Proposed Amendments to the Welfare and Pension Plans Disclosure Act

Stephen E. Dawson
University of Michigan Law School
PROPOSED AMENDMENTS TO THE WELFARE AND PENSION PLANS DISCLOSURE ACT

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PROPOSED AMENDMENTS TO THE WELFARE AND PENSION PLANS DISCLOSURE ACT

I. INTRODUCTION

Proposals to regulate private pension and deferred profit-sharing plans\(^1\) are by no means new to Congress. With the rapid growth in size, number and complexity of such plans in the late 1940's and early 1950's,\(^2\) Congress began to give increasingly close attention to their defects and, particularly, to their mismanagement. The first congressional attempt to reduce the instances of private pension plan mismanagement occurred in 1958 when Congress enacted the Welfare and Pension Plans Disclosure Act.\(^3\) The Act was amended once in 1962,\(^4\) and further proposed amendments are presently before the Congress.

This note will examine two of the proposed amendments to the Welfare and Pension Plans Disclosure Act which were introduced in the 91st Congress.\(^5\) Emphasis will be placed upon the need for further federal regulation of private pension plans and the strengths and weaknesses of the proposed legislation.

II. THE PRIVATE PENSION PLAN

It is unlikely that anyone contemplating the potential growth of

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\(^1\) A pension plan is a program under which either the amount of the benefit to be paid to the employee upon retirement or the annual contribution to the employee’s account (which account, upon retirement, contains the total amount which will thereafter be paid to the employee in lump sum or, more often, in installments) is fixed by a predetermined formula. See D. Rotham, Establishing and Administering Pension and Profit-Sharing Plans and Trust Funds 4 (1967).

\(^2\) See generally P. Harbrecht, Pension Funds and Economic Power 7-8 (1959). Professor Harbrecht cites four reasons for the sudden and rapid growth of private pension plans: first, since World War II the combination of high corporate taxes in general and the availability of certain tax deductions for contributions to private pension plans has encouraged employers to establish such plans; second, wage stabilization programs during World War II and the Korean Conflict led to increased competition among employers to attract and hold workers with more attractive “fringe benefits,” including pension plans; third, a court decision, Inland Steel Co. v. NLRB, 170 F.2d 247 (3d Cir. 1948), cert. denied, 336 U.S. 960 (1949), enforcing 77 NLRB 39 (1948), made pension plans a mandatory subject of collective bargaining; and, fourth unions sought pension plans because of the inadequacy of retirement benefits under government programs.


private pension plans in 1950 would have foreseen the amount of wealth that such plans would accumulate in less than twenty years. By 1968 private pension plans covered 47.2 percent of all workers in private employment, or 28.3 million workers, who received benefits totalling more than five billion dollars. Moreover, the Securities and Exchange Commission’s preliminary figures indicate that in 1969 the book value of assets in private pension funds totaled 126.2 billion dollars, almost two and one-half times the value of private pension plan assets in 1960. There is every reason to expect that this enormous growth will continue.

The impact of fund accumulations on the American economy further illustrates the importance of private pension plans. In 1969 these funds were largely invested in corporate stock valued at more than forty-seven billion dollars. In 1959, Professor Harbrecht noted that the investment of private pension funds in the securities market has a twofold effect. On the one hand, since pension funds tend to be heavy purchasers but infrequent sellers of corporate stock, they have a stabilizing influence on the market. On the other hand, their heavy purchases tend to contract the market and raise the prices of blue chip securities. After voicing concern about the growing concentration of control over pension funds in the hands of bank trustees and the possible future implications of this development, Professor Harbrecht concluded:

We find a greater concentration of control in the pension trusts than among the mutual funds, the insurance companies, and, probably, the banks holding personal trusts. And yet, unlike the pension trusts, the mutual funds are subject to the

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6 This represents an increase of over twice the percentage and three times the number of workers covered in 1950. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HANDBOOK OF LABOR STATISTICS, Table 118 (1970) [hereinafter cited as 1970 HANDBOOK OF LABOR STATISTICS].

7 1970 HANDBOOK OF LABOR STATISTICS, Table 118.


9 One writer estimates that total private pension fund assets by 1981 will value about 220 billion dollars. To date, his statistical computations have fallen short of the actual growth rate of fund accumulations. See D. Holland, Private Pension Funds: Projected Growth (1966).

10 SEC, Statistical Series Release No. 2437, Table 2 (1970), in 3 CCH PENSION PLAN GUIDE ¶ 25,136 at 18,311 (1970). In 1963 corporate stock represented approximately fifty-five percent of total private pension fund assets; cash and deposits represented one percent of total assets; U.S. Government securities represented three percent; corporate and other bonds represented thirty percent; and mortgages represented five percent. Id.

11 See note 2 supra.

12 P. Harbrecht, supra note 2, at 234.
regulation of the SEC, the insurance companies are rigidly governed by state agencies and the trustees of personal trusts have to account to beneficiaries (though this accounting may not amount to much as a preventive check). The bank trustees are therefore in a position to wield considerable economic power through their control of the pension trusts, a power which is further extended through their stockholdings for personal trusts.\textsuperscript{13}

These remarks are even more applicable today.\textsuperscript{14} The private pension plan system contains the only large private accumulation of funds that has escaped the imprimatur of effective federal regulation.

Such regulation of private pension plans is similarly warranted in view of the great benefit that such plans are capable of bestowing on the retired worker. In 1969 almost thirteen million retired Americans were receiving benefits under the Federal OASI system.\textsuperscript{15} The average monthly benefit received by these persons amounted, however, to only one hundred dollars per month,\textsuperscript{16} while in 1967 a retired couple's average costs on a low budget were $213 per month in the urban United States.\textsuperscript{17} Although views differ as to the appropriate role of Social Security,\textsuperscript{18} there is little doubt that the program by itself is presently inadequate to meet the needs of retired Americans. Since so very few are able to accumulate enough money during their working lives to provide for basic needs after retirement, the private pension plan is often all that remains to supplement Social Security benefits.\textsuperscript{19} It is

\textsuperscript{13} Id. at 235. See also A. BERLE, ECONOMIC POWER AND THE FREE SOCIETY 12 (1958):

When power is lodged in a particular group it has no choice except either to exercise it or to try to revolutionize the system. There is no way of avoiding power. . . . The trust funds admit they have it but they have thus far refused to use it. This situation cannot last much longer. Somebody is bound to use that power, of necessity. Pension trusts are so concentrated that a relatively small amount in equities outbalances any number of scattered holdings.


\textsuperscript{15} 1970 HANDBOOK OF LABOR STATISTICS, Table 119, at 284.

\textsuperscript{16} Id.

\textsuperscript{17} Id. at 328.


\textsuperscript{19} For a discussion of the various ways in which private pension plans can be integrated with Social Security see M. BERNSTEIN, supra note 18, at 30–32; Buck, Features of
therefore not surprising that the federal government should undertake to insure that the private pension plan system adequately fulfills this supplementary function.

III. ABUSES TO WHICH PENSION FUNDS ARE SUBJECT

A. Imprudent Investment

The problem of imprudent investment is by no means new to the law. State legislatures and courts have long wrestled with the problem. One writer describes the history of standards governing trust investments as follows:

At an early date the Massachusetts court announced what has come to be known as the prudent man rule governing trust investments... and has continued to test the propriety of a trustee's investments by reference to how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their own funds, considering the probable income, as well as the probable safety of the capital to be invested. Many states, however, not content to stop with such a general guide, enacted statutes setting up legal lists of trust securities. Under some statutes the trustee was confined to the legal list but sometimes... the statute was construed as permissive, so as not to prevent the trustee from making investments outside the legal list provided he met the test of prudence.

In recent years there has been a strong legislative tendency to get away from the legal lists and to leave the matter to be tested by the hypothetical conduct of the prudent man.20

Although the statement of the prudent man rule is generally the same, its application, unfortunately, varies considerably from state to state,21 and its effectiveness in controlling the investments of pension plan trustees and administrators is open to serious doubt. One primary reason is that many plans do not take the form of a trust22 and, frequently when they do, the trust in-

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21 Id. at 618. One of the current sources of difference in application of state prudent man rules concerns the propriety of investment in common stocks.
22 E.g., group annuity plans under which the employer purchases deferred annuities for plan participants. See also S. Rep. No. 1440, 85th Cong., 2d Sess. 9 (1958). The report states that, "it is not clear that administrators who handle funds only temporarily—passing them on to insurance companies or a corporate fiduciary—are really trustees in the accepted legal sense." That is, legal title to the assets never resides in the administrator. Without such a trust arrangement, it is extremely difficult for plan participants or beneficiaries to establish standing to sue for the administrator's malfeasance.
instrument gives such broad discretion to the trustees as to nullify the impact of the prudent man rule. Even where the plan requires the funds to be placed in trust and the trust instrument does not give complete discretion to the trustee in making investments, few plan participants and beneficiaries either know of the abuses that are occurring or have adequate resources and motivation to pursue a lawsuit against the trustee.

The Internal Revenue Code of 1954 does provide some standards that are helpful in controlling the investments of pension fund administrators and trustees. The Code provides that an employer who establishes a "qualified plan" is entitled to limited deductions based upon the amount which he contributes to the funding of the plan. In addition to meeting the requirements of a "qualified plan," a tax exemption for the income accruing from the employer's contributions is available only if the fund does not engage in any "prohibited transactions" as defined in section 503(b) of the Code. Under that section, the pension fund may not: lend any of its income or corpus without adequate security and a

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23 1970 House Hearings 359. Mario E. Impellizeri testified:

A number of pension trust agreements have few restrictions to inhibit the trustees in managing the money. Some company pension trust agreements, for example, authorize the trustees to buy securities on credit in their uncontrolled discretion, to issue promissory notes on such terms and conditions as they see fit. Other company pension trust agreements give full power, authority, and discretion to engage in any business as if they were the absolute owners of the fund, and states [sic] that the employer may vary contributions as it sees fit.

24 With respect to those plans which employ banks as trustees, some federal regulation with respect to fiduciary standards exists. National banks and state banks that are members of the Federal Reserve System are subject to the regulations of the Federal Reserve Board. For the most part, however, these regulations use state law as the touchstone for measuring investment standards. See P. Harbrecht, supra note 2, at 142.

25 Int. Rev. Code of 1954, § 401(a)-(f). Briefly, the major requirements for a "qualified plan" are: (1) it must be created and maintained as a domestic trust in the United States; (2) it must have been established by the employer for the exclusive benefit of his employees or their beneficiaries; (3) it must be impossible, before the satisfaction of all liabilities with respect to employees and their beneficiaries, for any part of the corpus or income to be used for purposes other than the exclusive benefit of the employees or their beneficiaries; (4) it must not discriminate in favor of certain specified classes of employees; and (5) forfeitures must not be applied to increase the benefits any employee would receive under the plan. See Treas. Reg. § 1.401-1(a) (1970). For a more complete discussion of these requirements see M. Bernstein, supra note 18, at 198–214.


27 Id. §§ 501(a), 805(d). Under §§ 402(a) and 403(a), the employee-participant is not taxed on the employer's contribution. He will, however, be taxed on the benefits he receives after retirement.

28 The test for "adequate security" is whether it may reasonably be anticipated that loss of principal or interest will not result from the loan. Mortgages or liens on property and stock or securities issued by corporations other than the borrower are examples of security considered to be adequate. IOU's are not. Treas. Reg. § 1.503(c)-1(b) (1970). Cf. Int. Rev. Code of 1954, § 503(e), which, subject to certain limitations, permits a pension fund to make loans to the employer if secured by a "bond, debenture, note or certificate or other evidence of indebtedness."
reasonable rate of interest; pay any compensation in excess of a reasonable allowance for services; make any of its services available on a preferential basis; sell any substantial part of its securities or other property for less than adequate consideration; or engage in any other transaction which results in a substantial diversion of its assets to either the employer creating the plan or a corporation controlled by the employer.

Unfortunately, several factors hinder the effectiveness of the Code in preventing such transactions. First, the sanction imposed by the Code—loss or denial of the fund’s tax exemption and the deductibility of the employer’s contributions to the fund—is only as effective as the incentive to secure or maintain such exemption or deduction. Although most writers have assumed that tax deductibility of pension plan contributions is a significant incentive to the employer, this is not necessarily the case. Insofar as such contributions serve as a substitute for other forms of compensation—for example, wages and salaries—which are also deductible, the employer gains no special tax advantage from the deductibility of pension plan contributions. Thus, the key to the effectiveness of the sanction lies in the tax-exempt status of the pension fund’s income. If the fund loses its tax exemption and the employer has guaranteed that a certain sized benefit will be paid to employees upon retirement, he may be forced to increase his contributions to the fund to offset that portion of the income lost to the tax. In turn, however, the employer is permitted to deduct his additional contribution to the fund. The effectiveness of section 503(b) is also weakened by the fact that the loss of a tax exemption is applied only to the taxable year in which the section is violated. In any subsequent year, a claim for exemption can again be made if accompanied by a written declaration, made under penalty of perjury, to the effect that the prohibited transaction will not knowingly be engaged in again. Moreover, a denial


30 M. Bernstein, supra note 18, at 198. See also P. Harbrecht, supra note 2, at 130. Of course, Bernstein’s remarks only apply when the employer may choose freely between establishing or maintaining a plan and not establishing or discontinuing one. When the employer is faced with a strong union’s demand for a plan, such alternatives cannot usually be considered.

31 Treas. Reg. § 1.503(d)(1)(a) (1970). However, the I.R.S. has ruled that before an organization’s application for an exemption will be accepted, the circumstances relating to the prohibited transaction must no longer exist. Rev. Rul. 69-233, 1969-1 CUM. BULL. 156, in 4 CCH 1970 STAND. FED. TAX REP. ¶ 3078.50, at 41,135.

Note also that under the regulation the declaration is to be made by a “principal officer of such [plan] authorized to make such declaration.” Since the penalty of perjury is personal to the officer, it is possible that a change in officers or simply a shifting of the responsibilities of the officers would make the sanction ineffective.
of tax exemption does little to help recover the funds lost by improvident investments.\textsuperscript{32}

It should be pointed out that the Code is of no assistance in regulating plans which do not or are unable to seek tax-exempt status.\textsuperscript{33} With respect to such plans, section 503(b)’s fiduciary standards have no effect at all. A final weakness of section 503(b) is that it only prohibits certain transactions between the fund and the employer. At least on its face, it does not purport to deal with transactions between the fund and other parties in interest, such as the employee organization or its officers.\textsuperscript{34}

In any event, there is little doubt that despite the “prudent man rule” and section 503(b) of the Internal Revenue Code, imprudent investments do occur. Although most of these ill-advised investments never come to the public’s attention, those that do are certainly spectacular. Often such investments arise from a conflict of interest into which the administrator or trustee, purposely or inadvertently, has placed himself. The results of such an arrangement can be disastrous, as was related to the House General Subcommittee on Labor:

In Chicago, the company-appointed trustee of Brasco Manufacturing Co. put $250,000, or 69 percent of the company pension fund’s total assets, into Brasco’s preferred stock. At the end of 1964 the stock was worthless and the fund’s total assets had shriveled to $13,500.\textsuperscript{35}

Such conflicts of interest and consequent unsound investments are by no means restricted to company-managed funds. A widely publicized example of questionable investment involves the United Mine Workers’ policy of keeping as much as seventy

\textsuperscript{32} In addition, a denial of tax-exempt status can greatly harm the interests of plan participants. In a letter to the Senate Committee on Labor and Public Welfare, the Commissioner of Internal Revenue stated that the loss of tax-exempt status might well be a tax penalty on the victims rather than on the perpetrators of the violation. For example, an employer or trustee who diverted funds might not be solvent, and the penalty might be assessment of a tax liability against the fund as well as a denial of tax deferment and capital gains treatment to the beneficiaries. S. REP. No. 1440, 85th Cong., 2d Sess. 16 (1958).

\textsuperscript{33} For example, an unfunded or “pay-as-you-go” plan does not meet the requirements of a “qualified plan” within the meaning of INT. REV. CODE of 1954, § 401(a). Nonetheless, it is not unusual for such a plan to accumulate a large fund to pay for past service liabilities. See 1970 House Hearings 331.

\textsuperscript{34} Treas. Reg. § 1.503(a)–1(a) (1970) does, however, provide that if a trustee or other fiduciary of the [plan] (whether or not he is also a creator of such [plan] ) enters into a transaction with the organization, such transaction will be closely scrutinized in the light of the fiduciary principle requiring undivided loyalty to ascertain whether the [plan] is in fact being operated for the stated exempt purposes.

\textsuperscript{35} 1970 House Hearings 359 (remarks of Mr. Impellizeri).
million dollars of its pension fund in an interest-free checking account at the seventy-five percent union-owned National Bank of Washington. This policy costs the fund over $3.5 million in interest per year. The union claims that the purpose for this "investment" is to maintain a readily available strike fund. Another illustrative example of questionable investment, related by former Secretary of Labor Schultz, involves the acceptance of improper security by a jointly-administered pension plan:

The trustees of a pension fund placed 16 million dollars in a questionable investment, the security for which was a mortgage on a proposed golf course. After the project had gotten under way, management responsibilities were turned over to an individual three months after he had been released from Federal parole. When the mortgagor went bankrupt, the fund suffered a loss of $6.7 million.

B. Other Breaches of Fiduciary Duty

Although imprudent investment constitutes a serious and all too prevalent abuse of the private pension plan system, an even more flagrant abuse occurs when the trustee or administrator takes advantage of his fiduciary position for personal gain. Such improper management may take many forms—exorbitant fees charged to the fund by the trustee or administrator, embezzlement, bribery, graft, kickbacks (often concealed by finder's

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36 Kessler, The Case for Regulation of Pension Funds, Detroit Sunday News, Nov. 29, 1970, § D, at 12. See also 1970 House Hearings 360. It is interesting to note that section 302 of the Taft-Hartley Act, [29 U.S.C. § 186 (1964)], specifically requires that union pension funds, like the U.M.W.'s, be administered equally by management and the union. Thus, either the Act is being violated or, more likely, the employers have given the union complete control over the choice of investments.

37 1970 House Hearings 471. Loans made by the trustees of the Teamsters Central States, Southeast and Southwest Area Pension Fund have also been the subject of much investigation. In one case these trustees allowed their mortgage on Caesar's Palace in Las Vegas, security for a 16.7 million dollar loan, to be subordinated to a bank's loan of two million dollars. Morgan & Ayres, Bankroll for the Big Mobs, Oakland Tribune, Sept. 21, 1969, in 1970 House Hearings 121.

38 See, e.g., 1970 House Hearings 471 (remarks of former Secretary of Labor Schultz): Five trustees administered 16 pension and [deferred] profit-sharing plans of a corporation. Of these five, three were past or present officers of the corporation. In one year, the five trustees received an aggregate of more than $300,000 in trustees' fees from the corporation's 16 funds, which, in addition, paid over $130,000 to a separate corporation, controlled by the trustees, which was established to administer and invest funds of the corporation's benefit plans. Trust fund management services by a bank trust department probably would be about $50,000 for a fund of comparable assets.

fees), or improper contributions from the employer. However, as in the case of imprudent investments, only the most spectacular examples of mismanagement come to the public and the federal government’s attention.

Most of the improper activities described above are covered by two sections of title 18 of the United States Code. Section 664 specifically covers embezzlement, theft and conversion. Section 1954 covers kickbacks, graft, and bribery. Unfortunately, the effectiveness of these sections of title 18 is open to some question. It is difficult to get informants who are willing to testify to crimes because all interested parties generally acquiesce in their commission. In addition, section 1954 is especially difficult, if

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40 A “finder’s fee” is a fee paid by a person who desires a loan to persons who “find” loans for the pension fund. It is, however, perfectly legal to compensate a person for acting as an intermediary between an organization or person seeking a loan and an organization that lends money. United States v. Marroso, 250 F. Supp. 27, 31 (E.D. Mich. 1966), infra note 48. The problem arises when the “finder” splits his fee with the pension fund trustee or administrator. It is, to say the least, extremely difficult to prove that such splitting occurred. See S. REP. No. 908, 87th Cong., 1st Sess. 4–5 (1961).

41 See 1970 House Hearings 271.


44 18 U.S.C. § 664 (1964) makes unlawful the embezzlement, theft or conversion of any assets of an employee pension benefit plan by any person and imposes a penalty of a ten thousand dollar fine or imprisonment for not more than five years for any violation.

45 18 U.S.C. § 1954 (1964) prohibits any officer, agent, employee, or other representative of the pension fund, the employer, the employee organization, or any organization which provides services to the pension fund (for example, an investment counseling service) from receiving, agreeing to receive, or soliciting any fee, kickback, gift, money, or anything else of value with intent to be influenced with respect to any of his actions, decisions, or other duties concerning the fund. In addition, § 1954 prohibits any person from directly or indirectly giving, offering, or promising to give or offer, any fee, kickback, etc. Violation of this section is punishable by a fine of ten thousand dollars and/or imprisonment for not more than five years.

46 Two reported convictions have been found under 18 U.S.C. § 664 (1964): United States v. Moore, 427 F.2d 40 (5th Cir. 1970), where the defendant converted for his own use, refund checks from the insurance company carrying the coverage for his employer’s welfare plan; United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), where the defendant was convicted of having converted to his own use the proceeds from the sale of an air-conditioner which was owned by his union’s welfare plan.

47 All states have embezzlement laws which should be applicable to the embezzlement of pension funds. However, the following statement made in the report of the Senate Committee on Labor and Public Welfare in 1958 reveals concern over enforceability of these laws:

While State criminal laws adequately cover outright embezzlement by trustees or employees few cases involving benefit plans have been prosecuted. Aside from the problem of strict construction of criminal statutes and difficulty of proof, there have been relatively few instances of patent appropriation or diversion which could be prosecuted appropriately under such State criminal statutes.

48 See note 42 supra.
not impossible, to enforce because the courts require the government to prove a clear agency relationship between the person who "finds" the loan for the fund and the fund itself.\textsuperscript{48}

IV. THE CURRENT WELFARE AND PENSION PLANS DISCLOSURE ACT: ITS PURPOSE AND DEFECTS

The policy underlying enactment of the Welfare and Pension Plans Disclosure Act of 1958 was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans.\textsuperscript{49} The primary requirement of the Act was that the plan administrator compile, file with the Secretary of Labor, and send to participants and their beneficiaries upon written request a description and annual report of the plan.\textsuperscript{50} Although failure to comply with the disclosure requirements of the Act subjected the plan administrator to certain civil and/or criminal sanctions,\textsuperscript{51} the primary responsibility for regulation of the plans was originally intended to be left to the states.\textsuperscript{52} Congress apparently believed that a policy of mandatory disclosure and, hopefully, an attendant policy of self-policing on the part of plan administrators, participants and beneficiaries would prevent the mismanagement of private pension plans.\textsuperscript{53}

It took Congress only three years to realize that the Act's modest disclosure provisions had failed to prevent imprudent

\textsuperscript{48} In United States v. Marroso, 250 F. Supp. 27 (E.D. Mich. 1966), the only reported case found under the relevant provisions of § 1954, the defendant represented himself as one who could obtain loans from the Teamsters' Pension Fund and influenced the grant of a one million dollar loan to the lendee for a "fee" of twenty-five thousand dollars. The court held that the defendant was neither an express nor a 'de facto' agent of the Teamsters' Fund within the meaning of § 1954(a)(1), because the Fund had failed to clearly manifest its consent to the agency relationship. The Marroso decision, if followed, renders § 1954 virtually ineffective. First, it is unlikely that any pension fund administrator who wants to receive kickbacks would expressly appoint an agent to secure loans for the fund. Second, unless the agent is expressly appointed, it will be extremely difficult to establish the clear manifestation of consent to an agency relationship required by the court. Finally, very few plan administrators are foolish enough to accept a kickback directly from the debtor. Rather, they are more apt to share the "legitimate" finder's fee with the finder.

\textsuperscript{49} 29 U.S.C. § 301(b) (1964).

\textsuperscript{50} 29 U.S.C. §§ 304, 305, 307 (1964). These sections and the proposed amendments to them are discussed in greater detail in the text accompanying notes 67-75 infra.

\textsuperscript{51} 29 U.S.C. § 308(a), (b) (1964).

\textsuperscript{52} S. REP. No. 1440, 85th Cong., 2d Sess. 18 (1958).

\textsuperscript{53} The report of the Senate Committee on Labor and Public Welfare states:

Complete disclosure of the details of welfare and pension plan operations provides the most effective single deterrent against abuses and the many other weaknesses of these plans. It would provide the greatest incentive to good management and investment policies and the best protection to the interests and rights of employers, employees, and the Government alike.

investments,\textsuperscript{54} that the states were either unwilling or unable to protect the plans from embezzlement, conversion, exorbitant fees, kickbacks, etc.\textsuperscript{55} and that the plans were too susceptible to grievous loss resulting from such abuses.\textsuperscript{56} In order to remedy these defects, Congress amended the Act in four principal respects.\textsuperscript{57} First, a more detailed disclosure of the assets of the pension plan was required.\textsuperscript{58} Second, the Secretary of Labor was given broader investigatory powers to discover violations of the Act's disclosure provisions.\textsuperscript{59} Third, the amended Act required the bonding of all administrators, officials and employees handling funds or other assets of the plan.\textsuperscript{60} Finally, criminal penalties were imposed for embezzlement, conversion, exorbitant fees and kickbacks,\textsuperscript{61} and for the knowing falsification or concealment of facts required to be disclosed by the Act.\textsuperscript{62} To date, these are the last amendments to the 1958 Welfare and Pension Plans Disclosure Act.

Experience is the test of any piece of legislation, and experience has not treated the Welfare and Pension Plans Disclosure Act kindly. Disclosure has not effectively reduced the instances of improper management, nor has it led to compliance with accepted fiduciary standards.\textsuperscript{63} Few participants or beneficiaries have brought suit under the Act, and in those instances when they have, the courts have tended to construe the Act's provisions strictly.

One particularly restrictive case is \textit{Doherty v. Sylvania Pension Plan for Hourly Employees},\textsuperscript{64} where the plaintiff, an employee covered by the Sylvania Plan, brought an action under section 308(b)\textsuperscript{65} of the Act seeking to enforce the prescribed statutory

\textsuperscript{54} S. REP. No. 908, 87th Cong., 1st Sess. 5 (1961).
\textsuperscript{55} Id. at 4–6.
\textsuperscript{56} Id. at 6.
\textsuperscript{58} 29 U.S.C. § 306(b) (1964).
\textsuperscript{59} Id. § 308(d).
\textsuperscript{60} Id.
\textsuperscript{63} See text accompanying notes 35–37 supra.
\textsuperscript{65} 29 U.S.C. § 308(b) (1964), provides:

Any administrator of a plan who fails or refuses, upon the written request of a participant or beneficiary covered by such plan, to make publication to him within thirty days of such request, in accordance with the provisions of section 307 of this title, of a description of the plan or an annual report . . . may in the court's discretion become liable to any such participant or
penalty for the administrator's failure to provide him with a description and annual report of the Sylvania Pension Plan. One of the plaintiff's two letters to the administrator made "a formal demand for an accounting of what was paid out to employees or others for any reason in each year, and what the total assets of the plan amounted to in each of these years." The court held that the claim for relief failed on three grounds. First, the court said that plaintiff's letter demanded "considerable information above and beyond" that to which he was entitled. This conclusion seems difficult to support in light of the language of section 307(a)(2) of the Act requiring the administrator to provide plaintiff with an adequate summary of the latest annual report. It does not seem unreasonable to expect such a summary to include a statement of benefits paid and the plan's total assets since this information must be contained in the annual report. Such information was essentially all that plaintiff demanded. Furthermore, the court said that the defendant did not understand the letter as requesting the statutorily required information. Apparently, the court would require the plaintiff to adopt the verbatim language of the Act in making demands upon the fund's administrator. Finally, although the court asserted that the plaintiff had not shown any injury resulting from the administrator's failure to supply the requested information, the court did not clarify what type of injury should have been shown. More important, it is hard to envisage any injury that might occur before it is too late for the employee-participant to take action to protect the plan from loss.

The Secretary of Labor and the Justice Department have had little more success in enforcing the Act than pension plan participants and beneficiaries. Section 308(a), which provides for a fine of not more than one thousand dollars or imprisonment for not more than six months for a willful violation of any provision of the Act, has resulted in only one conviction, although in 1968 more beneficiary making such request in the amount of $50 a day from the date of such failure or refusal.

66 310 F. Supp. at 1333.
67 Id.
68 29 U.S.C. § 306(b) (1964). Although it is true that plaintiff demanded information for each year of the plan's existence, this should not excuse the administrator from furnishing it for the latest year.
69 310 F. Supp. at 1333.
70 Id.
71 Id. Plaintiff's brief did allege that he "may have sustained an economic injury." The case of Harrold v. Coble, 261 F. Supp. 29 (M.D.N. Car. 1966), also required that plaintiff show that he suffered injury.
72 1970 House Hearings 488.
V. THE PROPOSED AMENDMENTS TO THE WELFARE AND PENSION PLANS DISCLOSURE ACT

A. Proposed Federal Standards of Fiduciary Responsibility

The minority report of the House Committee on Education and Labor in discussing the 1962 amendments to the Welfare and Pension Plans Disclosure Act states:

Although this bill specifically states that nothing contained in it shall be construed or implied as to authorize the Secretary to regulate or interfere in the management of any employee welfare or pension benefit plan, the question can also be asked, how long will it be before the Secretary comes back to Congress and requests such authority? This is certainly a very real possibility, for 2 years of administering the act... would furnish ample time for the Secretary to compile the necessary facts and figures to support the contention that he must be given the authority to regulate such plans if the public interest is to be protected.

While the minority report may have misjudged the length of time necessary for the Secretary to compile his "facts and figures," it correctly foresaw the request for further regulation of private pension plans.

Two major bills, H.R. 1046 and S. 3589, were introduced in the 91st Congress to add standards of fiduciary responsibility to the Welfare and Pension Plans Disclosure Act. Although they...
represent a vast improvement over the current Act, their effectiveness in preventing violations of standards of fiduciary responsibility is open to serious doubt.

1. **Coverage**—Both bills provide for the same general coverage as the current Act. They define an employee pension benefit plan as any fund or program, communicated or described in writing to the employees, and established by an employer and/or employee organization to provide retirement benefits for its participants or their beneficiaries. This definition is clearly intended to be broad enough to cover all possible variations in all types of private pension plans.

Not all of these plans, however, are subject to the fiduciary responsibility sections of the two bills. The fiduciary responsibility sections apply solely to “employee benefit funds,” defined as funds of money or other assets “maintained pursuant to or in connection with” an employee pension benefit plan. While this definition of “fund” would seem, by itself, to exclude all unfunded plans, the House bill specifically exempts plans under which benefits are provided “solely from the general assets of an employer or of an employee organization.” Both bills also exempt all assets of investment companies that are subject to regulation.
under the Investment Company Act of 1940. Since most investment companies are now subject to strict regulation by the Securities and Exchange Commission, the purpose of this exemption is to maintain a single standard of fiduciary responsibility and to avoid the conflicts that might arise between the Securities and Exchange Commission and the Secretary of Labor in administering such standards.

In addition, both bills exempt premiums or subscription charges paid to and monies deposited with insurance carriers. This provision would exempt, for example, an insured group annuity pension plan under which the employer annually pays premiums to the insurance carrier toward the purchase of an annuity. The insurer is obligated to pay the benefits of the plan to the extent of the premiums received on behalf of each employee. Because the insurance carrier does not establish a separate fund with these premiums and because insurance carriers are already subjected to rather stringent state regulation, this exemption is understandable. Nevertheless, S. 3589 specifically, and H.R. 1046 impliedly, provide that the fiduciary responsibility sections shall apply to separate accounts if such accounts are established and maintained by insurance carriers with monies deposited by the employer or employee organization. An example of an insured

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86 15 U.S.C. § 80 (1964). There is a slight, but significant, semantical difference with respect to this exemption in both bills. H.R. 1046 applies to investment companies "registered" under the Investment Company Act of 1940. S. 3589 applies to investment companies "subject to regulation" under the 1940 Act. It has been suggested that "subject to regulation" is the more appropriate phraseology, since some investment companies who need not register under the 1940 Act are nonetheless subject to its provisions. The Subcommittee of the Committee on Pension and Profit Sharing Trusts, Proposals for Federal Prudent Man Rule in Employee Benefit Plans, 5 REAL PROP., PROB. & TRUST J. 21, 25 (1970) [hereinafter cited as Committee on Pension and Profit Sharing Trusts].

87 H.R. 1046, § 14(b)(2); S. 3589, § 3(q)(2).


89 The AFL-CIO has stated its opposition to exemption of investment companies and insurance carriers from the fiduciary responsibility sections of these bills. The AFL-CIO's position is that fiduciary responsibility should be uniformly applied, whether the "trust is administered by an employer, an insurance carrier ... or investment company." 1970 House Hearings 110 (remarks of Mr. Biemiller).

90 Committee on Pension and Profit Sharing Trusts 24; see also note 91 infra.

91 H.R. 1046, § 14(b)(3); S. 3589, § 3(q)(2). A separate account is defined in S. 3589, § 3(r) as an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

The separate accounts procedure is a relatively recent development that grew out of the desire of insurance companies to be more competitive with trusteed plans. See St. John, supra note 88, at 141.

H.R. 1046, § 14(b)(3) exempts "moneys deposited with an insurance carrier, the repay-
plan with a separate account is the group deposit administration plan, under which the employer's premiums are accumulated in a separate account and invested in various equities. When an employee retires, the insurance company purchases an annuity for him by withdrawing from the account the amount required to provide the employee's total benefits. Separate accounts are, then, administered much like any other pension fund. To insure a uniform standard of fiduciary responsibility with respect to pension funds, the inclusion of the separate accounts procedure within the coverage of the fiduciary responsibility sections of these bills is desirable, if not necessary.

These bills have been criticized because the fiduciary responsibility provisions are limited to funded plans, thereby unduly restricting the coverage of these proposals and, as a result, their effectiveness. It would, however, be impracticable to further expand coverage of the fiduciary responsibility sections. To effectively cover unfunded plans, the federal government would have to regulate the administration of the general assets of the employers, the insurance carrier, and the investment company. In addition to bearing the increased administrative burden, the federal government would be forced into the area of insurance regulation—something that, to date, it has been unwilling to do. Furthermore, conflicts would inevitably arise between the fiduciary responsibility provisions of these bills and similar provisions of state law regulating insurance companies and the Investment Company Act of 1940. Finally, most of the violations of fiduciary responsibility seem to occur only with respect to funded plans. For all of these reasons, restriction of the coverage of these provisions to funded plans seems entirely warranted.

2. The Employee Benefit Fund as a Trust—Both bills undertake to further define and limit the purpose of an employee benefit fund. The Senate bill, for example, provides that every employee.

ment of which, including interest thereon, is guaranteed. The key to whether the language of this provision includes separate accounts is the word "interest." Since separate accounts, like most funds, generate income (not interest), it is probable that this provision was not intended to exempt them. The language is, however, ambiguous and should be modified to specifically include separate accounts. See H.R. 1046, § 7(f)(1)(G), which specifically refers to separate accounts in discussing the information which the annual report must include to meet the bill's disclosure requirements.

More often, however, the premiums contributed to a group deposit administration plan are commingled with the general assets of the insurance company. See St. John, supra note 88, at 117. If this is the case, these funds are exempt from the fiduciary responsibility provisions of both bills. See note 89 supra.


See note 89 supra.

1970 House Hearings 110 (remarks of Mr. Biemiller); Davis, When the 'Pension Ship' is Scuttled, Wall St. Journal, Feb. 12, 1971, at 6, col. 4.
benefit fund shall be deemed to be a trust held for the exclusive purpose of providing benefits to its participants and their beneficiaries and defraying reasonable expenses of administering the fund. If this statement were all that the fiduciary responsibility sections of these bills contained, they would nonetheless have a significant impact upon the administration of private pension plans. First, defining an employee benefit fund as a trust should force the courts in all states to apply the standards of fiduciary responsibility of the common law of trusts to private pension funds. Neither bill, however, leaves the incidents of such standards totally to private trust law. Second, requiring that the fund be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries should severely limit the abuses that derive from improper use of pension funds. This requirement should, for example, prevent the United Mine Workers Fund from continuing to hold seventy million dollars in an interest-free checking account for the purpose of maintaining a readily available strike fund. Such an “investment” is hardly for the exclusive purpose of providing retirement benefits to participants. Finally, further limiting the use of the fund to “defraying reasonable expenses of administering the plan” should prevent pension fund administrators from charging exorbitant fees and salaries to the fund. However, a provision limiting costs to reasonable expenses does not eliminate such problems as the finder’s fee.

3. Who is a Fiduciary—A fiduciary relationship may be generally defined as a relationship in which “the law demands of one party an unusually high standard of ethical or moral conduct with reference to another.” The law has embellished these relationships with certain duties which the fiduciary may not breach. However in analyzing any case in which a fiduciary relationship might exist, the initial consideration is determining whether the individual is a fiduciary.

97 See text accompanying notes 107 et seq. infra.
98 See text accompanying note 36 supra. Of course, any fund would be able to avoid the requirements of the bills by altering its funding method, e.g., utilizing a “pay-as-you-go” method. Such alteration of funding method would, however, generally require the approval of both the employer and employee organization and would entail a loss of the fund’s tax-exempt status and the employer’s right to deduct his contributions to the fund. Int. Rev. Code of 1954, § 401(a).
99 Supra note 45.
Both bills define the word "fiduciary" broadly. The Senate bill defines a fiduciary as

any person who exercises any power of control, management, or disposition with respect to any moneys or other property of an employee benefit fund, or has authority or responsibility to do so.101

The House bill provides that

[e]very person who receives, disburses, or exercises any control or authority with respect to any employee benefit fund is a fiduciary . . . .102

For the most part, both definitions would equally apply to most persons associated with the plan. For example, both can easily be construed to encompass all officials, administrators, or trustees who exercise actual control over a fund's policy and operation. Likewise, both definitions would cover an investment counselor paid by the fund to guide its investment policies and even lesser employees who perform the more ministerial functions with respect to the day-to-day operations of the fund.103 Nevertheless, in a few instances, the bills might treat persons differently. An example would be the case of the director of a fund who, while charged with management responsibilities by the trust instrument or collective bargaining agreement, abdicates his responsibility to other directors.104 Under the Senate bill he would still be a fiduciary with respect to the duties abdicated, since he retains the "authority" or "responsibility" to exercise a "power of control or management." However, under the definition of the House bill this may not be the case, since through his inactivity he no longer "exercises any control or authority."105 As a matter of policy, it would be best to remove this doubt by adopting the definition of fiduciary in the Senate bill. It would seem to be in the interests of plan participants to insure that administrators, directors, and/or trustees scrutinize the activities of each other. This could best be

101 S. 3589, § 3(w).
102 H.R. 1046, § 14(d).
103 Both bills make it clear that the fiduciary is only held responsible with respect to the exercise of his own duties. H.R. 1046, § 14(d); S. 3589, § 14(b)(1). H.R. 6204, 91st Cong., 1st Sess. (1969), is ambiguous on this point, and it is at least arguable that any fund employee can be held liable for all breaches of fiduciary responsibility—surely an unsatisfactory state of affairs.
104 This seems to be the case with respect to the employer-appointed directors of the Teamsters Fund. See 1970 House Hearings 131.
105 Although it may be arguable that our hypothetical director has "disbursed" control or authority within the meaning of "fiduciary" as defined by H.R. 1046, the word "disburse" was probably intended to refer to a delegation of control or authority to an agent.
achieved by holding all fiduciaries responsible for the actions of their co-fiduciaries.106

4. The Prudent Man—In the law of trusts the “prudent man rule” is generally the standard against which a trustee’s performance in administering a trust fund is measured.107 Unfortunately, this rule has been applied to private pension plans only when the plan’s fund creates a trust.108 Where the court finds that the plan’s fund is trusteed, the prudent man rule of the state in which the fund has its situs is the applicable standard.109 H.R. 1046 and S. 3589 attempt to solve these problems by imposing a federal prudent man rule on the performance of all pension fund fiduciaries. Their statements of the rule do, however, differ. H.R. 1046 provides that

106 S. 3589, § 14(a) accomplishes this result by providing that a fiduciary has the affirmative obligation to prevent any co-fiduciary with whom he undertakes or is required to undertake the performance of a duty or the exercise of a power from breaching a “responsibility, obligation, or duty of a fiduciary” unless he promptly objects in writing to the Secretary of Labor. It should be noted, however, that the duty is an absolute one, and there is no requirement that the fiduciary have knowledge of his co-fiduciary’s breach. This seems a rather harsh requirement.

On the other hand, the House bill is inadequate in this respect. Section 14(h) of that bill requires a trustee to use reasonable care to prevent his co-trustee from committing a breach of trust, or to compel a co-trustee to redress a breach of trust. The proviso to that section states that:

nothing . . . shall excuse a co-trustee for liability for inactivity in the administration of the trust nor for the failure to prevent a breach of trust.

Although the term “trustee” is not defined in the bill, other provisions indicate that the term is used in a technical sense and is not meant to encompass other pension fund fiduciaries [see, e.g., § 3(14)]. The following example of the typical management structure of a deferred profit-sharing plan best illustrates some of the problems that result from the restricted coverage of this provision:

Generally, three or more individuals who are officers or other employees of the employer or representatives of the union are appointed as members of a “Profit-Sharing Committee.” This committee is charged with the responsibility of . . . making the decisions which are necessary in the day-to-day operation of the profit-sharing plan. Sometimes the members of this committee are also named as trustees and as custodian of the profit-sharing fund. In other cases, a bank or trust company is designated as trustee . . . . The Profit-Sharing Committee, if desired, may have the right to instruct the trustee concerning the type of investments which should be made from time to time or may have a veto power over the investments proposed by the trustee.

Fefferman, Deferred Profit-Sharing Plans, in PENSIONS AND PROFIT SHARING 199 (H. Biegel et al. ed. 1964). In addition, the “committee” will generally have the power to determine who will be the trustee and to make the basic policy decisions as to the goals of the fund. When a committee has such power, the question of liability for inactivity (the § 14(h) proviso) should not turn on whether the committee is technically a trustee.107 See text accompanying notes 20-24 supra.

108 It is not easy to determine when a pension fund is a trust. Various courts, for example, have characterized the United Mine Workers Fund as a trust, George v. Lewis, 228 F. Supp. 725, 729 (D. Colo. 1964); an unincorporated association, Pavlovsk v. Lewis, 168 F. Supp. 839, 841 (W.D. Pa. 1958), aff’d, 274 F.2d 523 (3d Cir. 1959), cert. denied, 362 U.S. 990; and sui generis, Lewis v. Benedict Coal Corp. 259 F.2d 346, 355 (6th Cir. 1958).

[e]ach fiduciary shall discharge his duties with regard to the fund with the same degree of care and skill as a man of ordinary prudence would exercise in dealing with his property.\textsuperscript{110}

Although a number of states apply this statement of the rule to private trusts, the courts have generally stressed that the rule does not refer to the trustee's use of care in dealing with his own property as if he had only himself to consider. Rather, say most courts, the standard to be applied is that of the "ordinarily prudent man who is trustee of another person's property."\textsuperscript{111} If this is the standard that the House bill intends to apply, the drafters should have been more explicit. In addition, this definition, familiar as it is to the common law of trusts, might encourage the courts to apply state trust law to private pension funds.\textsuperscript{112} This result would frustrate two of the principal motivations behind the bills: to insure uniformity in pension fund investment standards and to provide for the sometimes unique aims of private pension fund investment. For example, some states, applying their own version of the prudent man rule, require a trustee to diversify his investments;\textsuperscript{113} other states do not recognize such a duty.\textsuperscript{114} Although either approach might be acceptable if consistently followed in all jurisdictions, a rule based on the varying provisions of state law would undoubtedly cause pension fund administrators (especially those managing large interstate funds) some confusion in determining which standards to apply. Moreover, various peculiarities in state trust law might discourage certain types of pension fund investment which would be beneficial to plan participants.\textsuperscript{115}

The statement of the prudent man rule in the Senate bill solves these problems, but necessarily creates another. Section 14(b)(1) provides that a fiduciary shall discharge his duties with respect to the fund

\begin{quote}
with the care under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
\end{quote}

\textsuperscript{110} H.R. 1046, § 14(d).
\textsuperscript{111} In re Cook's Trust Estate, 20 Del Ch. 123, 124, 171 A. 730, 731 (1934); A. Scott, supra note 131, at § 227.3.
\textsuperscript{112} Committee on Pension and Profit Sharing Trusts, supra note 86 at 25.
\textsuperscript{113} See, e.g., Dickinson, Appellant, 125 Mass. 184, 25 N.E. 99 (1890).
\textsuperscript{114} See, e.g., In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19 (1940).
\textsuperscript{115} For example, as a matter of policy one may want to encourage private pension funds to invest in low-income housing. However, because of the lower rate of return on such investments, a private trustee may be precluded from doing so by the state's prudent man rule. See 1970 House Hearings 186 (remarks of the late Mr. Reuther).
matters would use in the conduct of an enterprise of a like character and with like aims . . . .

By measuring the fiduciary's performance in light of the "conduct of an enterprise of a like character and with like aims," the courts would be required to take into account the sometimes unique goals of private pension plans,116 and consequently to develop new standards of prudence with respect to such plans.117 However, until new standards are developed, fiduciaries may be somewhat uncertain as to what degree of care they must exercise. In any event, they will be able to rely on past practices of well-administered plans as a guide to their actions.

5. The Specifics: What a Fiduciary May and May Not Do—Both bills conceive the prudent man rule as the basic standard against which the actions of fiduciaries are to be measured. Yet, not all problems of fiduciary responsibility are left solely to that rule. Rather, both bills specifically enumerate certain actions which a fiduciary may and may not undertake. In part, such enumeration is designed to take into account the uniqueness of private pension plans. More importantly, the drafters feared that without specific enumeration fiduciaries would continue to mismanage private pension funds.

(a) Lending Trust Assets and the Duty of Undivided Loyalty—Subject to the prudent man rule, the "legal lists,"118 and any express provisions in the trust instrument, the common law of trusts generally permits a trustee to lend money to individuals and corporations if the loan is properly secured.119 Although the definition of "proper security" varies from state to state, it is uniformly held that personal security alone is insufficient.120

116 Id.
117 Because of S. 3589's liberal grant of jurisdiction to the federal courts (concurrent jurisdiction in the federal and state courts when the action is brought by a participant or beneficiary; exclusive jurisdiction in the federal courts when the action is brought by the Secretary), its generous venue requirements (venue may attach where the plan is administered, where the breach took place, or where a defendant resides or may be found), its grant of broad removal power to the Secretary of Labor, and its provision for worldwide service of process, there is even less chance of inconsistent standards. S. 3589, § 9. Moreover, § 18 expressly provides that the bill's provisions shall "supersede any and all laws of the states and of political subdivisions thereof" to the extent that they relate to the "fiduciary, reporting and disclosure responsibilities of persons acting on behalf of" these plans. State courts would, therefore, be bound to apply the federal prudent man rule as developed by the federal courts. See Dice v. Akron, C. & Y.R.R., 352 U.S. 359 (1952).
118 The provisions of H.R. 1046 are comparably liberal in these respects.
119 See text accompanying note 20 supra.
120 G. BOGERT, supra note 100, at § 680. To meet the test of prudence, a proper rate of return on the loan is mandatory.
Moreover, security of the first rank (e.g., first mortgage or senior lien) is generally necessary. Since the death or financial ruin of the borrower might severely jeopardize the trust assets, the need for these requirements is obvious. Although neither bill specifically addresses these problems, the courts will undoubtedly incorporate these requirements into the federal prudent man rule.

The common law of trusts also prohibits the trustee from lending trust assets to himself, his relatives, his employees, and, in general, anyone with whom he will not be dealing at arm's length. The duty imposed is one of undivided loyalty and is designed to prohibit trustees from representing conflicting interests. Since the duty is absolute, such loans are improper regardless of how prudent or well secured they may be.

Consistent with the common law’s insistence upon undivided loyalty, the fiduciary responsibility sections of both bills proscribe loans of pension fund assets to certain interested parties. The Senate bill provides that a pension fund fiduciary shall not lend any fund assets to “any person known to be a party in interest.” The term “party in interest” is defined as (1) the administrator, trustee, officer, custodian, counsel or employee of the plan; (2) any person (including a corporation) providing services to the plan; (3) the employer whose employees are covered by the plan; (4) any person controlling, controlled by, or under common control with, the employer; (5) an officer, employee or agent of the employer or person providing services to the plan; (6) an employee organization having members covered by the plan; (7) an officer, employee or agent of such employee organization; or (8) a relative, partner, or joint venturer of any of the above. Although the House bill is less specific, it seems to be comparably inclusive. One definitional problem, however, may

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121 This is frequently a requirement of the “legal lists.” See G. BOGERT, supra note 100, at § 680. However, in In re Cook’s Trust Estate, 20 Del. Ch. 123, 124, 171 A. 730, 731 (1934), the court held that a trustee’s investment in certain debentures was prudent, because the bonds had the “most favorable rating.”

122 An incorporation of these requirements into the federal prudent man rule would, for example, have prevented the Teamsters Fund from subordinating the mortgages on their loan of seventeen million dollars to Caesar’s Palace behind a two million dollar loan of a Nevada bank. 1970 House Hearings 121.

123 G. BOGERT, supra note 100, at § 543(J), (T).

124 RESTATEMENT (SECOND) OF TRUSTS § 170 (1953).

125 S. 3589, § 14(b)(2)(F).

126 Both the Senate and House bills define a relative as: “a spouse, ancestor, descendant, brother, sister, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.” H.R. 1046, § 14(e); S. 3589, § 3(n).

127 S. 3589, § 3(m).

128 H.R. 1046, § 14(e), provides:

No loan of money or other assets shall be made from an employee benefit fund to a fiduciary with relation to such fund, or to any relative of such fiduciary, or to his employer, employee, partner, or other business associate.
arise in conjunction with the House bill. Section 14(e) prohibits loans to a "labor organization for the benefit of whose members the fund was established" or to an "employer who contributes to the fund on account of his employees," or to an official of either entity. The bill does not define "official" (nor does any section of title 29). Thus, it is unclear whether the scope of this term is intended to encompass officers, employees, and agents of such organizations, as does S. 3589's definition of party in interest. While every official is certainly either an officer, employee or agent, with the possible exception of an officer, the converse does not necessarily follow. Indeed, it is most probable that except for those employees or agents who occupy a fiduciary relationship with respect to the employee benefit fund, employees and agents are intended to be excluded from the provisions of the section. Such a construction is supported by the fact that other parts of section 14 (e.g., section 14(f)(4)(B)) specifically refer to "an officer, employee, or agent."

Another difference in this section of the bill is that the House bill is absolute in its prohibition. Unlike S. 3589, it does not limit its prohibition of loans by the fund fiduciary to known parties in interest. Thus the fiduciary must, at his own risk, make an effort to determine the identity of the borrower. The advantage of this added protection must be weighed against any policy considerations discouraging the imposition of responsibility for inadvertent breaches of the fiduciary duty.

Although the federal prudent man rule would also proscribe many of these loans, the duty of undivided loyalty is a crucial requirement that must be closely guarded to prevent the fiduciary from using his position for personal gain. Certainly the bills' specific prohibitions will have a more than casual prophylactic effect, and at least with respect to loans will adequately insure that the duty of undivided loyalty will be maintained.¹²⁹

(b) The Purchase and Sale of Pension Fund Assets — The law

or to a labor organization for the benefit of whose members the fund was established or to any official thereof; or to an employer who contributes to the fund or account of his employees or any official of such employer.

The use of the word "fiduciary" in this provision would seem to be sufficient to cover most of the specific persons listed in S. 3589's definition of "party in interest." For example, a person providing services to the plan (e.g., an investment counselor) is probably a person who exercises "control or authority with respect to any employee benefit fund" within the meaning of "fiduciary" as defined by H.R. 1046, § 14(d). See text accompanying notes 101-02 supra.

¹²⁹ Both bills expressly permit the fund to make loans to beneficiaries and participants of the plan, when such loans are specifically provided for by the plan and are available on a non-discriminatory basis. H.R. 1046, § 14(f)(5); S. 3589, § 14(c)(5). Such a provision seems reasonable in light of the main purpose for which pension plans are established: to provide for the welfare of employees.
of trusts charges the trustee with the duty of making the trust res productive of income.\textsuperscript{130} To perform this duty, the trustee is often required to purchase and sell trust assets.\textsuperscript{131} This power of purchase and sale is generally implied from the duty to make the res productive.\textsuperscript{132} Unfortunately, however, these general rules do not answer the more difficult questions regarding the types of trust assets which the trustee may purchase and sell, from whom these assets may be purchased, and to whom they may be sold. Since the applicable state’s common and statutory law will generally provide the answers to these questions in the context of private trusts, state trust law could conceivably answer these questions for private pension fund fiduciaries. However, at least in part, both bills reject state trust law as a guide to the investment of private pension fund assets.

Subject to two important limitations, both bills\textsuperscript{133} allow a pension fund to purchase any security\textsuperscript{134} issued by an employer whose employees are participants in the pension plan. Since in many instances the employer is also the fiduciary, these provisions in effect expressly permit the pension fund fiduciary to breach his duty of undivided loyalty. The draftsmen of the bills created this exception to the duty of undivided loyalty for two reasons. The first is based on the traditional practice of many pension plans to invest fund assets in the employer’s security,\textsuperscript{135} a procedure which often benefits both the employer and the pension fund.\textsuperscript{136} The second reason is that both bills have taken pains to insure that the employer will be unable to take undue advantage of such purchases. Both require that the purchase of the employer’s security\textsuperscript{137} be made for “adequate consideration.”\textsuperscript{138} Further-

\textsuperscript{130} G. BOGERT, supra note 100, at § 702.
\textsuperscript{131} Private trust law is somewhat more restrictive with respect to the purchase and sale of realty than this statement would indicate. Generally, the trustee may not purchase realty for the trust. G. BOGERT, supra note 100, at § 678. Likewise if the trust contains realty at its creation, courts are reluctant to imply a power of sale. A. SCOTT, LAW OF TRUSTS § 190, at 382 (abr. ed. 1960).
\textsuperscript{132} This implied power is, of course, subject to any express provisions to the contrary in the trust instrument.
\textsuperscript{133} H.R. 1046, § 14(f)(4)(A); S. 3589, § 14(c)(4)(A).
\textsuperscript{134} The term “security,” as used in both bills, is defined by the Securities Act of 1933, 15 U.S.C. § 77(a) et seq. (1964).
\textsuperscript{135} 1970 House Hearings 912 (statement of the Council of Profit-Sharing Industries); see also, 1970 House Hearings 850 (statement of Mr. Curtis).
\textsuperscript{136} 1970 House Hearings 850.
\textsuperscript{137} Both bills extend these requirements to the security of the immediate employer’s subsidiaries. S. 3589, § 14(c)(4)(A); H.R. 1046, § 14(f)(4)(A). S. 3589 further applies these requirements to the security of the immediate employer’s parent company, S. 3589, § 14(c)(4)(A).
\textsuperscript{138} “Adequate consideration” is defined by both bills as either:
(1) the price of the security prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or
more, both bills limit the size of the purchase to a certain percentage of the fair market value of the fund's assets—ten percent in the Senate version and twenty percent in the House bill.\textsuperscript{139} Although these limitations have come under severe criticism from numerous groups,\textsuperscript{140} the tremendous stake involved—the security of the pension fund—warrants these safeguards. Too often pension plans are terminated either because of the dissolution of the employer's business or the employer's financial difficulties in general.\textsuperscript{141} If the plan has invested all or a substantial portion of its assets in the employer's security, upon termination this security

\begin{itemize}
  \item (2) if the security is not traded on such a national securities exchange, at a price not less favorable to the fund than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer.
\end{itemize}

H.R. 1046, § 14(f)(b); S. 3589, § 3(s).

\textsuperscript{139} H.R. 1046, § 14(f)(A); S. 3589, § 14(c)(4)(A). Both bills expressly exempt from these restrictions deferred profit-sharing, stock bonus, thrift, savings, and "other similar plans which have the requirement that some or all of the plan funds shall be invested in stock or securities of the employer." A 'thrift' plan is a plan which provides for the contribution by the participants of a specified percentage of their salary. The employees' contribution is then matched by the employer out of his profits. The employee need not contribute, but if he does not, there will be no contribution by the employer.\textsuperscript{140} Tax Research Institute of America, Inc., Tax Coordinator 26,150A, at H-5209 (1971). A 'savings' plan is similar to a thrift plan except that, while the employees may or may not contribute to the plan, the employer must contribute a certain part of his profits. Id., ¶ 26.150B, at H-5210.

The justification for these exemptions is based upon the nature of these types of plans. All four are geared to the employer's financial success and therefore have traditionally invested their assets in the employer's security. 1970 House Hearings 912 (statement of the Council of Profit-Sharing Industries). Nevertheless, there are countervailing considerations. First, there is no evidence that employers who establish these types of plans are any less susceptible to financial difficulties than those who establish other types of plans. Second, a close reading of both bills reveals that the federal prudent man rule does not apply to the purchase by these plans of the employer's security. If the plan were jointly administered, the union representatives might insist that the employer's security be a sound investment. Such might not be the case with respect to those plans administered solely by the employer. Although the Int. Rev. Code of 1954 § 503(c)(6), (which prohibits any "substantial diversion" of the fund's corpus to the employer) and § 503(h) (which provides that the fund's acquisition of any bond, debenture, note or other evidence of indebtedness will not be treated as a loan without the receipt of adequate security if immediately following the acquisition of the obligation not more than twenty-five percent of the fund's assets are invested in such obligation of the employer) will have some prophylactic effect on such investments, such limitations will be subject to the inadequacies of the Internal Revenue Code as a device for regulating private pension plans. See text accompanying notes 29–34 supra.

\textsuperscript{140} See, e.g., 1970 House Hearings 850 (remarks of Mr. Curtis); Hearings on H.R. 5741 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 2d Sess. 169 (1968) (statement of Mr. Lane) [hereinafter cited as 1968 House Hearings].

\textsuperscript{141} From 1955 to 1965, 4,259 pension plans were terminated. Of these, 771 were terminated as a result of the dissolution of the employer's business and another 1,087 were terminated because of the employer's financial difficulties. Beier, Termination of Pension Plans: 11 Years' Experience, 90 Monthly Labor Review 26 (1967). During this same period, 3,655 deferred profit-sharing plans were terminated. Of these, 693 were terminated because of the employer's financial difficulties and 732 were terminated because of the dissolution of the employer's business. Beier, Profit-Sharing and Pension Plan Termination, 91 Monthly Labor Review 37 (1968).
will be almost worthless, and the employees who qualify for benefits under the plan will receive nothing when they retire. On the other hand, if the plan has invested its assets in other security, the employer's financial difficulties will have little effect on its ability to pay retirement benefits. Since one of the purported advantages of establishing a funded pension plan is to insure that the employee's benefits are not totally dependent upon the employer's financial success, the imposition of a ten or twenty percent limitation on the fund's investment in the employer's security would assist in achieving this desired end.

Unlike the House bill, the Senate bill further permits a plan fiduciary to purchase any security from a party in interest, provided that the security is listed and traded on an exchange subject to regulation by the Securities and Exchange Commission, that no brokerage commission, fee or other remuneration is paid in connection with the purchase, and that adequate consideration is paid. Thus, while permitting the purchase of any security from a party in interest, the Senate bill takes steps to insure that such a purchase is a fair transaction. By limiting purchasable securities to those traded on an exchange (that is, an equity investment, bond, or debenture), the bill provides a ready means to determine whether the fiduciary paid adequate consideration for the secur-

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142 Those who oppose the restrictions which the bills would place on investment in the employer's security frequently argue that the prudent man rule will prevent this situation from occurring. See, e.g., 1970 House Hearings 802 (statement of Mr. Lackman). The problem with this argument is that while the investment may subsequently be adjudged imprudent, it may be too late to help the plan participants. Although the fiduciary responsible for the imprudent investment can be held personally liable, (see text accompanying notes 170-80 infra), unless that fiduciary is a bank or other large institution, the fund may be unable to recoup its losses.

143 Even in this case the size of the employee's benefit will depend in large part upon the extent to which the plan is funded at the time of termination. If the plan has been in existence for only a short time, it is unlikely that all past and present service liabilities will have been funded.

144 During the course of the Hearings, several groups have made rather convincing arguments to the effect that these limitations should only be applied to future investments. As presently written, H.R. 1046, § 20, would require that pension funds meet these limitations as of the date of the bill's enactment. S. 3589, § 15(d), provides that:

In order to provide for an orderly disposition of any investment, the retention of which would be deemed to be prohibited by this Act, and in order to protect the interest of the fund and its participants and its beneficiaries, the fiduciary may in his discretion effect the disposition of such investment within three years after the date of enactment of this Act or within such additional time as the Secretary may by rule or regulation allow, and such action shall be deemed to be in compliance with this Act.

This provision seems to be the better of the two. Immediate compliance would require those plans which have invested heavily in the employer's security to dispose of their holdings forthwith, perhaps causing great loss to the fund, and to the employer's business.

145 S. 3589, § 14(c)(4)(B). If Congress were to enact H.R. 1046, the federal prudent man rule might prohibit the fund's purchase of any security from a party in interest on the ground that such a transaction breaches the duty of undivided loyalty. See G. BOGERT, supra note 100, at § 543(T).
Second, since no brokerage commission or fee is permitted in connection with such transaction, the bill in effect requires the fiduciary to purchase the security directly from the party in interest. The draftsmen of the bill apparently decided that although security purchases from a party in interest should be permitted, no added expenses in concluding such transactions should be incurred by the fund.

Under the law of trusts, it is a breach of the trustee’s duty of undivided loyalty to sell trust property to himself, his relatives, or other persons with whom he has a common financial interest. In certain circumstances both bills would undercut this duty by allowing the pension fund fiduciary to sell securities to interested parties. The House bill expressly permits a fiduciary to sell a security held by the fund to the employer, the employee organization, or an officer, employee, agent, or other representative of these two entities. However, the sale must be for no less than adequate consideration. Whether the bills should permit such sales involves weighing two competing interests. On the one hand, the ability of the fund to dispose of any security which it may hold should not be unduly restricted. On the other hand, reform legislation should prevent any major conflicts of interest which might subsequently injure the fund. When the fund sells a security from a party in interest, it can at least save itself brokerage commissions and fees by purchasing directly from the issuer, and can often make a very lucrative investment. But such considerations are not present with respect to the sale of a security, because there is no brokerage commission that can be saved, and, if the security represents a prudent investment, the fund should have little difficulty in selling it to an outsider in an arm’s length transaction. A benefit could, therefore, only accrue to the party in interest (most often a person who is familiar with the security which the fund holds), thereby increasing the danger of loss to the fund. Thus, by allowing sales to interested parties, a situation

146 "Adequate consideration" as used here would be limited to the price at which the security is being traded on the exchange at the time of purchase.
147 For the most part, the party in interest referred to in this section will be a parent or subsidiary of the employer.
148 G. BOGERT, supra note 100, §§ 543(A), 543(T).
149 H.R. 1046, § 14(f)(4)(B). S. 3589, § 14(c)(4)(B), permits sales of a security to the same persons and subject to the same restrictions as it permits purchases of security. That is, a security may be sold to a party in interest if it is sold directly to that party, is listed on a national exchange, and is sold for adequate consideration.
150 It is highly unlikely that most plan participants would have either sufficient resources or sufficient knowledge of the security in the fund to take advantage of this provision. Rather, it would most often be of benefit only to the employer, the employee organization, or the officers of either entity.
is created where a conflict of interest may arise and no benefit may inure to the fund.

(c) Disposition of Pension Fund Assets upon Termination of the Plan — Both bills require that every pension plan contain specific provision for the disposition of its assets upon termination. When terminated, no part of the assets of the plan may be expended except for the exclusive benefit of plan participants and their beneficiaries. However, after the satisfaction of all liabilities under the plan,

in accordance with the Internal Revenue Code of 1954 and the regulations promulgated thereunder, any remaining fund assets may be returned to any person who has a legal or equitable interest in such assets by reason of having made financial contribution thereto.\textsuperscript{151}

Essentially restating section 401(a)(7) of the Internal Revenue Code,\textsuperscript{152} the provision’s purpose is to insure that termination does not provide a windfall for the employer, at the expense of those covered by the plan.\textsuperscript{153} However, the provision’s coverage is not limited solely to those plans which seek qualified plan status under the Internal Revenue Code.\textsuperscript{154} The provision is crucial, particularly in situations involving discharge of employees caused by merger, consolidation or plant shutdown. If the pension plan continues as to any remaining employees, the weight of judicial authority holds that a large-scale discharge of employees does not in itself constitute termination of the plan.\textsuperscript{155} In such a case, the employer will gain a windfall insofar as the amount of the

\textsuperscript{151} H.R. 1046, § 14(i); S. 3589, § 14(f).
\textsuperscript{152} INT. REV. CODE of 1954 § 401(a)(7) provides:
A trust shall not constitute a qualified trust ... unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the right of all employees to benefits accrued to the date of termination or discontinuance, to the extent then funded or the amounts credited to the employee’s accounts, are non-forfeitable.
\textsuperscript{153} The plan may be terminated by the original employer or as the result of a conglomerate takeover. With respect to the problem of which fund assets may be returned to “any person who has a legal or equitable interest in such assets,” Treas. Reg. §§ 1.401–2(b)(1), (2) (1964), make clear that the employer is only permitted to recover any balance remaining in the fund which is a result of erroneous actuarial computations occurring during the existence of the plan. The employer must first satisfy all fixed and contingent liabilities owing to his employees.
\textsuperscript{154} The provision is, however, limited to those types of plans which are covered by the fiduciary responsibility sections of the bills.
non-vested interests accruing to the discharged employees can be applied against the employer’s future contributions. If, however, the courts were to consider the plan as terminated, then all accumulated pension credits in those who were employed at the date of termination would vest immediately, irrespective of whether the employees have met the plan’s service and age requirements.\textsuperscript{156}

By incorporating section 401(a)(7) of the Internal Revenue Code into their provisions, both bills modify the common law rule. Under section 401(a)(7), as under the common law rule, once a plan is terminated all forfeitable (non-vested) rights and interests become nonforfeitable.\textsuperscript{157} However, the Income Tax Regulations expressly state that the word “termination” is meant to include both a partial and complete termination of the plan.\textsuperscript{158} Thus, if a plan is deemed to have been partially terminated,\textsuperscript{159} the forfeitable interests of employees covered by that part of the plan become nonforfeitable, and the employer would be precluded from receiving a windfall from the large-scale discharge of his employees.

(d) Miscellaneous Prohibitions of S. 3589—With a few minor exceptions, the House bill permits all other pension fund transactions to be governed by the prudent man rule. The Senate bill, however, contains several other specific prohibitions, two of which merit brief consideration. Section 14(b)(2) prohibits a pension fund fiduciary from leasing or selling fund property to any person known to be a party in interest and from leasing or purchasing for the fund any property known to belong to any party in interest. Several persons, representing both employer and employee organizations, have severely criticized these provisions\textsuperscript{160} on the grounds that the prudent man rule provides an adequate safeguard, and that such transactions can often be of benefit to the fund.\textsuperscript{161} Although S. 3589 permits a pension fund fiduciary to purchase and sell securities listed on an exchange to a party in


\textsuperscript{157} Treas. Reg. § 1.401–6(a) (1963).

\textsuperscript{158} Id. § 1.401–6(b)(2).

\textsuperscript{159} Under Treas. Reg. § 1.401–6(b)(2), whether or not a partial termination occurs will be determined “on the basis of all the facts and circumstances.”

\textsuperscript{160} See, e.g., 1968 \textit{House Hearings} 187 (remarks of Mr. Biemiller), \textit{Id.} at 60 (remarks of Mr. Lumb); 1970 \textit{House Hearings} 926 (statement of Owens-Illinois, Inc.). The predecessor of H.R. 1046, H.R. 5741, 90th Cong., 1st Sess. (1967), contained these prohibitions. They were subsequently removed by the bill’s sponsor because of the severe criticism they received during the 1968 House Hearings.

\textsuperscript{161} Private trust law generally prohibits the trustee from purchasing or selling realty. \textit{Supra} note 131.
the bill takes a different approach with respect to transactions in real property for two reasons. First, the situation may arise where the employer would contribute certain property to the pension fund which would then lease it back to the employer for a minimum rental fee, a form of self-dealing that has concerned the House Committee. Second, whereas the value of a security traded daily on a national exchange is easily determinable, it is difficult to ascertain the fair market value of realty. Because there is no established market for land, its value can only be estimated, and such approximations may vary considerably. Although the prudent man rule does require adequate consideration for the sale or purchase of land, that requirement could encompass the whole spectrum of estimated values. To meet the literal demands of the prudent man rule, a pension fund fiduciary could take advantage of this range of values to sell fund realty at the lowest valuation. The consequent harm to the fund is obvious, and the Senate bill’s prohibition against the purchase, sale or lease of pension fund realty to parties in interest seems, therefore, most appropriate.

Section 14(c) of the Senate bill further provides that no fiduciary responsibility provision should be construed to prohibit any fiduciary from receiving reasonable compensation for his services or for the reimbursement of expenses incurred in the performance of his duties, provided, that no fiduciary who already receives full-time pay from the employer or the employee organization may receive further compensation from the fund except for the payment of expenses not otherwise reimbursed. Certainly, the amount of work involved in the administration of a pension fund and the threat of personal liability for mismanagement of that fund justify reasonable compensation for a fiduciary’s services. In light of these considerations, few employees will volunteer to become pension fund fiduciaries. It would therefore seem that the intent of this provision is to encourage independent management of pension funds. Independent management has the advantage of being less susceptible to those conflicts of interest that have caused such harm to pension funds

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162 Section 14(c)(4)(B), discussed in the text accompanying notes 145–50 supra.
163 1970 House Hearings 271 (statement of Mr. Bernstein).
164 S. 3589 requires that the security be traded on a national securities exchange before it may be purchased from or sold to a party in interest. See text accompanying notes 145–50 supra.
165 H.R. 1046, § 14(f)(2), permits the pension fund fiduciary to receive “reasonable compensation for services rendered,” but does not contain the proviso.
166 See text accompanying notes 170–80 infra.
167 See comments of former Secretary of Labor Schultz, supra note 38.
in the past\(^{168}\) and provides greater competence in the field of fund investment.

In conclusion, both proposals' provision for specific treatment of fund investments has several advantages over the more general approach of the prudent man rule. First, specificity enables the pension fund fiduciary to know precisely which transactions are permissible. Second, supervisors of the fiduciary's investment performance can more readily determine whether the investment is prudent \emph{at the time the investment is made}. Conversely, the prudent man rule often involves a post facto determination of prudence by the courts. In many cases by the time the court has declared the investment imprudent, the loss to the fund is so great that the fund’s chances of recouping its losses are severely curtailed. This situation often occurs when the imprudent pension fund fiduciary is an individual or small group of individuals as opposed to a bank or other large institution. Despite these problems, many witnesses who testified during the course of the 1968 and 1970 House Hearings favored the use of the prudent man rule in all pension fund transactions.\(^{169}\)

\section*{B. Personal Liability of the Pension Fund Fiduciary}

While the common law of trusts provides several methods by which a beneficiary can recover losses caused by the trustee’s mismanagement,\(^{170}\) the most important remedy is the trustee’s personal liability in damages for the amount of loss incurred by the trust. The purpose of imposing personal liability is to put the beneficiary in the position he would have been, but for the wrong committed by the trustee.\(^{171}\) The law of trusts also holds the trustee personally accountable for any gain he realizes through his breach of trust.\(^{172}\) Finally, a trustee may be held accountable for any profit that would have accrued to the trust but for his mismanagement, even though the value of the trust's assets may not have decreased.\(^{173}\)

\(^{168}\) Professor Bernstein argues that only a public agency can insure neutral management of pension funds since the pension industry is too employer-oriented to afford completely neutral pension fund management. \textit{See 1970 House Hearings} 271.

\(^{169}\) \textit{See note 160 supra.}

\(^{170}\) \textit{E.g.}, with the exception of those cases involving a bona fide purchaser, the beneficiary may bring a bill in equity to void a conveyance of trust property when this conveyance involves either a breach of the trustee's duty of loyalty or grossly inadequate consideration. G. Bogert, \textit{supra} note 100, at § 861. The beneficiary may in certain cases secure a court order requiring or prohibiting the trustee from engaging in a transaction involving trust property. \textit{Id.} at § 861. Both the Senate and House bills would permit the Secretary of Labor to enjoin any acts which constitute or will constitute a violation of the duties imposed on a fiduciary by their fiduciary responsibility sections. H.R. 1046, § 9(i)(1); S. 3589, § 9(e)(3).

\(^{171}\) G. Bogert, \textit{supra} note 100, at § 701.

\(^{172}\) A. Scott, \textit{supra} note 131, at § 205.

\(^{173}\) \textit{Id.; Restatement (Second) of Trusts} § 205 (1953).
Both bills have incorporated these common law rules into provisions imposing personal liability on any pension fund fiduciary who breaches any of the responsibilities or duties imposed on fiduciaries. Of course, personal liability will often prove an inadequate remedy, especially when the loss incurred by the fund is large. Nothing short of reinsurance can provide protection against all pension fund losses. Nevertheless, since financial ruin is a powerful deterrent, the threat of personal liability should prove most effective in preventing breaches of fiduciary responsibility.

The personal liability provisions of the bills have been subject to severe criticism during the Hearings. Critics argue that these provisions, imposing liability for unintentional violations of fiduciary standards, are too severe. It has been suggested that the fiduciary be held liable only when he acts with "wilful misfeasance, bad faith, gross negligence or reckless disregard" of his duties. This suggestion is rather unpersuasive. Under the law of trusts the trustee has always been held strictly liable for breaches of trust, and this sanction has not proven unduly burdensome. Most importantly, it would be extremely difficult to prove wilful misfeasance, or reckless disregard. If this standard were adopted, the effectiveness of personal liability as a deterrent would be severely reduced.

174 H.R. 1046, § 14(g). S. 3589, § 14(d). There may be some question as to whether or not these provisions cover the case in which the breach of fiduciary responsibility results only in the fund's failure to produce income. A proper construction of these provisions would probably include lost profits within the meaning of "losses to the fund.

175 If the fiduciary who is responsible for the loss is a bank or an investment company, the remedy of personal liability will be generally adequate.

176 Several bills have recently been introduced in Congress to provide for reinsurance of private pension plans. See, e.g., H.R. 1045, 91st Cong., 1st Sess. (1969); S. 2167, 91st Cong., 1st Sess. (1969).

The bonding requirements of the current Welfare and Pension Plans Disclosure Act, incorporated in their identical form by these bills, are not intended to cover most losses resulting from pension fund mismanagement, but are only directed against loss directly caused by dishonesty or fraud. 29 U.S.C. § 308d(a) (1964); H.R. 1046, § 13(a); S. 3589, § 10.

177 Both bills permit either the Secretary of Labor or a participant or beneficiary of the plan to institute a civil action to impose personal liability on the pension fund fiduciary. H.R. 1046, § 9(i)(1); S. 3589, § 9(e)(2). Appropriately, when the participant or beneficiary can meet the requirements for a proper class action, S. 3589 permits such an action to be maintained. Both bills take pains, however, to prevent strike suits. S. 3589, § 9(h)(1)(B), requires the plaintiff to post security for the payment of costs and attorney's fees. H.R. 1046, § 9(i)(2) provides that no action to recover damages for a breach of a fiduciary's duty "shall be brought by a participant or beneficiary except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte." Either approach seems reasonable.

178 See, e.g., 1968 House Hearings 61 (statement of Mr. Lumb); 1970 House Hearings 902 (statement of the American Retail Federation).

179 Committee on: Pension and Profit Sharing Trusts, supra note 86, at 27.

180 A. Scott, supra note 131, § 201.

181 Both bills provide that the fiduciary is not to be relieved from his responsibilities by
C. Prohibitions Against Certain Persons Holding Office

Both bills prohibit persons who have committed certain specified crimes\(^\text{182}\) from holding office\(^\text{182}\) in the pension plan.\(^\text{184}\) Modeled on a similar provision in the Labor-Management Reporting and Disclosure Act,\(^\text{185}\) this prohibition has two basic purposes. The first is to reduce the likelihood of breaches of fiduciary responsibility. The bills' draftsmen apparently believed that certain criminal acts are indicative of an inability to adhere to proper standards of fiduciary responsibility.\(^\text{186}\) In addition, this prohibition is designed to promote the policies of the Labor-Management Reporting and Disclosure Act,\(^\text{187}\) by preventing persons who have

\(^{\text{182}}\) H.R. 1046, § 15; S. 3589, § 15. The list of crimes in the two bills is somewhat different. S. 3589, the more inclusive of the two bills, lists the following: robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, kidnapping, perjury, assault with intent to kill, assault which inflicts grievous bodily injury, any crime described in section 9(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-9(a)(1)), or a violation of any provision of this Act, or a violation of section 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157, as amended, 29 U.S.C. 186), or a violation of chapter 63 of title 18, United States Code, or a violation of section 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157, as amended, 29 U.S.C. 186). The list of crimes in the House bill is limited to crimes involving fraudulent financial practices.\(^\text{183}\) Specifically, one is prohibited from serving as an administrator, officer, trustee, custodian, counsel, agent, employee (excepting, under S. 3589, an employee performing exclusively clerical or janitorial duties), or consultant of any pension plan. H.R. 1046, § 15(a); S. 3589, § 15(a).

\(^{\text{184}}\) Violation of these provisions is punishable by a fine of not more than ten thousand dollars and/or imprisonment for not more than one year. H.R. 1046, § 15(b); S. 3589, § 15(b). Note, however, that in addition to authorizing a criminal action under this section, both bills give the Secretary and a plan participant or beneficiary standing to bring an action to merely remove such person from office. S. 3589, § 9(e)(2); H.R. 1046, § 9(i)(2).

\(^{\text{185}}\) See text accompanying note 233 infra.

\(^{\text{186}}\) The prohibitions are not, however, absolute. Both bills provide that a person may not assume a position in the pension plan only during or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity [on behalf of the fund] would not be contrary to the purposes of this Act.

\(^{\text{187}}\) 1970 House Hearings 469 (statement of former Secretary of Labor Schultz).
been barred from holding union office from securing alternative employment in the service of the union's pension plan.\textsuperscript{188}

\textbf{D. Modified Disclosure Requirements—The Annual Report}

Although Congress originally thought that adequate disclosure of pension fund transactions would help prevent breaches of fiduciary responsibility, the categorical approach of the disclosure provisions of the current Welfare and Pension Plans Disclosure Act has been of little assistance in this regard.\textsuperscript{189} For example, under the current Act, with the exception of certain party-in-interest transactions, the pension fund administrator need only disclose the aggregate amounts received and expended for the sale and purchase of fund assets.\textsuperscript{190} Gains or losses resulting from such sales are likewise reported in the aggregate, according to the category of assets sold.\textsuperscript{191} This data does little to aid in the determination of whether or not a particular investment is prudent.\textsuperscript{192} In order to facilitate enforcement of their standards of fiduciary responsibility, both bills require more specific disclosure of pension fund transactions.\textsuperscript{193} Yet, several flaws remain which may seriously hinder the effectiveness of the fiduciary responsibility standards.

\textit{1. The Purchase and Sale of Fund Securities—With respect to the purchase and sale of fund securities in general, both bills perpetuate the inadequacies of the disclosure provisions of the current Act.}\textsuperscript{194} The House bill\textsuperscript{195} requires a statement of aggregate purchases, sales, redemptions, and exchanges of investment securities (including bonds and debentures), identified by type of security.\textsuperscript{196} In the case of purchases, the fund administrator must

\textsuperscript{188} Most witnesses testifying before the House General Subcommittee on Labor approved the inclusion of these prohibitions in the bills. Indeed, many argued for more stringent bans. \textit{See, e.g.}, 1968 House Hearings 172 (statement of Mr. Lane); \textit{Id.} at 223 (statement of Mr. Bronston).

\textsuperscript{189} \textit{See text accompanying notes 50-57 supra.}


\textsuperscript{191} \textit{See Employee Welfare and Pension Benefit Plan Annual Report, supra note 190, pt. IV, § c, Schedule 2, in 1968 House Hearings 82.}

\textsuperscript{192} 1968 House Hearings 55.

\textsuperscript{193} It should be noted here that both bills broaden the coverage of the disclosure provisions. The current Act requires every administrator whose plan is subject to the Act and covers one hundred or more participants, to file an annual report. 29 U.S.C. § 306 (1964). H.R. 1046, § 7(a), and S. 3589, § 7(a), require an annual report of all plans subject to the fiduciary responsibility provisions of the bills or, irrespective of whether or not they are subject to those provisions, of all plans subject to the Act in general which cover one hundred or more participants.

\textsuperscript{194} S. 3589, § 7(b)(2)(A); H.R. 1046, § 7(d)(1)(D).

\textsuperscript{195} This section only applies to plans which are “funded through the medium of a trust.” For a discussion of the possible problems arising from this phraseology, \textit{see supra} note 106.

\textsuperscript{196} \textit{E.g.}, Common stock, bond issues.
disclose the *aggregate* purchase price; in the case of sales, redemptions, or exchanges, he must disclose the *aggregate* cost, proceeds, and the net gain or loss. Such information would not reveal most instances of imprudent investments and would, in effect, permit the pension fund fiduciary to offset his gains against his losses.\(^{197}\)

There are basically two arguments against requiring more detailed disclosure. One contention is that detailed information with respect to the purchase and sale of fund securities should remain confidential. Some critics fear that detailed disclosure would generate pressure on pension fund fiduciaries to maximize short-term investment results, perhaps at the expense of the fund’s security, and that disclosure of purchases and sales of fund investments might be improperly construed as an expression of lack of confidence in a particular company.\(^{198}\) It is further asserted that detailed disclosure would impose too burdensome a workload on pension fund fiduciaries.\(^{199}\) Although more detailed disclosure would undoubtedly increase the fiduciary’s administrative workload, the bills could meet the confidentiality argument by requiring that the more detailed aspects of the annual report be kept confidential to everyone except the Secretary of Labor and, upon written request, the plan participants and their beneficiaries. Otherwise, inadequate disclosure would surely undermine the effectiveness of the bills’ standards of fiduciary responsibility.

The Senate bill strikes a compromise between these demands by requiring the disclosure of the aggregate cost and value of each security, by issuer, held by the pension fund at the end of the year.\(^{200}\) The pension fund fiduciary must also disclose the aggregate amount, by type of security, of all purchases, sales, redemptions and exchanges of securities made during the year and a list of the issuers of those securities.\(^{201}\) Disclosure of the cost and value of each security will enable the Secretary of Labor or plan participant to examine the performance record of each security. Nevertheless, the Senate bill would still permit the pension fund fiduciary to conceal a portion of his losses. Since the fiduciary need only list those securities held by the fund at the end of the year, the annual report would not reveal the prudence of an investment in a security which is purchased and sold entirely

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\(^{197}\) Under trust law the trustee is generally not permitted to offset his gains against his losses. G. BOGERT, *supra* note 100, at § 708.

\(^{198}\) See, e.g., 1970 *House Hearings* 813–14 (statement of Mr. Tyson).

\(^{199}\) See, e.g., 1970 *House Hearings* 799 (statement of Mr. Lackman).

\(^{200}\) S. 3589, § 7(b)(2)(A).

\(^{201}\) Id. § 7(b)(3).
within the reporting year. However, since the bill also requires a statement of the aggregate amount of all purchases and sales made during the year and a list of the issuers of those securities, the Secretary would at least be aware of such transactions. If he has cause to suspect any misdealing, the Senate bill authorizes the Secretary to secure additional information pursuant to his investigatory powers. The Senate bill therefore shifts much of the administrative burden from the fund fiduciary to the Secretary. Nevertheless, these provisions are an improvement over the similar provisions of the House bill.

Both bills require more detailed disclosure of purchases and sales of fund securities issued by the employer or other party in interest. Each proposal requires that the annual report separately identify every transaction and list, including the type of security, its cost and current value, the purchase or selling price, the net gain or loss on each sale, and the identity of the issuer. In addition, the report must include a detailed list of all transactions in securities held or owned by the employer, employee organization, or party in interest. This list must contain information with respect to the type of security involved, its cost, the expenses connected with the purchase or sale, the proceeds on that sale, the net gain or loss, and the identity of the other party and his relationship to the plan. This data should be sufficient to reveal most breaches of fiduciary responsibility. The principal reason for the detailed disclosure of party-in-interest transactions is that most breaches occur when the fiduciary is faced with conflicting interests.

2. The Purchase and Sale of Other Fund Assets—With respect to the purchase and sale of other fund assets in general, both bills require that the annual report include: a statement of aggregate purchases, sales, or exchanges, identified by type of asset; the aggregate purchase or selling price; the aggregate expenses incurred in connection with such purchase or sale; the aggregate cost of the asset and its proceeds; and the aggregate net gain or loss. The Senate bill further requires that the annual report separately identify each transaction involving over $100,000 or

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202 This is one of the inadequacies of the disclosure provisions of the current Act. 1968 House Hearings 55 (statement of Mr. Donahue).
203 S. 3589, § 9(c) provides in part: "The secretary shall have power . . . to make an investigation and in connection therewith he may require the filing of supporting schedules of . . . financial information . . . ." The House bill contains a comparable provision. H.R. 1046, § 7(b).
204 H.R. 1046, § 7(f)(1)(C); S. 3589, §§ 7(b)(2)(B)(ii), 7(b)(3).
205 H.R. 1046, § 7(f)(1)(C); S. 3589, § 7(b)(7).
206 H.R. 1046, § 7(f)(1)(E); S. 3589, § 7(b)(4)(A).
three percent of the fund's value, and include with respect to such transaction the type of asset, the purchase or selling price, the expenses incurred in connection with the purchase or sale, the cost of the asset, the net gain or loss on each sale, and the identity of the purchaser or seller. 207 Again, by requiring only aggregate disclosure, the draftsmen have over-reacted to the increased administrative burdens that more detailed disclosure would impose upon the pension fund fiduciary. Since transactions in assets other than securities (primarily fixed assets such as land and buildings) are unlikely to occur very frequently, the administrative burden argument is not compelling. Furthermore, full disclosure is especially important when the asset lacks an established market value as in the case of most assets other than securities. Without full disclosure of the details of such transactions, it will be impossible, absent subsequent investigation, 208 to determine the prudence of any particular investment. Finally, it is difficult to argue that such transactions should remain confidential. With fixed assets, there is little danger that full disclosure will affect investor confidence or encourage the fund fiduciary to sacrifice the fund's security in order to maximize short-term investment results. 209 For these reasons the annual report should at least fully disclose all pension fund transactions in assets other than securities.

With respect to the purchase and sale of assets other than securities to parties in interest, both bills again require more detailed information. The pension fund fiduciary must include in his report a detailed list of all such purchases, sales, and exchanges, the asset involved, the purchase or selling price, expenses incurred in connection with the transaction, the cost of the asset, the net gain or loss on sale, and the identity of the seller or purchaser and his relationship to the plan. 210 These disclosure requirements are sufficiently detailed to assist enforcement of the fiduciary responsibility sections of both proposals.

3. Loans—As discussed earlier, the power of pension fund fiduciaries to loan pension fund assets has been subject to great abuse, and the current Act has been relatively ineffective in preventing such abuses. 211 Both proposed laws would prohibit loans to parties in interest and subject all other loans to the scrutiny of the prudent man rule. 212 In order to enforce these provisions effectively, the bills must contain adequate disclosure provisions.

207 S. 3589, § 7(b)(4)(B).
208 See text accompanying notes 222–31 infra.
209 See text accompanying note 198 supra.
210 H.R. 1046, § 7(f)(1)(C); S. 3589, § 7(b)(7).
211 See notes 37–40 supra.
212 See text accompanying notes 125–29 supra.
The House bill requires that the annual report contain a detailed list of all loans made by the pension fund during the year and all loans outstanding at the end of the year, including information as to the identity and address of the debtors, the dates on which the loans were made, their maturity dates, the interest rate, the face amount of the loan, the amount outstanding at the end of the year, the type and value of collateral held, and any other terms and conditions. Loans made to the employer, the employee organization, or other parties in interest must be separately identified. Thus, the House bill requires precisely the type of disclosure needed to determine whether each loan is adequately secured and provides a sufficient rate of return to be a prudent investment.

Unfortunately, the Senate bill takes a less thorough approach. In general, it requires the fiduciary to make a schedule of principal and interest payments received during the year, aggregated by type of loan. More detailed disclosure is only required when a loan is made to a party in interest, is in default, is written off during the year as uncollectable, or exceeds $100,000 or three percent of the fund's value. Perhaps the considerations of the great administrative burden which would otherwise be imposed upon the pension fund fiduciary underlie the limited disclosure provisions with respect to loans. However, in order to determine whether a particular loan meets a minimum test of prudence, at least the collateral and interest rate of that loan should be disclosed. Limiting detailed disclosure to loans exceeding $100,000 or three percent of the fund's value will probably permit concealment of improper loans of lesser amounts.

In general, both bills require significantly more detailed disclosure than the current Welfare and Pension Plans Disclosure Act.
Act. Nevertheless, whether the proposals provide effective disclosure is open to serious doubt.

E. Enforcement

The original Welfare and Pension Plans Disclosure Act relied exclusively on pension plan participants and beneficiaries for its enforcement. The Secretary of Labor was to be "a mere repository" of information reported under the Act. In 1962, Congress sought to strengthen the original Act with amendments giving the Secretary certain investigatory powers. Under the current Act the Secretary may, "when he continues to have reasonable cause to believe investigation may disclose violations" of the Act, make any investigation that he deems necessary. He is also authorized to seek, in his discretion, a permanent or temporary injunction to restrain any acts or practices that violate the provisions of the Act.

In order to facilitate enforcement of fiduciary responsibility standards and prohibitions against certain persons holding office in the pension fund, H.R. 1046 and S. 3589 would liberalize the Secretary's investigatory powers and grant both the Secretary and pension plan participants and beneficiaries further power to enforce the provisions of the Act.

With respect to the investigatory powers of the Secretary, the Senate bill provides the more liberal grant of power. Section 9(c) provides, in part:

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218 S. 3589 requires the pension fund administrator to disclose certain other information which need not be disclosed under H.R. 1046. First, § 7(b)(6) requires the administrator to list all leases of property with persons other than parties in interest who are in default on their lease and all leases with parties in interest. Information with respect to the terms of the lease, the nature of the property leased, the identity of the lessor or lessee, his relationship to the plan, etc., must be disclosed. S. 3589, § 14(b)(2)(A), and (B), prohibit a fiduciary from leasing fund property to any known party in interest or leasing on behalf of the fund any property known to be property of any party in interest. In addition, S. 3589 requires the disclosure of certain information which, although of little relevance to the purposes of the bill, is designed to provide Congress and the public with a better understanding of the current state of the private pension plan system. For example, § 7(f)(7) would require the pension fund fiduciary to include in the annual report a statement showing the number of participants who terminated service under the plan during the year, whether or not they retain any non-forfeitable rights, their length of service by category, the present value of the total accrued benefits of said participants and the present value of such benefits forfeited. Several witnesses before the House General Subcommittee on Labor have severely criticized these provisions as being both of little value and overly burdensome on plan fiduciaries. See, e.g., 1970 House Hearings 771-72 (statement of Mr. Bassett); Id. at 926 (statement of Owens-Illinois, Inc.).


221 Id. § 308(f).
The Secretary shall have power, when he believes it necessary in order to determine whether any person has violated or is about to violate any provisions of this Act, to make an investigation and in connection therewith he may require the filing of supporting schedules of the financial information required to be furnished under [the annual report section] and may enter such places, inspect such records and accounts, and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation.

This provision, based on section 601 of the Labor-Management Reporting and Disclosure Act of 1959, gives the Secretary almost unrestricted investigatory powers. The House bill applies a more restrictive standard, requiring, as a condition precedent to investigation, that the Secretary have "reasonable cause to believe investigation may disclose violations of this act." However, the House bill further provides that notwithstanding the reasonable cause standard, the Secretary may cause periodic examinations to be made of any pension benefit plan subject to [the fiduciary responsibility section of the bill]: Provided, however, That no such examination shall be made more often than once a year.

Although the examinations are limited to one per year, this provision most certainly lessens the effectiveness of the reasonable cause limitation.

These provisions have been subject to criticism on the ground that they authorize the Secretary to engage in "fishing expeditions," and will lead to undue interference with the management of the plan. It is doubtful, however, that the Secretary...
has either the time or resources to engage in "fishing expeditions." Moreover, if the Secretary were to engage in such expeditions, it is within the power of the federal district courts to impose protective restraints on the conduct of his investigation. Finally, if the bills required detailed disclosure, an investigation conditioned solely upon reasonable cause would be sufficient. The Secretary would have sufficient information to determine whether or not each transaction was prudent or otherwise not prohibited by the Act. However, since the bills rely, for the most part, on categorical and aggregate disclosure, it may be necessary for the Secretary to conduct an investigation into a particular fund's investment policies before he can determine whether the fund is being managed prudently.

In addition to the rights of action which the current Welfare and Pension Plans Disclosure Act provides, both bills permit either the Secretary or any pension plan participant or beneficiary to bring a civil action for appropriate relief, legal or equitable, when a fiduciary has breached a responsibility or duty imposed by the fiduciary responsibility sections. Actions may also be brought to remove any fiduciary who has failed to fulfill his required duties or who is occupying a position with the fund which the Act prohibits him from holding. The House bill further permits the Secretary or any plan participant or beneficiary to seek an order enjoining any acts or practices which constitute or will constitute a violation of fiduciary standards; the Senate bill gives this power solely to the Secretary.

These provisions should be more than sufficient to enforce the bills' substantive provisions. However, pension plan participants have traditionally been rather inactive in supervising the operation of their pension plan. There may be several reasons for this inactivity: too often workers assume that their union always acts

provides that "nothing contained in this chapter shall be so construed or applied as to authorize the Secretary to regulate, or interfere in the management of, any employee . . . pension benefit plan . . . ." H.R. 1046, § 9(h); S. 3589, § 9(i).

See 1970 House Hearings 490 (remarks of former Secretary of Labor Schultz).


The ability of the Secretary to conduct such investigations will, however, be dependent upon a substantial increase in the Labor Department's manpower and financial resources. Supra note 229.

See 1970 Senate Hearings 608 (remarks of former Secretary of Labor Schultz).

S. 3589, § 9(e)(2), expressly permits a participant or beneficiary to bring suit "as a representative party on behalf of all participants or beneficiaries similarly situated where the requirements for maintaining a class action are met."

H.R. 1046, § 9(i)(2); S. 3589, § 9(e)(2).

H.R. 1046, §§ 9(i)(1), (f).

S. 3589, § 9(e)(3).
in their best interest; many lack sufficient financial resources to pursue a lawsuit against the fund administrators; many pension plan participants are not assured of any vested interest in a pension until they actually retire; perhaps many feel that the amount of benefits that they will actually receive is too insignificant to merit legal action; or perhaps they are inadequately informed as to the nature of their pension plan. These bills, like the current Act, may rely too extensively on plan participants and their beneficiaries. In any event, the shadow of inadequate disclosure casts doubt upon the effectiveness of the enforcement provisions of the two bills. In the absence of constant supervision by the Secretary of Labor, only the most flagrant abuses will be discovered.

VI. Conclusion

The American private pension plan system is designed, in part, as a response to the need to alleviate the penury and sense of helplessness which many citizens face upon retirement. Unfortunately, private pensions have not proven to be a complete solution to these problems. Many workers are still not covered by a private pension plan; and many of those covered find themselves deprived of a pension at the last moment, either because they fail to meet the plan's service or age requirements, because the employer suddenly terminates the plan, or because the plan has been improperly managed and is without sufficient funds to meet the benefit demands of retiring employees.

Although H.R. 1046 and S. 3589 attempt to remedy some of the ills of private pension plans, they have many weaknesses. Their lists of prohibited transactions are not sufficiently inclusive, another potential problem of relying on enforcement by plan participants and beneficiaries is that the union and/or employer may assert great pressure on any of these persons who contemplate bringing an action against the fund fiduciary, especially if that fiduciary happens also to be an official of the employer or the union. In this connection it is interesting to note that the LMRDA, 29 U.S.C. § 464(a) (1964), provides that the Secretary, upon written complaint of a union member, shall investigate the complaint and if he finds probable cause that a violation of the Act has occurred, shall bring a civil action without disclosing the identity of the complainant. This provision was undoubtedly intended to insulate union members from any pressures that might be forthcoming from the union and to encourage reports of violations. Although not expressly authorized by either H.R. 1046 or S. 3589, neither bill prohibits the Secretary from following such procedures.

Several bills were introduced in the 91st Congress that would specifically deal with this problem. They would, inter alia, establish minimum standards for the funding of pension plans and the vesting of pension plan benefits. See S. 2167, 91st Cong., 1st Sess. (1969); H.R. 1045, 91st Cong., 1st Sess. (1969). For a discussion of these proposals, see Levin, Proposals to Eliminate Inequitable Loss of Pension Benefits, 15 Vill. L. Rev. 527, 580–84 (1970).
their disclosure provisions are in several respects inadequate, and consequently their enforcement provisions will not be fully effective. Legislative compromise is apt to weaken them further. Nevertheless, because these proposals would prevent many of the more flagrant abuses, they should assist in the much needed reform of the private pension system.

—Stephen E. Dawson