radical change in the character of the reports the Secretary will receive. Optional reporting forms, which were prepared by the Secretary in 1958, set out the "summary statement" in about the same detail as the amended Act now requires.⁷⁹

The 1962 amendments, however, perpetuate a far more significant disclosure "loophole." Only a detailed statement of the salaries, fees and commissions charged to the plan must be reported. A finder's fee, for example, paid by an individual who obtains a loan from the plan need not be reported. Such fees sometimes cloak a kickback to a fund trustee. It is often an easy matter "to arrange" to borrow enough to cover both your need and the finder's fee to be paid to the broker, who will in turn split the payment with a fund trustee.

The information in the report must be sworn to by the administrator or certified by an independent certified or licensed public accountant. Such a certificate must be based on a "comprehensive audit" conducted in accordance with accepted auditing standards, although the audit need not include the books or records of a bank, insurance company, or other institution where they are subject to examination by any federal or state agency. The phrase "comprehensive audit" is another example of the ambiguous draftsmanship found in the original Act. It has no established meaning, and, in fact, it could mean anything from an examination made in accordance with "generally accepted auditing standards" (where the extent of the audit will vary with the effectiveness of the internal controls and other circumstances) to a "detailed audit" (where all accounts and transactions are examined without any use of testing).⁸⁰ Fortunately, the Secretary will now be able to clarify the issue by regulation.

A certification is made mandatory prior to a section 9(d) investigation where a possible violation of section 7 is involved.⁸¹ The requirement does not

⁷⁷ See *Senate 1957 Hearings* at 318-19. See also HARBRECHT, *PENSION FUNDS AND ECONOMIC POWER* 81-83 (1959).

⁷⁸ See *Senate 1957 Hearings* at 120.

⁷⁹ See *House 1961 Hearings* at 128-29. Over 99% of the plans which complied with the 1958 Act, moreover, used the forms prepared by the Secretary of Labor. *Id.* at 95.

⁸⁰ See Christensen, *Welfare and Pension Plans Disclosure*, *The Journal of Accountancy*, August 1961, p. 49-50.

⁸¹ See S. REP. NO. 908, 87th Cong., 1st Sess. 8 (1961).

obtain, however, if the administrator refuses to secure it.⁸² The Secretary may also require prior to such an investigation the filing of a schedule of assets and liabilities. The legislative history of the provision clearly indicates, however, that such schedules should be sparingly requested.⁸³ When it is requested, moreover, the information in the schedule is exempted from the public information provisions of section 10.⁸⁴

(c) The unfunded plan

Where the plan is unfunded, it is only necessary to include in the annual report the total benefits paid, the average number by year of eligible employees during the preceding five years, and where applicable, a statement that the plan is underwritten solely by the general assets of the employer.

(d) The insured plan

Where some or all of the benefits paid under a particular plan are underwritten by an insurance carrier or other organization, information in addition to that required by subsection (b) must be filed. The report must include: (1) the premium rate, the total premium paid to each such carrier, and the approximate number of persons covered by each class of such benefits; and (2) the total premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such carrier. The report must also include the dividends or retroactive rate adjustments, commissions and administrative service or other fees, or other specific acquisition cost paid by the carrier; amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers or other persons to whom commissions or fees were paid, and also the amount and purpose of such fees. Where the carrier does not maintain separate experience records on the specific groups it serves, the report may include only the basis of its premium rate, the total amount of premiums received from the plan, and a copy of the carrier's financial report; it still must note in detail, however, specific costs incurred in the acquisition or retention of any particular plan.

(e) Investments by welfare benefit plans

Where the welfare benefit plan retains or invests funds, the details must be reported in the same fashion, outlined below, as pension plans funded through a trust.

(f) Employee pension benefit plans

Employee pension benefit plans must report certain information in addition to the "applicable" information required by the foregoing subsections. Fortunately, the Secretary can now specify what is applicable, so the potential reporting discrepancies under the old Act no longer exist.

Where the plan is funded through a trust, it must include in its report the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of retired and nonretired employees covered. It must also include a statement of assets as required by subsection (b) above, which may be evaluated either on the basis used in report-

⁸² *Id.* at 9.

⁸³ 108 CONG. REC. 1560 (daily ed. Feb. 6, 1962).

⁸⁴ H. R. REP. NO. 998, 87th Cong., 1st Sess. 9 (1962). See also 108 CONG. REC. 1843 (daily ed. Feb. 6, 1962).

ing the fund to the Secretary of the Treasury for tax exemptions or the aggregate cost or present value, whichever is lower. The report must include further a detailed list (including cost, present value and percentage of total) of all investments in the employer, employee organizations or other "parties in interest." Under the old Act only officers, trustees and employees of the fund were considered "parties in interest." Now the phrase has been given a technical definition and it includes broadly persons associated with: (1) the plan, (2) the employer, (3) the employer organization, and (4) individuals providing benefit plan services to the plan. But where the investments are: (1) in securities listed and traded on an exchange subject to regulation by the Securities and Exchange Commission; or (2) of an investment company registered under Investment Company Act of 1940; or (3) of a public utility holding company registered under the Public Utility Holding Company Act of 1935; and (4) the assets statement notes the total investments in common and preferred stock, bonds, and debentures, valued as noted above, the identity of such securities and the fees and commissions incidental to their purchase and sale need not be reported. A detailed list of all loans made to the employer, employee organization, or other "party in interest" must also be included in the report. To the degree that the investments of the trust are in insurance or annuity contracts, however, the report need only include the information noted below, which is applicable to funding through insurance carriers.

Where the plan is funded through an insurance company contract, the report must include: The type and basis of funding, actuarial assumptions used to determine contract payments, and the number of retired and non-retired employees covered. It must also include the amount of current and past service liabilities based on the actuarial assumptions (except for benefits completely guaranteed by the carrier) and the amount of all accumulated reserves.

Where the plan is unfunded, the report need only include total benefits paid per year to retired employees for the past five years.

(g) Insurance carrier certification

Insurance carriers must certify, under the amended Act, to the plans with which they deal, within 120 days after the end of each policy year, such information determined by the Secretary of Labor to be necessary for the administrators to comply with the above reporting requirements.⁸⁵ Similar certification was not required under the old Act.

(h) Simplified reports

The amended Act also provides that the Secretary of Labor may provide by general rule simplified reports for plans which he finds would be unduly burdened if they were required to file detailed reports each year. The old Act did not contain such a provision. The privilege of filing such reports, however, may be revoked where the Secretary finds the purposes of the Act would thereby be served.

⁸⁵ The Secretary has provided by regulation that carriers shall certify to plan administrators the information specified in § 7(d)(2) of the Act, plus, in the case of employee pension benefit plans, that specified in § 7(f)(2). 27 Fed. Reg. 5742 (1962), adding 29 C.F.R. §§ 1302.1-6.

Publication: Section 8 (29 U.S.C.A. § 307)

Publication of the plan description and annual report must be made to both participants and beneficiaries. Administrators must make copies of both available for examination in the principal office of the plan. They must, moreover, where written demand is made, send to the last known address of a requesting participant or beneficiary a copy of the description and an "adequate summary" of the latest annual report. Under the Act before amendment, only a "summary" report was required. Presumably now the Secretary will decide what constitutes an "adequate" summary.

Administrators must further file two copies of the description and annual report with the Secretary, who must make them available in the public document room of the Department of Labor; the Secretary is also empowered under this section to prepare forms for the description and annual reports,⁸⁶ and use of the forms prescribed for these purposes has been made mandatory by regulation.

Reports Made Public Information: Section 10 (29 U.S.C.A. § 308(a))

As it was originally proposed,⁸⁷ section 10, an entirely new provision, was based on its counterpart in the L.M.R.D.A.⁸⁸ Congressman Goodell, however, secured a modification in the language, not intended to alter substance but designed to insure that the Secretary would only publish the data obtained from the description and annual report, although the section terms it public information, where to do so would protect the interests of the participants and beneficiaries.⁸⁹

Retention of Records: Section 11 (29 U.S.C.A. § 308(b))

Section 11, another entirely new provision, is also based on its counterpart in the L.M.R.D.A.⁹⁰ It provides that persons required to file descriptions and annual reports must keep for five years adequate records to support the information contained in the documents filed.

The combined effect of sections 10 and 11, like their counterparts in the L.M.R.D.A.⁹¹ will probably be to bring into play the rule of *Shapiro v. United States*⁹² should a grand jury or the Secretary's civil investigators be denied access to such records under a plea of the fifth amendment by an individual. It is clear, of course, that corporations⁹³ and unions⁹⁴ may not invoke the

86 Section 8(b); implemented by regulations: 29 C.F.R. § 2.4, (Supp. 1962); 27 Fed. Reg. 4964 (1962), reissuing 29 C.F.R. § 2.11. The latter makes mandatory the use of forms prescribed by the Secretary for filing descriptions and annual reports. Venue for a criminal failure to file "with the Secretary of Labor" would probably lie only in the District of Columbia. See *Travis v. United States*, 364 U.S. 631 (1961).

87 See, e.g., S. 2520, section 10.

88 73 Stat. 528, 29 U.S.C. § 435(a) (Supp. III, 1962).

89 108 CONG. REC. 1842-43 (daily ed. Feb. 7, 1962).

90 73 Stat. 529, 29 U.S.C. § 436 (Supp. III, 1962).

91 See Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 883-86 (1960).

92 "The privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation. . . ." 335 U.S. 1, 33 (1948).

93 *Wilson v. United States*, 221 U.S. 361, 382 (1911).

94 *United States v. White*, 322 U.S. 694 (1944).

privilege. Even if *Shapiro* should not be held controlling,⁹⁵ access to the records could be obtained by recourse to the immunity provisions of section 9(e) or section 1954(b) of the Title 18 amendments.⁹⁶

Sections 10 and 11 will also provide a needed incentive, particularly to smaller plans, to keep records on a more businesslike basis. As Professor Patterson has observed, such record keeping provisions are sometimes "the most useful provisions of disclosure laws."⁹⁷

Reliance on Administrative Interpretations: Section 12 (29 U.S.C.A. § 308(c))

Taken from the Portal to Portal Act,⁹⁸ and also an entirely new provision, section 12 provides that good faith reliance on an interpretation of the Act by the Secretary of Labor shall be a bar to any liability for a failure to comply with any provision of the Act. This provision will have importance, if any, as a defense to private civil suits under section 9(b), since it is unlikely that the Secretary himself would initiate such a suit, and the criminal penalties of section 9(a) are already limited by a strict concept of willfulness, where a good faith mistake of law would probably constitute a valid defense.⁹⁹

Bonding: Section 13 (29 U.S.C.A. § 308(d))

Few individuals quarreled with the basic idea that bonds should be required of the various plans' personnel. It is hard to understand, in fact, why such a provision was not included in the original Act. Yet, section 13 underwent a number of changes before its final form emerged. Now every administrator, officer and employee of any benefit plan who handles the property of the plan must be bonded. An exception, however, is made for the plan which is underwritten solely by the general assets of the union or employer. It was felt that a "performance-type" bond was beyond the purpose of the statute.¹⁰⁰

The Senate bonding provisions did not contain a bond ceiling; the House provision fixed the upper limit at \$500,000. Under the conference substitute the amount of the bond must be fixed at the beginning of the plan's reporting year. It must be not less than 10 per cent of the total funds handled, except that it must be at least \$1,000 and it need not exceed \$500,000, except where, after notice and hearing, the Secretary prescribes otherwise. The Conference Report, moreover, makes it clear that the Secretary may require a bond in excess of \$500,000, yet not more than 10 per cent of the funds handled, "by regulation prior to the effective date of the bonding requirements" or subsequently "on a case-by-case basis."¹⁰¹

95 The decision rests on a precarious five-four basis. It is not entirely unlikely, therefore, that "a more conservative Supreme Court might at any time adopt the minority view." DAVIS, 1 ADMINISTRATIVE LAW 203 (1958).

96 See *infra* at 280 and 285.

97 PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS 201 (1960).

98 61 Stat. 88, 29 U.S.C. § 258 (1958).

99 See *United States v. Murdock*, 290 U.S. 389 (1933).

100 The final form of the language of the exception is based on an amendment offered by Congressman Goodell in the House. 108 CONG. REC. 1847 (daily ed. Feb. 7, 1962.) Since the Senate had a more flexible bonding provision, the same effect had been achieved through legislative history. S. REP. NO. 908, 87th Cong., 1st Sess. 10 (1961). See also 108 CONG. REC. 1783 (daily ed. Feb. 7, 1962).

101 H.R. REP. NO. 1417, 87th Cong., 2d Sess. 12 (1962).

Fortunately, Congress profited by the mistakes made in some of the "regrettable"¹⁰² draftsmanship in section 502(a) of the L.M.R.D.A.¹⁰³ It is clear under section 13 that the bond need only protect against fraud and dishonesty, and it may be either an individual or a schedule bond. The surety must be an acceptable surety on federal bonds under the authority granted to the Secretary of Treasury pursuant to the Act of July 30, 1947,¹⁰⁴ but the bond may not be procured from any company or through any agent or broker in whose business the plan or any party in interest has significant control or financial interest.

Responsibility for securing the bonds is placed both on the individual handling the funds and the persons having authority to direct them. The section provides, however, that duplicate bonding shall not be required. Rather than "extending to more people less stringent provision," as Congressman Ashbrook observed,¹⁰⁵ this provision will have the desirable effect of making section 13, not section 502 of the L.M.R.D.A.,¹⁰⁶ the bonding standard where union or union-employer plans are involved. Consequently, the interpretative problems noted above will no longer be significant. If not more protection, at least clearer protection will be extended to the participants and beneficiaries. Under a Senate amendment section 13 also empowers the Secretary to issue regulations on bonding.¹⁰⁷

Under an amendment offered by Congressman Jones of North Carolina to the House bill, the Secretary could have exempted individuals from the section where evidence of financial responsibility was offered.¹⁰⁸ A comparable Senate provision only applied where other bonding arrangements were required by federal or state law.¹⁰⁹ The conference substitute now permits the Secretary to accept either other bonding arrangements or evidence of financial responsibility. The intent of the provision is to permit the Secretary by regulation or on a case-by-case basis to accept other forms of surety. Irrevocable escrow arrangements or cash bonds are contemplated.¹¹⁰ Insurance firms, such as Lloyds of London, although not approved by the Secretary of the Treasury also could, for example, continue to write bonds subject to the approval of the Secretary of Labor.

102 See Aaron, *supra* note 91, at 895-97, and Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195, 228-30 (1960).

103 73 Stat. 536, 29 U.S.C. § 502(a) (Supp. III, 1962).

104 6 U.S.C. §§ 6-13 (1958).

105 108 CONG. REC. 1568 (daily ed. Feb. 6, 1962).

106 See *House 1961 Hearings* at 408.

107 The Secretary has issued comprehensive regulations: governing procedures for seeking and granting exemptions from the bonding requirements, 27 Fed. Reg. 8798 (1962); on basic bonding requirements and definitions of terms involved therein, 27 Fed. Reg. 11803 (1962); and concerning the prohibition against bonding by parties interested in the plan, 27 Fed. Reg. 10581 (1962). These add, respectively, 29 C.F.R. §§ 1307.1-11, §§ 1306.1-29, and §§ 1309.1-4. The latter states that not all "parties in interest" as defined in § 3(13) of the Act are disqualified from providing or procuring bonds for the plan, specifically not where the "party in interest" is such only because it provides multiple benefit plan services and the plan has availed itself of other services provided by the party. This is said to be so because there is no distinction between this type of relationship and the ordinary arm's length business relationship involved in securing a bond.

108 108 CONG. REC. 1848 (daily ed. Feb. 7, 1962).

109 S. REP. NO. 908, 87th Cong., 1st Sess. 10 (1962).

110 H. R. REP. NO. 1417, 87th Cong., 2d Sess. 12 (1962).

Effect of Other Laws: Section 16 (29 U.S.C.A. § 309)

Section 16 of the amended Act now provides that the provisions of section 13 of the Act, concerning bonding, are to pre-empt any other present or future state or federal law affecting the operation or administration of employee welfare or pension benefit plans. Pre-emption under the 1958 Act was expressly limited to certain restrictions on duplication of report making, and this added exception regarding bonding was the only change made in section 16 by the 1962 Amendments. Thus section 16 still provides that, with these two exceptions, the amended Act does not supersede any other state or federal law affecting the operation or administration of benefit plans.¹¹¹

Advisory Council: Section 14 (29 U.S.C.A. § 308(e))

Largely taken from the original Douglas bill,¹¹² section 14, a new provision, sets up an Advisory Council to consult with and make recommendations to the Secretary in the administration of the Act. The Council is composed of representatives from the insurance and corporate trust field, management and labor, and finally "other interested groups" and the general public. Voluntary, nonprofit, prepayment medical plans are now, and actuaries, insurance consultants and accountants may be in the future, represented as in the "interested groups" category. The original Council appointments made in 1962 are for two years. Section 14 also contains a requirement, included at the suggestion of Congressman Goodell,¹¹³ that the Secretary send to Congress each year a report covering the administration of the Act and the Council's recommendations.

Administration: Section 15 (29 U.S.C.A. § 308(f))

Section 15 makes the Administrative Procedure Act ¹¹⁴ applicable to the Act. Congressman Roosevelt's statements on the House floor make it clear that the Act is to apply without exception.¹¹⁵ It will have effect primarily on the provisions throughout the Act requiring, prior to certain action, notice and hearing and on the issuance of regulations. Few can object to following its procedures.¹¹⁶

¹¹¹ See *People v. Automobile Transporters Welfare Fund*, 235 N.Y.S.2d 702 (App. Div. 1962).

¹¹² S. 2888, 85th Cong., 1st Sess. § 9 (1957).

¹¹³ 108 CONG. REC. 1848 (daily ed. Feb. 7, 1962). At the suggestion of Congressman Goodell, an amendment was also included which limited the personnel and appropriation for the first two years of the amended Act's administration. *Ibid.*

¹¹⁴ 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1958).

¹¹⁵ 108 CONG. REC. 1564 (daily ed. Feb. 6, 1962). It is questionable, however, that the APA would apply to investigational hearings, as the legislative counsel to the Teamsters' Union suggested, *House 1961 Hearings* at 224, particularly where the investigation is preliminary to a referral to the Department of Justice and no adjudication or rule-making function is involved. See Note, 35 NOTRE DAME LAWYER 77 (1959). On the other hand, strong arguments have been advanced for applying the APA to these types of investigations. See Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness*, 60 MICH. L. REV. 169 (1961), and Rosenblum and Silverstein, *Investigations Under Landrum-Griffin*, 49 GEO. L. J. 283-93 (1960).

¹¹⁶ By General Order 15-62, 27 Fed. Reg. 4977 (1962), the Secretary of Labor established the Office of Welfare and Pension Plans, and delegated to the Assistant Secretary for Labor-Management Relations authority and responsibility for the performance of all functions assigned to the Secretary by the amended Act.

Section 15 also contains the final form of the so-called Ashbrook amendment. Apparently catching the Democratic leadership by surprise, Representative Ashbrook of Ohio proposed and secured the acceptance¹¹⁷ of a provision which would have, in effect, prevented Department of Labor personnel engaged in administering the Act from affiliating with the AFL-CIO.¹¹⁸ Congressman Roosevelt of California described the amendment as an "anti-labor move straight down the line."¹¹⁹ As the provision finally emerged from the House-Senate conference, out of an express desire to avoid conflicts of interest,¹²⁰ it prevented Labor Department personnel from administering or enforcing the Act "with respect to any employee organization of which he is a member or employer organization in which he has an interest."¹²¹

Enforcement: Section 9 (20 U.S.C.A. § 308)

By far the most significant amendments were made to section 9. Now section 9(a) applies not only to sections 5 and 8, but to the entire Act, making a "willful" violation of any provision subject to a fine of not more than \$1,000 or imprisonment of not more than six months. The threat of a criminal action under section 9(a), however, is not too potent. To date the Department of Justice has not yet instituted a single prosecution, largely because of the strict standard of willfulness embodied in the section.¹²² The House report on the original Act expressly stated that no penalty: "shall be enforced except for deliberate defiance or persistent refusal in bad faith to comply with a clear obligation imposed by the provisions of this Act."¹²³

Section 9(b), originally the key to the individual enforcement concept of the Act, has been retained. It provides that, upon request by a participant or beneficiary, if an administrator shall fail or refuse to publish the description or annual report within thirty days in accordance with section 8(a)(2), he may become liable to that person for \$50 per day. Section 9(c) provides that an action for such liability can be maintained in any court of competent jurisdiction. Reasonable attorney fees and costs may also be allowed.

Section 9(d) now spells out the scope of the investigative powers of the Secretary of Labor. Over the strong objection of Secretary Goldberg,¹²⁴ both the House and the Senate attempted to put definite limits on those powers. When the administrative agencies first appeared, in the early part of the 1900's, courts looked with some suspicion on their investigative power. *FTC v. American Tobacco Co.*,¹²⁵ is perhaps the leading case which attempted to place limitations on the administrative "fishing expedition." Despite judicial disfavor, Congress

117 The amendment was passed by a vote of 105 to 79. 108 CONG. REC. 1846 (daily ed. Feb. 7, 1962).

118 108 CONG. REC. 3896 (daily ed. March 15, 1962).

119 *Id.* at 3898.

120 H. R. REP. NO. 1417, 87th Cong., 2d Sess. 13 (1962).

121 Section 15(b).

122 *House 1961 Hearings* at 256.

123 H. R. REP. NO. 2283, 85th Cong., 2d Sess. 11 (1958). It should also be noted that this expression of intent applies to civil penalties as well. *Ibid.*

124 *Senate 1961 Hearings* at 10.

125 264 U.S. 298 (1924).

enacted again and again broad grants of investigative authority. Finally, in *Oklahoma Press v. Walling*,¹²⁶ the right of free access to records for legitimate investigative purposes was upheld. Section 9(d) is the first instance since the beginning of administrative investigations in which Congress, and not the courts, has attempted to circumscribe such investigations.

Under section 9(d) the Secretary can initiate upon complaint or his own motion civil investigations only where he has "reasonable cause" to believe such an investigation may reveal a violation of the Act. Moreover, where section 7 is concerned, a certification must first be requested.¹²⁷ After such certification, if the Secretary continues to have "reasonable cause," the investigation may be conducted. The key to any investigation will be, of course, the meaning of "reasonable cause." It can be expected, therefore, that one of the first cases under the new amendments will concern an attempt to articulate a workable definition of the phrase. Congressman Ashbrook of Ohio is wrong when he asserts that it is synonymous "with anything and everything."¹²⁸ Senator McNamara's discussion of the phrase is much closer to the heart of the matter. Unquestionably, it will be the starting point for any court faced with a concrete case to decide. Recognizing that it is a "term of art" neither too discretionary nor too restrictive, he observed:

It certainly prevents the Secretary from embarking on a "fishing expedition," that perennial horror of private lawyers.

But it does not mean that the Secretary must have in hand before his investigation, the evidence he seeks to find by his investigation.

It will be sufficient for him to find, on a reasonable basis, that an investigation may reveal a violation of the act.

Thus he will not be required to possess the powers of prophecy, only the sense of justice that our courts have required of those who guard the public interest.¹²⁹

On the other hand, it must be recognized that the phrase's lack of precision will permit the skilled but not too ethical attorney to impede at the outset every legitimate investigation by the Secretary of Labor by taking each subpoena to court and pushing all possible appeals to their utmost. For this reason, it is certainly to be hoped that the courts called upon to enforce subpoenae will handle them realistically and expeditiously.¹³⁰

Section 9(e) makes the provisions of the Federal Trade Commission Act of 1914 dealing with the attendance of witnesses and the production of documents applicable to the investigations conducted by the Secretary. As originally proposed, section 9(e) had incorporated, at the suggestion of the Department of Justice,¹³¹ the similar provisions of the Federal Power Act of 1920.¹³² The substitution was made to reassure some House members that the investigative

¹²⁶ 327 U.S. 186 (1946).

¹²⁷ S. REP. No. 908, 87th Cong., 1st Sess. 8 (1961).

¹²⁸ 107 CONG. REC. 17115 (daily ed. Sept. 6, 1961).

¹²⁹ 108 CONG. REC. 1748 (daily ed. Feb. 7, 1962).

¹³⁰ See Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 MICH. L. REV. 187 (1961), for a review of the practice of federal courts during the past twelve years.

¹³¹ 108 CONG. REC. 1841 (daily ed. Feb. 7, 1962).

¹³² 49 Stat. 856, 16 U.S.C. § 825(f),(g) (1958).

powers of the Secretary would not by reference be enlarged.¹³³ Unfortunately, the only real effect of the substitution is to make a plea of possible self-incrimination unnecessary in order for a witness to obtain immunity for testimony in obedience to a subpoena.¹³⁴

Section 9(f) provides that the Secretary can obtain under appropriate circumstances both permanent and temporary injunctions in federal courts. Once obtained, the injunctions can be enforced, of course, by both civil and criminal contempt proceedings.¹³⁵ Unlike the L.M.R.D.A.,¹³⁶ the amendments unfortunately do not provide for jury trials where the criminal contempt alternative is chosen. Section 9(g) grants appropriate federal courts jurisdiction to hear suits under the section.

For the benefit of those not familiar with the legislative history of the Act and the 1962 Amendments, section 9(h) spells out in so many words that the Secretary of Labor is not to regulate or interfere in the management of the various plans. Section 9(i) represents another manifestation of distrust in the Department of Labor. It was included to guarantee "that there could never be a cover up of any nature by any future Secretary of Labor."¹³⁷ The section makes explicit the duty of the Secretary to transmit to the Attorney General any information warranting consideration for criminal prosecution.

E. AMENDMENTS TO THE CRIMINAL CODE

In extensively rewriting the Welfare and Pension Plans Disclosure Act, Congress also enacted three new criminal statutes, dealing with: (1) false statements and concealment of facts in relation to documents required by the Act,¹³⁸ (2) embezzlement and theft from plans subject to the Act,¹³⁹ and (3) bribery and graft occurring in the administration of such plans.¹⁴⁰

1. Section 1027

Largely on the assumption that existing law was adequate,¹⁴¹ although the Douglas bill specifically dealt with the problem,¹⁴² the Teller bill in 1958 did not contain any provision dealing with false statements. As the Act finally emerged from conference, however, the general federal false statement provision was explicitly made applicable.¹⁴³ Still, it remained an open question how

133 108 CONG. REC. 1841 (daily ed. Feb. 7, 1962).

134 *United States v. Monia*, 317 U.S. 424 (1942). To the degree that an embezzlement would involve a false report and consequently a willful violation of the Act under section 9(a), the administrative immunity provision of the Secretary of Labor could be used by the Department of Justice in enforcing § 664 of the Title 18 amendments. See *Goldberg v. Battles*, 196 F. Supp. 749 (E.D. Pa. 1961), *aff'd*, 299 F.2d 937 (3d Cir.), *cert. denied*, 371 U.S. 817 (1962). The immunity provisions of the L.M.R.D.A., which parallel the new provisions of the amended Act, are discussed at length in Rosenblum and Silverstein, *supra* note 115.

135 See *United States v. UMW*, 330 U.S. 258 (1946).

136 73 Stat. 541, 29 U.S.C. § 528 (Supp. III, 1962).

137 108 CONG. REC. 1841 (daily ed. Feb. 7, 1962).

138 76 Stat. 42 (1962), 18 U.S.C.A. § 1027 (Supp. 1962).

139 76 Stat. 42 (1962), 18 U.S.C.A. § 664 (Supp. 1962).

140 76 Stat. 42 (1962), 18 U.S.C.A. § 1954 (Supp. 1962).

141 H. R. REP. NO. 2656, 85th Cong., 2d Sess. 11 (1958).

142 S. 2888, 85th Cong., 1st Sess. § 13(b) (1957).

143 Section 9(e) of the 1958 Act, 72 Stat. 1002, made 18 U.S.C. § 1001 (1958), the general provision regulating to false statements in any matter within the jurisdiction of any agency of the United States, applicable to descriptions and annual reports under the Act.

section 1001 could be applied to the Act.¹⁴⁴ Section 1027 is apparently designed to answer objections to the former arrangement¹⁴⁵ and guarantee that false statements in the various documents required by the Act will be subject to stiff criminal sanctions.

Representative Hiestand of California is right in his criticism when he observes that it is difficult "to make sense out of" the new provision.¹⁴⁶ Upon a close reading, however, its meaning becomes evident. It applies across the board to "any person"; it is not limited, for example, to plan personnel. It deals, moreover, with three categories of information: (1) that contained in documents required "to be published," which would include the description, annual report and summary under section 8(a); (2) that contained in documents required to be "kept" under section 11, which would include such records as vouchers, worksheets, and receipts needed to verify, explain, or clarify the description or the annual report; and (3) that required to be "certified" by insurance carriers under section 7(g) or by public accountants under section 7(b). Any knowing false statement or concealment in any of these would subject the person to a fine of not more than \$10,000 or imprisonment for not more than five years, or both.

Section 1027 differs from the general false statement provision in a number of respects. Unlike section 1001, it does not require that a particular false statement be made "willfully." The difference is probably more apparent than real, since "willful" within section 1001 does not denote "evil purpose."¹⁴⁷ Section 1001, unlike section 1027, also requires that the false statement be "material." Again, however, the difference may be more apparent than real. "Materiality" within section 1001 is governed by the same test used in perjury cases.¹⁴⁸ There the term has been so broadened that "it might as well be omitted from the statute."¹⁴⁹ We can conclude, therefore, that the new section makes few, if any, substantial changes in existing law. Its major contribution will be to specify in detail the kinds of documents to which it applies.

2. Section 644

Both the Douglas bill¹⁵⁰ and the Administration proposal¹⁵¹ in 1957 included a provision prohibiting the embezzlement of the funds of a benefit plan. Unfortunately, the Teller bill and the Act as it finally emerged from conference did not deal with the problem. But section 644 as it now stands is little more

144 Making the statute applicable through an explicit incorporation still did not answer Congresswoman Green's objection founded on the lack of administrative functions within the Department of Labor. See H. R. REP. NO. 2283, 85th Cong., 2d Sess. 27 (1958).

145 The objections were, in fact, removed when the Secretary of Labor was given administrative functions. Consequently, there is much truth in the observation that section 1027 was not needed legislation.

146 107 CONG. REC. 17115 (daily ed. Sept. 6, 1961).

147 *Corcoran v. United States*, 229 F.2d 295 (5th Cir. 1956).

148 Compare *Carroll v. United States*, 16 F.2d 951 (2d Cir.), *cert. denied*, 273 U.S. 763. (1927), with *Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961).

149 Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 IND. L.J. 1, 2 (1959).

150 S. 2888, 85th Cong., 1st Sess. § 13(d) (1957).

151 S. 2175, 85th Cong., 1st Sess. § 201 (1957).

than a carbon copy of its counterpart in the Douglas bill. It makes any person who embezzles, steals, or unlawfully and willfully abstracts or converts any of the moneys, funds, securities, premiums, credits, or other assets of a benefit plan subject to the Act¹⁵² liable for a fine of \$10,000 or imprisonment for not more than five years, or both.

By and large there was little real opposition to the inclusion of an embezzlement provision among the 1962 amendments, although in 1957¹⁵³ and in 1961¹⁵⁴ objections had been made to the language of the provisions, particularly the phrase "abstracts or converts," on the ground that they were too vague and indefinite. The objections, however, are fairly met by the memorandum filed by the Department of Justice in 1957¹⁵⁵ and the testimony of its Criminal Division in 1961.¹⁵⁶ While fine distinctions are inappropriate to consolidated offenses,¹⁵⁷ it should not be concluded that statutes such as section 644 are without definite meaning. "Abstract"¹⁵⁸ and "convert"¹⁵⁹ are both terms which have been subject to adjudication and definition by appellate courts. There is little danger, moreover, of an otherwise innocent transaction being caught up in such a statute, since it is clear that wrongful intention would be held to be the core of the crime.¹⁶⁰

3. Section 1954

At the suggestion of the Securities and Exchange Commission,¹⁶¹ when the Douglas bill was reported in 1957 it included a provision dealing with the bribery of certain persons connected with benefit plans.¹⁶² As finally enacted in 1962, however, section 1954 is based only in part on the Douglas bill. It actually bears a closer kinship¹⁶³ to section 302 of the Taft-Hartley Act.¹⁶⁴ Like section 302, it is designed to deal with what Judge Hand aptly described as:

what has been done, time out of mind, when one person, knowing that he is likely to have continuous dealing with another, in which the second person will be acting as a fiduciary, wishes to insure a friendly approach to the fiduciary; and makes him presents or does him favors, or in other and less palpable forms tries to turn the edge of his allegiance.¹⁶⁵

¹⁵² Constitutionally, therefore, the provision, like the Act itself, rests on the commerce clause. Section 501(c) of the L.M.R.D.A. has a similar constitutional base which has been affirmed on appeal as fully constitutional. *Lawson v. United States*, 300 F.2d 252 (10th Cir. 1962).

¹⁵³ *Senate 1957 Hearings* at 443.

¹⁵⁴ *House 1961 Hearings* at 235.

¹⁵⁵ *Hearings before the House Committee on Education and Labor*, 85th Cong., 1st Sess. 87 (1957).

¹⁵⁶ *House 1961 Hearings* at 261.

¹⁵⁷ *United States v. Page*, 277 F.2d 3 (2d Cir. 1960).

¹⁵⁸ *United States v. Northway*, 120 U.S. 327 (1887); *Williams v. United States*, 275 Fed. 129 (6th Cir. 1921).

¹⁵⁹ *Hubbard v. United States*, 79 F.2d 850 (9th Cir. 1935).

¹⁶⁰ *Dobbins v. United States*, 157 F.2d 257 (D.C. Cir.), *cert. denied*, 329 U.S. 734 (1946).

¹⁶¹ *Senate 1957 Hearings* at 66.

¹⁶² S. 2888, 85th Cong., 1st Sess. § 13(e) (1957). The section did not include "because of" language; see note 167 *infra*.

¹⁶³ See S. REP. NO. 908, 87th Cong., 1st Sess. 13 (1961).

¹⁶⁴ Ch. 120, § 302, 61 Stat. 157 (1947) (now 29 U.S.C. § 186 (Supp. III, 1962)).

¹⁶⁵ *United States v. Ryan*, 225 F.2d 417, 426 (2d Cir. 1955) (dissenting opinion), *rev'd*, 350 U.S. 299 (1956).

Section 1954 begins by setting out four categories of fiduciaries: (1) persons associated with the plan; (2) persons associated with an employer connected with the plan; (3) persons associated with an employee organization connected with the plan; and (4) persons associated with an organization, such as an accounting or investment brokerage firm,¹⁶⁶ which provides benefit plan services to the plans. It then attempts to insulate those fiduciaries from both graft and outright bribery¹⁶⁷ by prohibiting them from receiving, agreeing to receive, or soliciting any fee, kickback, commission, gift, loan, money, or thing of value.¹⁶⁸ Under the section, graft encompasses all of the above transactions entered into "because of . . . actions, decisions, or other duties" of the fiduciary relating to the plan. A bribe, on the other hand, would be committed where the fiduciary entered into the particular transaction "with intent to be influenced with respect to" any of his similar actions, decisions or other duties. On the face of the statute, both graft and bribery are subject to a fine of \$10,000 and/or imprisonment for not more than three years. Congress has apparently left it up to the judiciary to distinguish between outright bribery and the less serious taking of graft where punishment is concerned.

The Department of Justice has also been entrusted with a measure of flexibility; a specific intent to influence will have to be shown only where it is charged. Consequently, the Department can be expected to move under the less stringent graft language in situations actually involving bribery but otherwise not suitable for prosecution because of a lack of evidence on the issue of intent. The Department has assured Congress, however, that the provision will be used against conflict of interest payments only in relatively more complex and sophisticated situations.¹⁶⁹

The distinction between the graft-type transaction and the outright bribe is not without other important differences. A conviction for having accepted graft probably would not constitute a conviction of "bribery" within section 504 of the L.M.R.D.A., which disqualifies persons convicted of certain crimes, including bribery, from service as a union officer or a labor relations consultant for five years after their release from prison.¹⁷⁰ Since a graft-type conviction could be obtained without proof of an intent to influence, the touchstone of the traditional definition of bribery,¹⁷¹ it would probably not be held a disqualifying conviction for "bribery" within the meaning of section 504.

166 See S. REP. NO. 908, 87th Cong., 1st Sess. 11 (1961).

167 The statute reads "because of or with intent to be influenced with respect to," indicating alternative circumstances under which the statute may be violated. (Emphasis added.) See *Adolfson v. United States*, 159 F.2d 883 (6th Cir.), *cert. denied*, 331 U.S. 818 (1947). The phraseology is based on similar bribery provisions of Chapter 11, Title 18, United States Code. See, e.g., Act of June 25, 1948, ch. 645, § 206, 62 Stat. 692; compare 18 U.S.C.A. § 201(f)-(i) with 18 U.S.C.A. § 201(b)-(e) (Supp. 1962). The intent of Congress was to go beyond a strict "influence-type" statute. STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., *FEDERAL CONFLICT OF INTEREST LEGISLATION* 67 (1958).

168 The comparable provision in H. R. 8723 did not include agents of plans; officers, counsels, agents and employees of organizations providing benefit plan services; or counsels of employers and employee organizations. Solicitations, fees, kickbacks, commissions, gifts and loans were also not expressly included. H. R. REP. NO. 1417, 87th Cong., 2d Sess. 13 (1962).

169 See S. REP. NO. 908, 87th Cong., 1st Sess. 15-16 (1961).

170 73 Stat. 536, 29 U.S.C. § 504 (Supp. III, 1962).

171 PERKINS, *CRIMINAL LAW* 406-07 (1957).

Any person who gives or offers any fee, kickback, or other thing of value prohibited by section 1954 is similarly subject to fine or imprisonment. Largely to protect individuals providing benefit plans with professional advice,¹⁷² the section excludes the payment of bona fide salary, compensation, or other payment for goods, facilities, or services actually furnished or performed in the regular course of the individual fiduciary's duties.¹⁷³

At the suggestion of the Department of Justice,¹⁷⁴ the section also includes an immunity provision, obviously patterned after section 1406 of the Narcotics Control Act,¹⁷⁵ which can be used to compel testimony or the production of records in grand jury or court proceedings in the face of a plea of possible self-incrimination. Like section 1406,¹⁷⁶ the provision will unquestionably be construed to protect persons compelled to give testimony from both state and federal prosecutions.¹⁷⁷ For those concerned by any attempt to circumvent the fifth amendment, there is some consolation in the requirement of the provision that it be used only after the Attorney General himself approves the grant on a case-by-case basis.¹⁷⁸

F. CONCLUSION

Over-all criticism of the Welfare and Pension Plans Disclosure Act, even as amended, must begin by noting the continuing inadequacy of its disclosure provisions. They are inadequate precisely because they do not require full and complete disclosure. It is clear that strong sanctions now exist which can, if used, deal well enough with such abuses as double dealing and outright thievery. Vigorous prosecution¹⁷⁹ and adequate bonding will do about all that law can do where basic dishonesty is involved. Of greater importance to the ultimate beneficiary, however, is the possibility of incompetent, imprudent or irresponsible management. Only detailed regulation or detailed disclosure can deal with these problems, if they can be dealt with at all. A sound investment plan, for example, could perhaps be guaranteed by exposing the administrator's or trustee's judgment to public criticism or by articulating in detail a mass of regulations and guidelines. For those concerned with maintaining a healthy balance between private and public judgment, however, disclosure — effective disclosure — is the only acceptable alternative. The present Act, by requiring only category disclosure, and not touching many areas of plan management, adopts neither approach.

Category disclosure ignores as well the problem of the concentration of

¹⁷² See *House 1961 Hearings* at 233.

¹⁷³ The language originally proposed excepted such payments for "necessary services." H. R. 7235, 87th Cong., 1st Sess. § 17(a) (1961). At the suggestion of the legislative counsel of the Teamsters, the phrase was omitted. *House 1961 Hearings* at 234.

¹⁷⁴ H. R. REP. No. 998, 87th Cong., 1st Sess. 7 (1961).

¹⁷⁵ 18 U.S.C. § 1406 (1958).

¹⁷⁶ See *Reina v. United States*, 364 U.S. 507 (1960).

¹⁷⁷ See S. REP. No. 908, 87th Cong., 1st Sess. 11 (1961).

¹⁷⁸ 108 CONG. REC. 1752 (daily ed. Feb. 7, 1962).

¹⁷⁹ The Title 18 provisions will be administered by the Department of Justice. Investigations under the provisions, moreover, will be conducted by the Federal Bureau of Investigation and/or federal grand juries. See *House 1961 Hearings* at 256-57. Interestingly enough, grand jury investigations are not limited by "reasonable cause" requirements. See *Blair v. United States*, 250 U.S. 273 (1919). Recognizing this fact brings into stronger relief the distrust manifested by Congress in the Office of the Secretary of Labor.

financial power. Largely unasked and unanswered is the question of what effect on our private economy and personal freedom will result from the accelerating trend toward institutional holding of private property, of which the benefit plan, particularly the self-insured pension trust, is perhaps the best illustration.

Traditionally, America has been committed to an economic system based on the private ownership of property, fundamentally because of a belief that private ownership promotes individual freedom. These benefit programs have today amassed, and are amassing, vast aggregates of wealth upon which many have claims, but of which no one can call himself owner. The old analysis that the rise of the corporation has resulted in a separation and dilution of ownership and control must now be supplemented by the recognition of a new merger of legal ownership and, perhaps, control in the benefit plan trustee; it is a sobering observation indeed that 90 per cent of the assets of self-insured pension plans are held by eight or nine New York banks.¹⁸⁰ Little information is possessed on how this trust is being exercised. Likewise, the mere allegations surrounding the Montgomery Ward and New York Central proxy fights are disturbing.¹⁸¹

What is needed in the area of these programs is the clear recognition that those who administer the various plans occupy positions of public trust. They must account to the larger community from whom they obtain their position for the administration of this stewardship. Private economic power like public political power must be held accountable. The real challenge of the benefit plan is to achieve this goal short of the twin evils of pluralistic anarchy or state authoritarianism.

Criticism of the Act must also note the failure to deal with such problems as termination, amendment, eligibility, actuarial soundness, vesting, legal enforceability of individual rights; and the interrelation of the plans and Social Security, the equity market, economic growth and inflation. It may well be that the Act is most notable for what it has not done. These areas are certainly crucial problems of concern, which should at least occupy the attention of the new Advisory Council.

On the other hand, political realities and public understanding must also be seen for what they are. Few of the participants—government, employers, unions, or beneficiaries—have developed to date any articulate understanding of what they are doing.¹⁸² Under these circumstances, the present Act is probably the best that could be obtained at this time. Witness the fate of the Douglas bill. It may well be, moreover, that it is too soon to expect any definitive treatment of the problem. The disclosure provisions, as inadequate as they are, the record keeping requirements and the bonding and criminal

180 BERLE, *ECONOMIC POWER AND THE FREE SOCIETY* 11 (1957).
Society ser. 1957).

181 See generally, *Stock Market Study (Corporate Proxy Contests)*, *Hearings before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess., pt. 3 (1956).

182 See HARBRECHT, *PENSION FUNDS AND ECONOMIC POWER* 73-121 (1959).

provisions, given effective administration,¹⁸³ will go a long way toward securing a greater measure of security for the beneficiaries of the various benefit plans than existed before the Act. Ultimately, it must be recognized that all of the problems implicit in the development of the benefit plan cannot be solved by the enactment of any single law. Professor Patterson's reference¹⁸⁴ to Oliver Goldsmith is in point:

How small, of all that human hearts endure,
That part which laws or king can cause or cure.

¹⁸³ Unfortunately, too little consideration was given to the effect which its administering of yet another law like the L.M.R.D.A. will have on the historic relation of the Department of Labor to the labor movement. Congressman Kearns is perhaps right when he asks that consideration should be given to a reorganization of the Department. 108 CONG. REC. 1849 (daily ed. Feb. 7, 1962).

¹⁸⁴ PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS 256 (1960).