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Phyllis C. Borzi

U.S. House of Representatives

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A NATIONAL RETIREMENT INCOME POLICY: PROBLEMS AND POLICY OPTIONS

Phyllis C. Borzi*

I think this is really an historic Labor Day—historic in the sense that this legislation will probably give more benefits and rights and success in the area of labor-management than almost anything in the history of this country.

. . . .

[I]t is indicative of the kind of cooperation that can be achieved between labor and management. I know how hard and how long many people in the labor movement and management have worked to make sure that we came up with the right kind of legislation.

[I]t is a good reflection on the relationship between the executive branch on the one hand and the legislative branch on the other. So, when you add it all up, even though this is an extremely complicated piece of legislation, it has been the long labors of many, many people that have produced the kind of result that is good for America and, primarily, for those who will be the ultimate beneficiaries of the legislation.

Remarks of President Gerald R. Ford
September 2, 1974¹

* Counsel for Pensions, U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Labor-Management Relations. B.A., 1968, Ladycliff College; M.A., 1970, Syracuse University; J.D., 1978, Catholic University. The opinions expressed in this Article are solely those of the author and not those of the Committee on Education and Labor, or the Subcommittee on Labor-Management Relations, or their members.

1. Taken from the President's remarks at the bill signing ceremony in the White House Rose Garden on Sept. 2, 1974. President Ford's Labor Day Message and his remarks upon signing the Act are reprinted in SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 94th Cong., 2d Sess. 5321 (1976) [hereinafter cited as LEGISLATIVE HISTORY].

As members of Congress, congressional and agency staff, private sector representatives of retirees, organized labor, the business community, and the press gathered together on Labor Day, 1974 to watch President Gerald R. Ford sign H.R. 2, the Employee Retirement Income Security Act of 1974 (ERISA),² they had reason to be proud.

For over ten years Congress and the various Administrations³ had been concerned about the mounting losses of benefits to workers covered by private pension plans.⁴ Members of Congress had introduced bills, conducted investigations, and held hearings to document the need for comprehensive pension reform.⁵ Yet because of the complex nature of the issues, the widely divergent approaches to pension reform that had been advanced, and the various turf battles that had been waged, many legislators thought that the consensus necessary to enact a bill was impossible to obtain.

Senator Jacob Javits, author of the first proposal for comprehensive pension reform,⁶ heralded the Employee Retirement Income Security Act of 1974 (ERISA) as "the greatest development in the life of the American worker since social security."⁷ Congressman John Dent, the original sponsor of H.R. 2, called ERISA's passage the most important legislative battle he ever fought.⁸

Even ERISA's most ardent defenders, however, recognized its

2. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 18, 26, 29, 31 & 42 U.S.C.).

3. On Mar. 28, 1962, President John F. Kennedy formed a special cabinet-level task force, the Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, to review employee benefit programs. The Committee issued its report in 1965, during the Johnson administration. For a full discussion of the evolution of ERISA and the extent of involvement of the Johnson and Nixon administrations, see SENATE SPECIAL COMM. ON AGING, 98TH CONG., 2D SESS., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1-25 (Comm. Print 1984) (essay of Michael S. Gordon, Esq.) [hereinafter cited as SEN. AGING PRINT]. See also AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, THE DEBATE ON PRIVATE PENSIONS 7-10 (1968) [hereinafter cited as AEI].

4. Senator Jacob Javits's remarks on the Senate floor during the passage of the conference report on H.R. 2, 93d Cong., 1st Sess. (1973), illustrated the types of loss that had occurred. See LEGISLATIVE HISTORY, *supra* note 1, at 4748-51.

5. LEGISLATIVE HISTORY, *supra* note 1, at 4747-48 (remarks of Sen. Javits).

Senator Javits introduced the first comprehensive pension and welfare plan reform bill in 1967 as S. 1103, 90th Cong., 1st Sess., the Pension and Employee Benefit Act of 1967. Senator Vance Hartke had introduced a pension reinsurance bill as early as 1964. The bill was reintroduced in 1967 as S. 1635, 90th Cong., 1st Sess. For a detailed list of proposed legislation predating ERISA, see AEI, *supra* note 3, at 8.

6. S. 1103, 90th Cong., 1st Sess. (1967).

7. LEGISLATIVE HISTORY, *supra* note 1, at 4747.

8. *Id.* at 4667.

limitations. For example, Congressman Dent was "not convinced that the provisions contained in [the] conference report [were] a penultimate solution to all the problems of retirement security for our work force," and anticipated the need for future adjustments.⁹ Nonetheless, Congress believed that in enacting ERISA it had laid the foundation for the orderly and rational development of a national retirement income policy, which had as its ultimate goal assurance for each American worker of retirement years free of economic anxiety.¹⁰

Unfortunately, many believe that Congress has lost its way, and that current concern with budget deficits has eclipsed the goal of retirement income security. Virtually all segments of the employee benefits community have demanded that a national retirement income policy be developed and articulated; that each legislative and regulatory proposal be measured against this policy; that only those proposals that further our national retirement income policy be adopted; and that retirement income security, not revenue-raising, be the focus of congressional debate. Both organized labor and management have voiced identical concerns. When Lane Kirkland, President of the AFL-CIO, and Richard Leshner, President of the United States Chamber of Commerce, agree on something, people begin to pay attention.¹¹

This Article examines the need for a national retirement income policy, identifies the major components of such a policy, and briefly discusses some of the policy options for private pension plans. This Article is an overview of several critical policy areas. It is not an exhaustive policy analysis, nor does it provide a definitive series of options for achievement of a particular policy. Its focus will be on the private pension system, rather than on federally provided benefits such as social security or Medicare, or employer-provided pensions for state, local, or federal employees. The issues discussed are a starting point for the type of national debate that must accompany the development of short- and long-term retirement security goals.

9. *Id.* at 4667-68.

10. For a discussion of subsequent legislation, see SEN. AGING PRINT, *supra* note 3, at 45-78 (essay of Dan M. McGill).

11. This unusual harmony is the result of both men's vigorous opposition to the proposal to tax employee benefits. Their argument against taxing benefits stems from the belief that such action would affect far more than tax policy. Encouraging the development of employee benefit plans is part of a broad social policy, only part of which is tax-oriented. See generally Kirkland, *Don't Pick the Pockets of Workers*, USA Today, Jan. 9, 1985, at 6A, col. 3; Leshner, *It Makes No Sense to Destroy Benefits*, USA Today, Jan. 9, 1985, at 6A, col. 6.

I. THE NEED FOR A NATIONAL RETIREMENT INCOME POLICY

Over the years, employer-provided pensions have developed as supplements to social security. Private sector employers, as well as governmental employers, have established employee benefit plans for their employees. Initially, these programs arose through the collective bargaining process and in response to the needs of labor-management relations. Since the early 1920's, however, Congress has encouraged the provision of employee benefits through various tax incentives.¹² Although it is true today that many retirees can expect to receive pensions in addition to social security, it is equally true that not all retirees—either today or in the future—will be so lucky. The metaphorical “three-legged stool” of retirement income consisting of social security, employer-provided pensions, and individual savings is well known. This stool, however, has never been particularly sturdy or reliable. For most workers, some of its legs are shorter than others and, for some workers, one or more of its legs are missing. Still other workers have added a fourth leg: post-retirement earnings.

A national retirement income security policy is needed to assure that all of the legs of the stool exist and are pointing in the same direction. Such a policy need not mandate that each worker's stool be identical, but it should improve the chances that most workers will have more than the single leg of social security to rely upon when they retire.

Some have suggested, though, that a national policy is unnecessary.¹³ They argue that each person can determine individually what he or she needs for retirement and can plan accordingly. Retirement income would consist of whatever savings or assets had been accumulated during one's career, as well as any other support family members would provide. This Darwinian approach, however, is unlikely to gain widespread approval. The frailty of human nature, as well as economic necessity, causes many individuals to reach retirement with little or no savings or other means of support. If retirement income security were totally dependent on individual efforts, some individuals would do very well. Others, though, for reasons not entirely within their

12. Munnell, *ERISA—The First Decade: Was the Legislation Consistent with Other National Goals?*, 19 U. MICH. J.L. REF. 51, 53-55 (1985).

13. William A. Niskanen, a member of President Reagan's Council of Economic Advisors, made such an observation at the ERISA 10th Anniversary Conference, held by the Senate Special Committee on Aging on Sept. 11, 1984 in Washington, D.C.

control, would have little or nothing to show for their lifetime of work. Societal pressure causes the government to provide assistance for the latter individuals.¹⁴ Taxpayers bear the cost of that assistance; in the end, the cost of not having a national policy to encourage employer-provided benefits might well be higher than the costs of employer-provided benefits under the current system of tax incentives.

Others have suggested that a national policy is essential because retirement income must consist of a mix of public and private programs,¹⁵ as it does today.¹⁶ They argue that neither the public sector nor the private sector can by itself provide adequate retirement income. A national retirement income policy is necessary because the respective roles and objectives of the public and private sectors can only be developed, implemented, and monitored on a national level.

The framers of ERISA certainly intended the statute to be a concrete expression of national policy. Even with respect to private sector employee benefit plans, though, ERISA was not a complete statement of policy. Some issues, such as portability, were simply not addressed.¹⁷ Other issues, such as preemption and the interface of the vesting rules with the antidiscrimination rules, were addressed in ERISA but earmarked for further study.¹⁸

More importantly, ERISA covers only a part of the universe of employee benefit plans. Federal, state, and local plans (the so-

14. Of course, the current social security system provides far broader coverage and is not generally means tested. Nearly all workers are covered by social security. The four basic types of insurance benefits provided are old-age or disability benefits paid to the worker, benefits for dependents of retired or disabled workers, benefits for surviving family members of a deceased worker, and lump-sum death payments.

15. FINAL REPORT OF THE PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY (Feb. 26, 1981) [hereinafter cited as PRES. COMM'N REP.].

16. In part, this mixture of public and private programs emerged because a significant number of individuals were unable or unwilling to save enough to tide them over in retirement. In part, however, it resulted from the inability of many families to care for their aged members while assuring the family's own economic viability.

17. Congress, though, was concerned enough about portability to request that a study be done about it. ERISA § 3022, 29 U.S.C. § 1222 (1982). Portability generally refers to an employee's ability "to carry" earned benefits to the next employer. One of the reasons that no system of portability has been developed to date is that two fundamental questions must first be answered: (1) what benefits should be portable (all accrued benefits versus all vested benefits) and (2) should only benefit credits be transferred or should plan assets follow these credits? For a fuller discussion of these and other policy issues, see E. MEIER & P. BASSETT, PORTABILITY OF PENSION BENEFITS (Jan. 1981) (working paper for the President's Commission on Pension Policy).

18. ERISA § 3022, 29 U.S.C. § 1222 (1982).

called governmental plans) are exempt.¹⁹ So are church plans²⁰ and unfunded excess benefit plans.²¹ Even if ERISA were to cover these excluded plans, employer-provided benefits are only one leg of the three-legged stool of retirement income. Social security and private savings also would have to be considered as part of an overall policy.

To develop a meaningful retirement income policy, there must be a national coordination of, planning for, and ongoing evaluation of all the described programs, as well as of health and life insurance plans, which are critical supplements to pensions. In addition, a national retirement income policy must factor in numerous other programs, such as Medicare, Medicaid, employer-provided welfare benefits,²² and other in-kind benefits.

A single administrative and regulatory structure in the executive branch is essential to the development of a rational and comprehensive national policy. Although a number of legislators have proposed a single agency to administer ERISA,²³ no one has introduced a bill that consolidates all the functions and duties of the myriad governmental agencies administering all retirement income security programs. Such a bill would be so far-reaching that both its introduction and passage would be highly unlikely. Yet, a national retirement income policy must cover all of these programs to be fully effective.

In addition to the development of a single administrative and regulatory structure in the executive branch, a single legislative and oversight body must be created in the legislative branch. In 1981 the President's Commission on Pension Policy (the Carter Commission) recommended the establishment of special committees on retirement income security in the House and Senate, and the consolidation of jurisdictions of existing committees into

19. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (1982).

20. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (1982).

21. ERISA § 4(b)(5), 29 U.S.C. § 1003(b)(5) (1982).

22. Welfare benefits are provided under an employee benefit plan and may include health, disability, unemployment, vacation, training, day care, legal services, and scholarship benefits. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982) defines a welfare benefit plan.

23. A single agency has been proposed several times since ERISA was enacted. H.R. 4340, 95th Cong., 1st Sess. (introduced Mar. 2, 1977 by Congressmen John Dent (D-Pa.) and John Erlenborn (R-Ill.)); H.R. 14138, 95th Cong., 2d Sess. (introduced on Sept. 20, 1978 by Congressmen Dent and Erlenborn); H.R. 6525, 96th Cong., 2d Sess. (introduced Feb. 13, 1980 by Congressmen Frank Thompson, Jr. (D-N.J.) and Erlenborn); H.R. 4929, 97th Cong., 1st Sess. (introduced on Nov. 10, 1981 by Congressmen Erlenborn, Phillip Burton (D-Cal.), Peter Peyser (D-N.Y.), and Thomas Petri (R-Wis.)); and H.R. 3339, 98th Cong., 1st Sess. (introduced June 16, 1983 by Congressmen Erlenborn and William L. Clay (D-Mo.)).

those special committees.²⁴ Although such an approach would go a long way toward solving the problems caused by the lack of a comprehensive approach to retirement income issues, the institutional jealousies among existing congressional committees are likely to impede the adoption of this meritorious suggestion.

Short of the development of a single executive and legislative structure, a national retirement income policy is nonetheless within reach. A retirement income security policy can be developed, at least with respect to private employee benefit plans covered by ERISA and administered by the three ERISA agencies.²⁵ The four ERISA congressional committees, which are the House Committees on Education and Labor and Ways and Means and the Senate Committees on Labor and Human Resources and Finance, could cooperatively set short- and long-term retirement income goals. Their task would be to evaluate the current situation, and to formulate goals and strategies for reform. Although the committees' task would not be easy, it would be critical to the development of an overall national policy. To be effective, the four committees would have to work together in the manner ERISA's framers contemplated when they conceived the Joint Pension Task Force.²⁶

II. RETIREMENT ISSUES THAT MUST BE ADDRESSED BEFORE IMPLEMENTATION OF A NATIONAL POLICY

Once Congress has recognized the need for a national retirement income policy, it must address some threshold issues before implementing a policy. In particular, Congress must define retirement, establish who will decide when it should occur, and set retirement income goals.

A. *Defining Retirement and Deciding When It Should Occur*

Before establishing a national policy to assure adequate retire-

24. PRES. COMM'N REP., *supra* note 15, at 52.

25. The three agencies are the Departments of Labor and Treasury, and the Pension Benefit Guaranty Corporation (PBGC).

26. ERISA § 3021, 29 U.S.C. § 1221 (1982). Until 1981, the House Education and Labor Committee had its own task force, the Task Force on Pension and Welfare Benefit Plans, which was sometimes mistaken for the Joint Pension Task Force. Today, the Subcommittee on Labor-Management Relations performs the functions of the House Pension Task Force.

ment income, legislators must settle two fundamental issues: what is retirement and when should it occur? The answers to these questions are not as simple as they might appear.

To define what retirement is, Congress must decide whether retirement should be a total withdrawal from the work force, or whether some type of gradual or phased-in retirement is desirable. Part-time work, flexible scheduling, periodic sabbaticals, and job sharing are some of the ways in which older workers can continue employment without facing the traumatic experience of traditional retirement: one day a full-time worker and the next a person totally withdrawn from the work force.²⁷

If the traditional theory of retirement is replaced by a more flexible approach, changes to ERISA might be made in the areas of suspension of benefits upon reemployment,²⁸ and hours of service to recognize part-time work or job sharing.²⁹ In addition, the elapsed time alternative for counting service deserves reexamination.³⁰

In 1974, when Congress enacted ERISA, an employer could require an employee to retire at age sixty-five. Retirement

27. S. RHINE, *MANAGING OLDER WORKERS: COMPANY POLICIES AND ATTITUDES* 4-5 (1984) (a research report from the Conference Board). Phased retirement was rare among the companies the Conference Board surveyed: it was unavailable at 97% of them and only one percent have a formal program of phased retirement. Two percent said that gradual retirement could be arranged at the request of the employee.

28. See ERISA § 203(a)(3)(B), 29 U.S.C. § 1053 (a)(3)(B) ((1982). A plan may generally provide that benefit payments attributable to employer contributions may be suspended if the retiree is reemployed by the same employer. In the case of a retiree receiving benefits under a multiemployer plan, the rules are more complicated. If the retiree resumes work in the same industry, in the same trade or craft, and in the same geographic area covered by the plan under which benefit payments are being made, the benefits generally may be suspended. The Department of Labor has issued regulations, effective Jan. 1, 1982, concerning suspension of benefits. 29 C.F.R. § 2530.203-3 (1985).

29. ERISA § 203(b)(2), 29 U.S.C. § 1053(b)(2) (1982).

30. Treas. Reg. § 1.410(a)(7)(1980).

The general way to calculate an employee's service is based on the actual counting of hours of service during a specified computation period. The elapsed time alternative for counting service permits an employer to use equivalencies rather than count actual hours. In other words, if a person is employed on the first day of a period ("employment commencement date") and also on the last day of the period ("severance from service date"), service would be counted by measuring the elapsed period, rather than the actual number of hours worked during the period. Under the elapsed time alternative, therefore, it is possible for an employee who would have otherwise been entitled to a full year of service credit under the normal rule (because the employee would have actually worked more than 1000 hours in a 12-month period) to fail to receive a year of service credit because he or she was not actually employed at the beginning and the end of a 12-month period. Thus, employees working under plans in which the elapsed time alternative was used would have limited flexibility to adjust their employment to meet their needs. If they were not actually employed on the first and last days of the measuring period, they would not get credit for the year of service.

meant a total withdrawal from one's position or occupation. Federal law was reasonably consistent on this point. The Age Discrimination in Employment Act (ADEA)³¹ permitted mandatory retirement at sixty-five. Moreover, the age at which unreduced social security benefits could begin for workers was also sixty-five. It is not surprising, therefore, that ERISA generally allowed plans to treat age sixty-five as the normal retirement age.³²

The provisions in ERISA permitting suspension of benefits upon reemployment³³ and the social security earnings limitation³⁴ discouraged workers from continuing employment beyond the normal retirement age. Although the existence of these provisions showed Congress's recognition that some workers might not be willing or able to withdraw totally from the work force when they retired from a particular job, the provisions themselves represented an implicit policy that at some point "retirees" should not be receiving both wages and a pension.

At the same time that ERISA has continued to favor sixty-five as the normal retirement age, two subsequent legislative changes have called this policy into question. The 1978 Amendments to the Age Discrimination in Employment Act raised the age of the protected class to seventy.³⁵ With relatively few exceptions, employers can no longer force employees to retire before age seventy.³⁶ In addition, a controversial amendment to the 1983 social security financing legislation gradually extended the age for receipt of unreduced social security benefits from sixty-five to

31. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634).

32. See, e.g., ERISA § 206, 29 U.S.C. § 1056 (1982). But see 26 U.S.C. § 408(f) (1982) (imposing the additional tax on early withdrawals if the individual is younger than 59½). Under ERISA, the concept of "normal retirement age" is important in establishing the age at which an individual's benefits commence. Although plans could permit benefit distributions early, no plan can prohibit benefit distribution once the worker reaches normal retirement age under the plan. Furthermore, prior to that age, a vested employee who has terminated employment, has no right to demand benefit payments unless the plan so provides.

33. ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B) (1982); 26 U.S.C. § 411(a)(3)(B) (1982).

34. Working beneficiaries under age 70, who earn income in excess of a specified amount, forfeit benefits. Before 1983, 72 was the cut-off age. Social Security Amendments of 1983, Pub. L. No. 98-21, § 114(c)(1), 97 Stat. 65, 79.

35. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189-90 (amending 29 U.S.C. § 631 (1976)).

36. Sections 12(c) and (d) of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 202, as amended by § 3(a) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, 189-90 (amending 29 U.S.C. § 631 (1976)) are exceptions to that rule.

sixty-seven.³⁷

Although the decision to retire is a personal one based on many factors, perhaps the most significant one is economic.³⁸ To the extent that full retirement benefits under social security will generally not be paid until age sixty-seven, workers who are physically able will have a strong incentive to remain in the work force until that age.

One policy issue, then, is whether ERISA should be amended to conform with the decision made in 1983 to raise the retirement age to sixty-seven. Those who believe that private pensions and social security should move in tandem to avoid inadvertent and conflicting results would argue for an amendment. On the other hand, given the voluntary nature of the private pension system, one might question whether consistency in this area is essential.

Employers have traditionally used early retirement incentives as a method to regulate their employment needs. Due to the nature of their business, some companies want to retain older, more experienced workers and, therefore, provide little incentive for employees to retire early. Other employers depend on the gradual replacement of older workers with younger ones, and therefore provide generous early retirement benefits to facilitate the transition. Notwithstanding the apparent federal trend to encourage employees to work longer, most employees choose to retire before age sixty-five.³⁹

At least four policy options exist to deal with the inconsis-

37. Social Security Amendments of 1983, Pub. L. No. 98-21, § 210(a), 97 Stat. 65, 107-08. The age at which a retiree is entitled to full benefits will gradually be increased to 67. Beginning with workers who reach age 62 in the year 2000, the age for receiving full benefits will be increased by two months a year for six years. Thus, workers reaching age 62 in 2005 will have to wait until age 66 for full benefits. For workers reaching age 62 in 2002, a similar phase-in will occur so that by 2027, the retirement age will be 67.

38. The Carter Commission identified three elements present in every retirement decision: anticipated retirement income, health, and relationship of the worker to the job (i.e., what is motivating the employee to ponder retirement: unemployment, mandatory retirement, discrimination). See generally E. MEIER, *EMPLOYMENT OF OLDER WORKERS: DISINCENTIVES AND INCENTIVES* (Apr. 1980) (working paper for the President's Commission on Pension Policy).

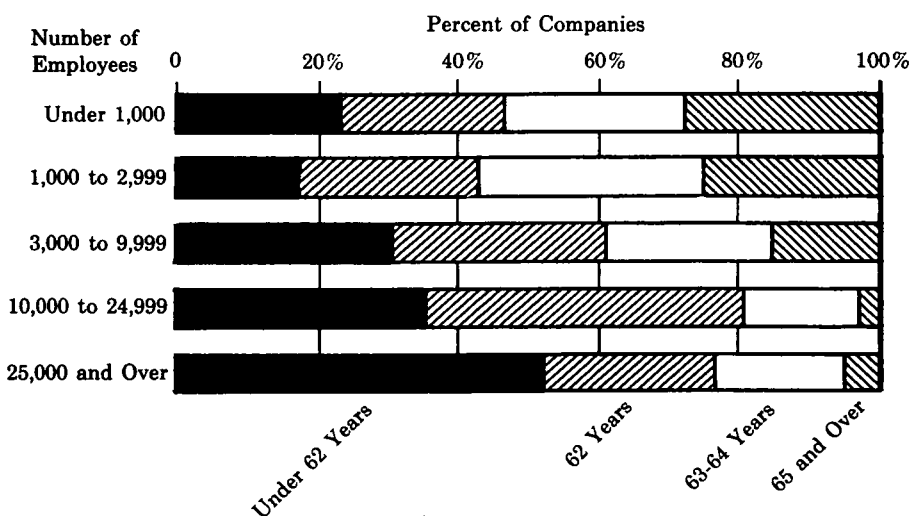
39. The Conference Board recently released a study of the policies relating to older workers of 363 companies in manufacturing, gas and electric utilities, insurance, banking, and retail trade. The study examined retirement ages, practices and incentives related to early/delayed retirement, and general company attitudes toward older workers. The survey found that the larger the company, the lower the average retirement age is likely to be, although the average age of retirement for all companies surveyed was lower for most companies than it was 12 years ago. This is not surprising because the Conference Board found that the vast majority of firms are continuing to encourage earlier retirement through various incentives. (See Chart 1 on next page.)

tency between ERISA's reliance on sixty-five as the normal retirement age and the other federal laws affecting retirement age. First, Congress could leave ERISA as it is. Second, Congress could conform ERISA to the Social Security Act by requiring private pensions to use a normal retirement age corresponding to that of social security. Third, Congress could conform ERISA to the Age Discrimination in Employment Act by requiring private pensions to use seventy as their normal retirement age. Fourth, Congress could amend ERISA to remove age sixty-five as the normal retirement age, and permit employers to set their own standards for normal retirement age.

The fourth option is the most desirable because of the voluntary nature of the private pension system and the varying needs of both employees and employers. If Congress were to elect this option, however, other amendments to ERISA would be necessary. For instance, if a company chose to raise the normal retirement age and thereby encourage employees to work longer, it should be required to continue pension accruals and contributions on behalf of employees until they retire. In addition, employers should be required to adjust actuarially the benefit calculated as of normal retirement age to reflect continued service, or recalculate the normal retirement benefit to include salary increases or benefit increases in effect during the post-normal re-

Chart 1

Average Age at Retirement in 1982, by Size of Company Work Force



Source: S. RHINE, *supra* note 27, at 7.

tirement age periods of service.⁴⁰ Finally, the rule permitting employers to exclude employees within five years of normal retirement age would have to be reconsidered, particularly if the vesting period were shortened.⁴¹

In summary, two threshold policy decisions are necessary before a national retirement income policy can be developed: what is retirement and at what age should it begin? From both a worker and employer perspective, ERISA should be neutral, encouraging neither working longer nor retiring earlier. Older workers should be free to retire in the traditional way, or to retire gradually. Plans could be structured to accommodate such choices. Questions of plan design, including normal retirement age, should be left in the hands of plan sponsors. ERISA might be amended to provide an alternative set of requirements to be

40. The issue of whether employers are required to continue crediting service and making contributions under ERISA for workers who continue in employment beyond the normal retirement age under the plan has been a source of contention since Congress passed the 1978 Amendments to the Age Discrimination in Employment Act (ADEA), Pub. L. No. 95-256, 92 Stat. 189. Although there is no specific language in ADEA that spells out the relationship of that law to ERISA, or the right of an employer to refuse to credit service between formal retirement age, usually 65, and age 70, the issue emerged during the floor debate. Donald Elisburg, Assistant Secretary of Labor for Employment Standards, assured members of Congress through a letter to the Senate Committee on Human Resources, that the Secretary of Labor would not interpret ADEA as to require crediting of service after normal retirement age. See 124 CONG. REC. 8218 (1978) (remarks of Sen. Williams). The Elisburg letter was followed by a Department of Labor amendment to the Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. § 860.120(f)(2)(ii) (relating to the application of § 4(f)(22) of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 623(f)(2)) to such plans). When the administration of ADEA was shifted from the Department of Labor to the Equal Employment Opportunity Commission (EEOC) in July of 1979, the EEOC announced that it intended to reexamine the issue. The EEOC, though, backed down because of the swift and vociferous opposition of the Secretary of Labor, as well as certain representatives of the business community and various members of Congress who had been involved in the issue in 1978. The EEOC recently reconsidered the issue, and on June 24, 1984 announced that it intended to rescind the Labor Department's interpretation allowing employers to freeze pension contributions and accruals for employees who work beyond age 65. On Mar. 5, 1985, the EEOC unanimously approved proposed regulations rescinding those rules and announced that it will require employers to continue crediting service and making pension contributions.

The regulatory process is, however, merely beginning. The proposed regulations must be coordinated with other agencies, including the Labor Department and Internal Revenue Service. The proposed regulations, together with regulatory impact analysis, must then be forwarded to the Office of Management and Budget (OMB) for approval. After OMB approves, the proposal will be published in the Federal Register, and a 60-day public comment period will follow. Only upon completion of each of the foregoing steps would the EEOC vote on finalizing the regulations, which would become effective on the date they were published in the Federal Register in final form. Given these hurdles, most people believe that absent legislation amending ERISA to require post-65 accruals, the current rule will not be administratively overturned.

41. See ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982).

applied once the plan sponsor has made the decisions on these threshold issues.

B. *Setting Retirement Income Goals*

One of the reasons that national planning to assure adequate retirement income for workers and their dependents must be undertaken is demographic. In 1980, approximately fifty-six million Americans were in the sixty to seventy age group, with about eighteen million older than seventy. By 2040, these numbers will more than double, rising to 118 million in the sixty to seventy age group with fifty-four million above seventy.⁴²

The effect of such a shift in our population on the social security system and employer-provided pensions could be staggering. The Social Security Administration projects that the number of Old-Age, Survivors and Disability Insurance (OASDI) beneficiaries will be seventy-eight million by the year 2040. People older than sixty will represent twenty-six percent of the total population.⁴³

The increase in the percentage of the total population over age sixty raises the question of how an increasing number of retirees will be supported. Before one can determine how to support them, though, an adequate retirement income for them must be defined. Defining an adequate retirement income involves two considerations: what would be adequate at retirement

42. D. KOITZ, VARIOUS EFFECTS OF RAISING THE NORMAL RETIREMENT AGE FOR SOCIAL SECURITY BENEFITS 54 (Table 13) (July 10, 1984) (Congressional Research Service, Library of Congress).

TABLE 13

Long-Range Projections of Aged Population

Year	Age Groups			
	60+	60-64	65-69	70+
	(Persons in millions) ^a			
1980	37	10	9	18
2000	47	11	9	27
2020	73	20	17	36
2040	86	17	15	54

a. Rounded to nearest million.

Source: SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE ACTUARY, SOCIAL SECURITY AREA POPULATIONS PROJECTIONS, ACTUARIAL STUDY No. 88, Tables 16e, 18e, 18f (1983).

43. *Id.* at 53 (See Table 12 on next page).

and what would be necessary to maintain adequacy during retirement? The task of defining an adequate retirement income has inspired a considerable amount of research and discussion over the past ten years, and some basic policy assumptions have emerged.

1. *Adequate income at retirement*— In determining adequacy, the appropriate measure should be the maintenance of preretirement standards of living. Most policymakers agree that an adequate level of income in retirement is one that does not cause a person's lifestyle to deteriorate markedly from that individual's preretirement level.⁴⁴ This principle is normally expressed in a replacement ratio that varies according to income level. Many factors are considered in calculating this ratio, including tax liabilities, both before and after retirement.⁴⁵

In 1981, the Carter Commission discussed the question of retirement income objectives, although it did not recommend a particular set of goals. The Commission did note that "[b]ecause of changes in consumption patterns, tax liabilities and savings rates, the income that needs to be replaced in retirement is less than 100% of preretirement earnings."⁴⁶ The Commission illustrated various replacement ratios that might be necessary to maintain a preretirement standard of living. The average range was from seventy-nine percent for the minimum-wage earner to fifty-one percent for the highest earner.⁴⁷ These ranges are a reasonable baseline for policymakers to use in trying to develop re-

TABLE 12

Basic Long-Range Demographic Assumptions

Year	Total	Population ^a		OASDI Beneficiaries ^b	
		Age 60 and older (% of total) (Persons in millions) ^c		OASI	DI
1980	236	37	(16%)	30	5
2000	277	47	(17%)	40	5
2020	308	73	(24%)	57	7
2040	325	86	(26%)	71	7

a. SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE ACTUARY, SOCIAL SECURITY AREA POPULATIONS PROJECTIONS, ACTUARIAL STUDY NO. 88, Tables 16e, 18d, 18e, 18f (1983).

b. From THE 1983 OASDI TRUSTEES' REPORT 75.

c. Rounded to nearest million.

44. See generally E. MEIER, C. DITTMAR & B. TORREY, RETIREMENT INCOME GOALS 1-11 (Mar. 1980) (working paper for the President's Commission on Pension Policy).

45. *Id.*

46. PRES. COMM'N REP., *supra* note 15, at 42.

47. *Id.*

tirement income goals.

Because a fundamental assumption underlying the development of a national retirement income policy is that social security should provide a floor of retirement income, it is necessary to examine what portion of total retirement income social security is likely to provide both to current and future retirees. For workers retiring today at sixty-seven⁴⁸ the ultimate long-range replacement rates for social security vary from 54.1% for low, 40.7% for average, and 27.2% for high wage-earners.⁴⁹

Thus, subtracting from the total replacement rate goals the actual social security replacement rates should yield a figure equal to the amount of preretirement income that must be replaced by sources of income supplementing social security. For example, a minimum-wage worker might have a replacement rate goal of eighty percent. At sixty-seven, social security would replace about fifty-four percent. That worker would need income from other sources equal to twenty-six percent of preretirement income to meet his or her retirement income goal. Similarly, a worker who always earned at least as much as the maximum earnings taxable for social security purposes (\$39,600 in 1985) might have as a total replacement rate goal fifty percent of preretirement earnings. Because social security would replace only

48. Beginning in 2027, 67 will be the age at which unreduced social security benefits are payable.

49. D. Korrz, *supra* note 42, at 21 (Table 5).

TABLE 5

Social Security Replacement Rates: The Impact of
Raising the Normal Retirement Age to 67

Age of Retiree	Ultimate long-range replacement rates ^a					
	Low Earner ^b		Average Earner ^c		Maximum Earner ^d	
	Old Law	New Law	Old Law	New Law	Old Law	New Law
62	45.7%	40.0%	34.2%	29.9%	23.0%	20.1%
65	55.1	47.8	41.3	35.8	27.7	24.0
66	56.2	51.0	42.2	38.3	28.2	25.6
67	57.3	54.1	43.1	40.7	28.8	27.2
70	61.0	65.7	46.2	49.8	30.6	33.0

a. Defined as benefits in the first year of entitlement over earnings in the final year of work.

b. Defined here as someone who always earned the Federal minimum wage.

c. Defined here as someone who always earned an amount equal to the average wage used for social security indexing purposes.

d. Defined here as someone who always earned an amount equal to the maximum earnings taxable for social security purposes (e.g., \$37,000 in 1984).

Source: Developed using unpublished tables prepared by Orlo Nichols, Office of the Actuary, Social Security Administration (Nov. 17, 1983).

twenty-seven percent; the worker would need twenty-three percent of preretirement income from other sources to meet his or her goal.

Once retirement income goals have been set, the next step is to examine sources of retirement income. Although the Carter Commission did a great deal of work on this topic,⁵⁰ the 1982 New Beneficiary Survey (NBS), conducted by the Social Security Administration, contains the most recent data on retirement income. The sample represents beneficiaries first entering pay status during the twelve months extending from mid-1980 to mid-1981. In their recent Article analyzing the results of the NBS, Linda Drazga Maxfield and Virginia P. Reno discuss the main components of retirement income supplementing social security, which are employer-provided pensions, income from savings and assets accumulated before retirement, and post-retirement earnings.⁵¹

According to Maxfield and Reno, fifty-three percent of married men received pension income—either private or governmental—as did forty-two percent of the unmarried workers.⁵² About seven percent of the couples had pension income earned by both spouses,⁵³ although female spouses were unlikely to have pension income earned on their own.⁵⁴ Eighty-four percent of the couples received asset income⁵⁵ as did seventy-three percent of the unmarried female workers and sixty-three percent of the unmarried male workers.⁵⁶

Perhaps the most surprising finding was the large number of retired workers with continued income from employment. Twenty-seven percent of the unmarried workers and forty-four percent of the married reported income from this source. Husbands and wives were equally likely to be earning post-retirement income—approximately twenty-seven percent of each group reported earnings.⁵⁷

Although the NBS found a relatively high incidence of supple-

50. See generally E. MEIER & C. DITTMAR, *INCOME OF THE RETIRED: LEVELS AND SOURCES* (Oct. 1980) (working paper for the President's Commission on Pension Policy).

51. Maxfield & Reno, *Distribution of Income Sources of Recent Retirees: Findings From the New Beneficiary Survey*, 48 *SOC. SECURITY BULL.*, Jan. 1985, 7-13.

52. *Id.* at 9.

53. *Id.* at 11.

54. *Id.* at 9. Only 10% of the female spouses had pension income earned on their own.

55. Examples of asset income are interest on savings accounts, money market accounts, certificates of deposit, and checking accounts.

56. Maxfield & Reno, *supra* note 51, at 9.

57. *Id.*

mentation of social security benefits, the amounts of income from those sources were relatively low. Half the married workers and one-fourth of the unmarried either had no additional income or additional income of less than \$100 per month.⁵⁸

2. *Maintenance of adequate retirement income*— Even if retirement income is adequate when a worker retires, maintaining adequacy throughout the retirement years is difficult. Some sources of retirement income, though, are subject to cost-of-living adjustments (COLAs). Social security benefits, for example, are indexed for inflation.⁵⁹ Automatic cost-of-living increases are effective in any year after the Consumer Price Index has risen three percent or more between specified periods.⁶⁰ Maintenance of adequacy is thereby accomplished for social security recipients. Private pensions, however, rarely provide automatic COLAs, although some grant ad hoc adjustments.⁶¹ Thus, a major problem facing Congress in developing a national retirement income policy is how to assure that a worker covered by a private pension has an adequate retirement income throughout the worker's retirement years. In the future, maintenance of adequate retirement income is likely to become more important and expensive because increases in longevity are likely to continue.⁶²

58. *Id.* at 12.

59. State pension systems generally have a COLA feature, with most providing automatic full inflation protection up to a ceiling averaging between two and five percent. HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, DESIGNING A RETIREMENT SYSTEM FOR FEDERAL WORKERS COVERED BY SOCIAL SECURITY, H.R. DOC. NO. 17, 98th Cong., 2d Sess. 62-63 (1984) [hereinafter cited as POST OFFICE & CIVIL SERVICE REP.]. One of the most controversial features of the Civil Service Retirement System is its automatic full COLA. *Id.* at 8.

60. Social Security Amendments of 1983, Pub. L. No. 98-21, § 112, 97 Stat. 65, 73-76.

61. For a description of the COLA practices of private pension plans, see POST OFFICE & CIVIL SERVICE REP. *supra* note 59, at 47, 236.

62. D. KORTZ, *supra* note 42, at 57 (See Table 16 on next page).

ERISA does not require plans to provide COLAs for retirees.⁶³ As desirable as that income protection might be, however, it would be quite costly, at least judging from the costs to the Civil Service Retirement System of such a feature.⁶⁴ For political reasons, it is unlikely that Congress would mandate such costs, particularly in light of the many other higher priority areas for increased employer spending.⁶⁵

III. DESIRABLE FEATURES OF PENSION PLAN POLICY

After Congress has decided to formulate a national retirement income policy and addressed the important threshold retirement issues discussed in Part II, it must define some of the problems the policy will address. Specifically, it should consider how to

TABLE 16

Long-Range Projections of Changes in Life Expectancy

<u>Year</u>	<u>Life Expectancy^a</u>			
	<u>At Birth</u>		<u>At Age 65</u>	
	<u>Male</u>	<u>Female</u>	<u>Male</u>	<u>Female</u>
1940	60.9	65.3	11.9	13.4
1960	66.6	73.2	12.9	15.9
1980	69.8	77.5	14.0	18.3
<u>Projections:</u>				
2000	73.4	81.0	15.7	20.8
2020	74.4	82.2	16.4	21.7
2040	75.4	83.3	17.2	22.6
2060	76.3	84.4	17.9	23.6

a. The life expectancy for any year is the average number of years of life remaining to a person if that person were to experience the death rates by age observed in, or assumed for, the selected year.

Source: THE 1983 OASDI TRUSTEES' REPORT 40.

63. Alicia Munnell, Senior Vice President and Director of Research at the Federal Reserve Bank of Boston, has raised questions with respect to the effect of inflation on vested benefits. In the past, she has advocated some form of indexing of vested benefits for employees who terminate employment before retirement age. For a discussion of this issue, see Munnell, *supra* note 12, at 65-68.

64. The Congressional Research Service estimates that this indexing feature alone costs the Civil Service Retirement System 11.5% of payroll. POST OFFICE & CIVIL SERVICE REP., *supra* note 59, at 12 (Table 1-1).

65. For example, Congress would most likely mandate shorter vesting periods, establish some type of a minimum retirement benefit for all workers, and require all service to be aggregated for purposes of determining the right to and amount of a benefit (disregarding all breaks in service regardless of length) before it would require employers to provide pension COLAs.

increase pension coverage, increase eligibility for plan participation, treat vesting requirements, and formulate a portability system.

A. Increasing Pension Coverage

The most common supplement to social security is an employer-provided pension. According to the Carter Commission, coverage under pension plans varies widely according to the category of workers. Ninety-one percent of federal workers between twenty-five and sixty-four, and eighty-three percent of state and local workers in the same age group are covered by a plan.⁶⁶ A significantly lower coverage rate of fifty-four percent exists among private sector workers.⁶⁷ Because coverage issues related to governmental plans are beyond the scope of this Article, this section will focus only on coverage under private pension plans.

The most serious problem confronting policymakers in their efforts to assure an adequate retirement income is the stagnation of coverage. Between 1940 and 1960, pension coverage of nongovernmental nonagricultural workers rose from 14.5% to 40.8%, but between 1960 and 1970 only about 4% growth occurred.⁶⁸ Because coverage rates as of May 1983 were about 56%,⁶⁹ as compared to 52% in 1979,⁷⁰ the rate of growth appears to have leveled off.

One goal of a national retirement income policy would certainly be the increase of worker coverage under private pension plans. In fact, a national policy goal ought to be the coverage of every worker under the private pension system and the guarantee of benefits under an employer-provided plan as a supplement to social security. This would assure the existence of at least two legs of the retirement income stool. Before developing policy options to reach that goal, however, policymakers must identify the characteristics of workers not currently covered under private pension plans, and determine why those workers are not covered.⁷¹

66. PRES. COMM'N REP., *supra* note 15, at 27 (Table 11).

67. *Id.*

68. *Id.* at 12 (Table 1).

69. Employee Benefit Research Institute Issue Brief, *New Survey Findings on Pension Coverage and Benefit Entitlement*, Aug. 1984, at 5 (Table 1) [hereinafter cited as *New Survey Findings*].

70. PRES. COMM'N REP., *supra* note 15, at 13 (Table 2).

71. Because this is such a critical issue, the Employee Benefit Research Institute (EBRI), in conjunction with the Department of Health and Human Services (HHS),

Two ways exist to identify the characteristics of the noncovered work force. One focuses on the characteristics of employers without pension plans, the other on the characteristics of noncovered individuals.

Looking first at employers, the three most accurate predictors of pension coverage are the size of the firm, its union status, and the industry of which it is a part. Only 22.9% of workers in firms with less than 100 employees are covered by pension plans, while 81.5% of workers in firms with 500 or more workers are covered.⁷² Moreover, 81.6% of all unionized workers are covered, in contrast to 44.4% of nonunion workers.⁷³ Finally, 69% of manufacturing workers are covered, while only 43.6% of nonmanufacturing workers are.⁷⁴

Turning to the characteristics of workers, the primary factors that determine the likelihood of coverage include age,⁷⁵ earnings,⁷⁶ sex,⁷⁷ job tenure,⁷⁸ and number of hours worked.⁷⁹ In addition, two types of workers are highly unlikely to be covered under pension plans: the self-employed and agricultural workers.⁸⁰

In summary, the workers least likely to be covered under a pension plan are those who are young, work for a small nonunion company of fewer than 100 employees, and earn less than \$10,000 a year. In addition, workers who do not meet ERISA's

sponsored a special supplement to the MAY 1983 CURRENT POPULATION SURVEY (CPS) conducted by the U.S. Bureau of the Census. Dr. Emily S. Andrews discusses the findings in a new book. E. ANDREWS, *THE CHANGING PROFILE OF PENSIONS IN AMERICA* (1985).

72. *Id.* at 49 (Table III.1).

73. *Id.*

74. *Id.*

75. 64.6% of all employed individuals under age 25 are not covered by a pension plan and 64.9% of all employed workers over 65 are not covered. *Id.* at 72 (Table IV.1).

76. 37.5% of all employed individuals earning between \$5,000 and \$9,999 are covered; 57.9% of those earning between \$10,000 and \$14,999 are covered; 71.9% of those earning between \$15,000 and \$19,999 are covered; and approximately 80% or more of the workers earning above \$20,000 are covered. *Id.* at 52 (Table III.2).

77. Sex appears to be decreasing in importance as a determining factor in coverage. In 1979, 39.1% of the covered work force were women, whereas in 1983 they were 42.9% of the covered work force. *Id.* at 63 (Table III.8).

78. 29.4% of those on the job for less than one year are covered; 56.2% of those who worked between one to nine years are covered; and 79.6% of those on the job for 10 years or more are covered. *Id.* at 49 (Table III.1).

79. 27.5% of those working less than 1000 hours are covered; 50.5% of those working between 1000 and 1999 hours are covered; and 64.5% of those working 2000 or more hours are covered. *Id.*

80. Eighty percent of the self-employed enjoy no pension coverage, either through a Keogh plan or an IRA, and 89.6% of agricultural workers are not covered. *Id.* at 72 (Table IV.1).

participation standards,⁸¹ are unlikely to be covered. Therefore, such workers could be excluded from coverage even if their employers offered a pension plan. Nevertheless, about one-third of the currently noncovered workers would have to be included in a plan if their employer offered one, because they already meet ERISA's minimum participation standards.⁸²

A national retirement income policy with a goal of increasing coverage faces two clear tasks: expanding coverage by encouraging employers without pension plans to establish them, and expanding coverage by changing ERISA's participation rules. Each of these tasks is formidable.

Before trying to fashion a way to expand coverage among employers without pension plans, one must first examine why these companies have no plans. Although little reliable statistical evidence exists on this issue, anecdotal evidence suggests at least three reasons why employers do not establish pension plans.

First, pension plans cost money. Not only must the employer generally contribute on a regular basis, he or she must also bear both the initial cost of instituting a plan and the ongoing costs of its administration. Because of economies of scale, small companies pay a disproportionate amount in administrative expenses, and such administrative cost is a major disincentive to plan formation. Many small companies have little or no profits, or even any extra cash, from which to absorb these costs. In addition, if the employer does have some extra money, health insurance rather than pensions is the first employee benefit provided. Finally, most small business owners would rather reinvest profits in the company than provide a pension plan. Later, the sale of the business will provide the owner with retirement income, while employees may have no retirement benefits to show for their work.

Second, pension plans are burdensome. If an employer self-administers the plan, there are reporting requirements⁸³ and fiduciary rules.⁸⁴ If the plan is a defined benefit plan, an actuary must be hired,⁸⁵ plan termination insurance premiums paid to the Pension Benefit Guaranty Corporation,⁸⁶ and additional rules followed. Even if the employer hires someone to administer

81. Examples of workers who do not meet ERISA's participation standards are those without one year of service, or who do not work 1000 hours a year.

82. E. ANDREWS, *supra* note 71, at 72 (Table IV.1).

83. ERISA § 101, 29 U.S.C. § 1021 (1982).

84. ERISA § 401, 29 U.S.C. § 1101 (1982).

85. ERISA § 103(d), 29 U.S.C. § 1023(d) (1982).

86. ERISA § 4007, 29 U.S.C. § 1307 (1982).

the plan, he or she still retains a duty to supervise the plan's administration. Although many argue that the actual burden of the plan is small compared to the benefit to both the employees and the employer, the belief that pension plans are burdensome persists, and it is a disincentive to plan formation.

Third, pension plans are sold, not bought. Conversations with both small business owners and their advisors reveal that establishing a pension plan is the farthest thing from their minds. Running their businesses consumes all of their energy, and they do not have time to ponder pension plans. If an insurance agent or someone they know, such as an employee, approaches them about establishing a plan and convinces them that it is affordable and not unduly burdensome, they might agree. They, however, are unlikely to seek out someone to establish a plan.

The number of employers who have pension plans can be increased in two ways. One is to mandate the existence of pension plans. The other is to provide incentives for employers to establish plans voluntarily.

The Carter Commission proposed a mandatory private pension system as a second tier to social security.⁸⁷ The Commission recommended that a Minimum Universal Pension System (MUPS) be established for all workers, funded by employer contributions equal to three percent of pay. Although participation was to be limited to employees over age twenty-five with one year of service who had worked at least 1000 hours,⁸⁸ vesting was immediate. The Commission recommended that the program be phased in over a three-year period, and that a special tax credit be given to small employers to ease the costs.⁸⁹ Not surprisingly, the reaction of the business community to the proposal was generally negative, that of participant and retiree groups generally positive.

Requiring all employers to provide pension coverage for their employees would achieve the goal of expanding coverage. It would require, however, a reversal of our longstanding policy of a voluntary private pension system. It is unlikely that Congress is ready to take that step. Some form of a mandatory pension system may occur, though, at least for some workers, if voluntary incentives fall substantially short of the goal of full coverage.

87. PRES. COMM'N REP., *supra* note 15, at 42-44.

88. The Carter Commission's proposed participation standards were equivalent to ERISA's standards at the time of the Commission's proposal.

89. PRES. COMM'N REP., *supra* note 15, at 42-44.

Designing incentives to increase coverage is a much harder task conceptually than mandating the existence of pension plans. In the past, Congress has considered various tax incentives.⁹⁰ Based on what we know about which employers do not have plans and why they do not, however, it is not clear that tax incentives will work. Many of the employers without plans are small, marginal companies. Many of them are not profitable enough to pay taxes. The debate, therefore, over whether a tax credit or a tax deduction is a greater incentive is irrelevant.⁹¹ Unless a refundable tax credit is used as an incentive, tax incentives alone will probably not increase coverage significantly. In addition, if Congress moves forward on a tax simplification plan, corporate tax rates are likely to be even lower than they currently are. The usefulness of tax incentives diminishes as marginal tax rates decrease.

Thus, Congress must look to other types of incentives to increase coverage. In the past, some effort has been made to provide pension plans that are simple to adopt and administer, such as the master and prototype plans⁹² the Internal Revenue Service developed, the Simplified Employee Plan (SEP),⁹³ and em-

90. For example, S. 3017, 95th Cong., 2d Sess., introduced by Senator Jacob Javits in 1978, provided for a special declining tax credit, in addition to the normal tax deductible contributions, for five years for small employers setting up new qualified pension plans. The credit was equal to five percent of the normal deductible contributions in the first year, three percent in the second and third years, and one percent in the fourth and fifth years. In addition, any employer who improved a plan to provide for significantly more liberal eligibility standards than ERISA required, such as faster vesting and earlier participation, would also get a five percent tax credit. A similar provision appeared in S. 209, the Williams/Javits bill, introduced in 1979. H.R. 3396, 97th Cong., 1st Sess., introduced by Congressman Claude Pepper (D-Fla.) on May 1, 1981, took another approach. That bill would have authorized an additional tax credit equal to six percent of the allowable deductions for plan contributions under § 404 of the Internal Revenue Code. Alternatively, an employer could take a 46% tax credit in lieu of the normal deduction. In addition, H.R. 3395, 97th Cong., 1st Sess. (1981), also introduced by Congressman Pepper, would have authorized a 50% refundable tax credit for retirement savings, either through an IRA or a voluntary plan contribution.

91. The Carter Commission recommended exploring the use of tax credits to encourage low- and moderate-income workers to save for retirement. See THE PRESIDENT'S COMMISSION ON PENSION POLICY, FIRST INTERIM REPORT 21 (May 23, 1980).

92. Both master and prototype plans are authorized by the Internal Revenue Service under Rev. Proc. 84-23, 1984-1 C.B. 457. Under a "master plan," a sponsoring organization makes available for adoption by employers a plan for which a single funding medium (usually a master trust) is established for the joint use of all contributing employers. Under a "prototype plan," a sponsoring organization makes available for adoption by employers a plan under which a separate funding medium is established for each contributing employer. Financial institutions are usually the sponsoring organizations for master or prototype plans.

93. 26 U.S.C. § 408(k) (1982).

ployer-sponsored IRAs.⁹⁴ Yet none of these simplified approaches seem to have caught on in numbers sufficient to increase coverage significantly.⁹⁵

Part of the reason why employers have not used these simplified approaches is that plans are sold rather than bought. Who has marketed the SEP or the master/prototype plans? Certainly not the IRS. Certainly not Congress. Certainly not the insurance companies. And certainly not the largest of the growth industries, employee benefit consulting firms, which provide actuarial services for defined benefit plans.

If coverage is to be increased, someone must market a simple, readily available, and relatively inexpensive pension plan. Such a plan would most likely be a defined contribution plan,⁹⁶ but one that is a retirement plan, rather than a mere capital accumulation plan. It could combine the ease of a SEP with the salary reduction feature of a cash or deferred plan under section 401(k) of the Internal Revenue Code.⁹⁷ In that way, employers would not have to contribute to the plan, but could match employee contributions if they so desired. Given the popularity of section 401(k) plans today, employees themselves might market these plans to their employer. In addition, if the financial institutions could be convinced that these plans would represent a new source of funds, they might market them as aggressively as IRAs.

Alternatively, Congress might decide to create a new type of defined benefit plan structured much like current multiemployer plans, but with a few important differences. First, any employer could join the plan, regardless of whether the employer's participation was the result of collective bargaining. Second, an independent fiduciary, probably a financial institution, would administer the plan. Third, employers would buy a particular level of benefits, and benefit increases would only occur when the employer chose to upgrade its benefit levels through higher contri-

94. 26 U.S.C. § 408(c) (1982).

95. *But see* Baum, *Small Firms Opt for Quick, Easy Retirement Plan*, Wall St. J., Feb. 12, 1985, at 33, col. 2.

96. Defined contribution plans are relatively simple to establish because individual accounts are set up for each participant and the employer contributes a fixed amount to each account on a specified basis. These plans are easy to administer and easy to communicate to employees. In addition, the annual cost to an employer is known in advance and therefore can be taken into account as part of normal business planning. Finally, the cost to an employer beyond the predetermined contribution rate is minimal and does not include certain costs, described above, to hire an actuary or pay PBGC termination insurance premiums, which are incurred by defined benefit plans.

97. 26 U.S.C. § 401(k) (1982).

butions. Fourth, employers would not be subject to the current provisions in ERISA imposing withdrawal liability. Some changes in the minimum funding standards would be necessary. Special rules would be needed to facilitate the ability of a withdrawing employer to spin off assets and liabilities into an individual plan.

These are but two suggestions of methods to increase coverage. Adoption of either might provide a mechanism for portability.⁹⁸ The hardest part of developing policy options in this area is the difficulty in identifying incentives. More creative study is certainly needed.

A final disincentive to new plan formation is the frequency with which Congress has changed the rules governing private pensions. Although this disincentive's effects cannot be quantified, they certainly exist. Employers cannot undertake responsible business planning, even if they already have plans, if they never know how Congress will change ERISA. A rational retirement income policy can best be developed in an atmosphere of calm, not frenzy. The more frequently legislative change occurs, the more costly the administrative burden of those changes on plans. Therefore, if the establishment of a national retirement income policy is a serious objective, Congress must decide to make no further piecemeal changes to ERISA or the Internal Revenue Code until it develops and articulates a national policy. Although that decision may have little short-run effect on expanding coverage, its effect in the long run will be considerable.

Thus far, the coverage discussion has been limited to consideration of how to increase the number of employers who have established pension plans. But even among employers who have established pension plans, a coverage problem exists for some workers. These are, specifically, workers who have been excluded from coverage under an existing plan. Although many people believe that an employer must cover all employees under its pension plan, that is not necessarily true.

As long as an employer's plan coverage is broad enough to meet one of the tests under section 410(b) of the Internal Revenue Code, it can retain its tax-favored status.⁹⁹ Specifically, a plan has to cover either seventy percent or more of all employees, or eighty percent or more of all *eligible* employees if at least seventy percent of all employees are eligible. For purposes of the eighty percent test, employees who have not satisfied the mini-

98. Portability is discussed *infra* text accompanying notes 126-32.

99. 26 U.S.C. § 410(b) (1982).

minimum age and service requirements of the plan are not considered employees.

In addition, certain categories of employees may be excluded in determining whether the plan meets these coverage tests of the Internal Revenue Code.¹⁰⁰ The most substantial group that may be excluded are employees covered under a collective bargaining agreement, if there is evidence that good faith bargaining over benefits occurred. Whether the union employees are actually covered under a separate plan is immaterial.

Although it is difficult to determine the number of uncovered workers who are employed by companies with pension plans, it is clear that some workers will not be covered unless Congress requires that a plan cover all workers for it to enjoy favorable tax treatment.

Solving the problem of coverage does not guarantee workers a private pension to supplement social security. According to recently published figures, about fifty-seven percent of all covered nonagricultural workers have a vested right to benefits.¹⁰¹ An important goal of a national retirement policy, therefore, should be to improve the likelihood that covered workers receive benefits from their plans.¹⁰² Reaching this goal may require changes involving the minimum participation¹⁰³ and vesting rules of ERISA,¹⁰⁴ and integration of private pension plans with social security.¹⁰⁵

B. Increasing Participation

One strategy for increased participation ERISA's framers envisioned was to require that every worker be eligible to participate in the company's pension plan from the first day of hire. Yet early versions of the Act, and the law itself, all established attainment of age twenty-five and one year of service as the minimum participation standards.¹⁰⁶ Congress was concerned that the imposition of earlier standards would be too costly for employers to administer. This decision was based on statistical evidence showing that work force turnover rates tend to stabilize

100. 26 U.S.C. § 410(b)(3) (1982).

101. *New Survey Findings*, *supra* note 69, at 4-5.

102. *See infra* text accompanying notes 117-25.

103. ERISA § 203, 29 U.S.C. § 1053 (1982).

104. ERISA § 104, 29 U.S.C. § 1024 (1982).

105. *See infra* notes 148-64 and accompanying text.

106. Pub. L. No. 93-406, § 202(a)(1)(A), 88 Stat. 829, 853 (1974).

after age twenty-five.¹⁰⁷

In recent years, some have proposed lowering the participation age, and others have even suggested elimination of the minimum age. Although employers do not generally support such proposals, the Retirement Equity Act of 1984 (REA) lowered the age to twenty-one, while retaining the one year of service requirement.¹⁰⁸ Although it is too early to quantify with any degree of precision the effect this change will have on ultimate benefit delivery, some impact is certain.¹⁰⁹ It is arguable that to the extent that an employer without a pension plan has a particularly young work force, this change may serve as a disincentive to plan formation.

Although Congress is unlikely to make any further changes with respect to the age of participation, one issue not addressed in REA was the one year of service rule. The statutory definition is "a 12-month period during which the employee has not less than 1000 hours of service."¹¹⁰ The statute also provides special rules for seasonal¹¹¹ and maritime¹¹² industries. Although most agree that the one-year rule is appropriate, Congress could alternatively consider a form of pro rata credit for part-time employees. For example, if an employee works between 501 and 1000 hours a year, that employee could be entitled to one-half a year of service. In that way, employees who are permanent part-time workers might be eligible for plan participation.

A related issue involves the extent to which use of the elapsed time method, an alternative method for measuring years of service, ought to be allowed. The elapsed time method uses equivalencies instead of the actual counting of hours.¹¹³ Under this method, an employer looks at the total period of time that elapses during the employee's period of employment.¹¹⁴ Many employers prefer to use this method because it does not require tracking of actual hours of service, and thus is relatively easy to

107. See LEGISLATIVE HISTORY, *supra* note 1, at 605 (S. REP. NO. 127, 93d Cong., 1st Sess. (1973)). See generally STAFF OF HOUSE COMM. ON EDUCATION & LABOR, GENERAL SUBCOMM. ON LABOR, 93D CONG., 1ST SESS., ESTIMATES OF THE COST OF VESTING IN PENSION PLANS (Comm. Print 1973).

108. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 102(a)(1)(A), 98 Stat. 1426, 1426 (amending ERISA § 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A) (1982)).

109. The Employee Benefit Research Institute (EBRI) has published some preliminary data on this issue. See Employee Benefit Research Institute Issue Brief, *Impact of the Retirement Equity Act*, Feb. 1985, at 2.

110. ERISA § 202(a)(3)(A), 29 U.S.C. § 1052(a)(3)(A) (1982).

111. ERISA § 202(a)(3)(B), 29 U.S.C. § 1052(a)(3)(B) (1982).

112. ERISA § 202(a)(3)(D), 29 U.S.C. § 1052(a)(3)(D) (1982).

113. Treas. Reg. § 1.410(a)-7 (1980).

114. See *supra* note 30.

administer. Yet, it is possible that a plan using the elapsed time method could deny an employee with 1000 hours of service eligibility for a year of service.¹¹⁵

Although codification of the current regulation permitting elapsed time has been proposed to provide certainty for employers choosing to utilize it, this proposal has been controversial, precisely because in certain circumstances employees might be disadvantaged. If one goal of a national retirement policy is to encourage the growth and maintenance of plans, the administrative convenience of the elapsed time method must be weighed against the possible inequities to workers. One policy option would be to amend ERISA to codify the current elapsed time rules, but provide that if a worker could prove that he or she had at least 1000 hours of service, a year of service would be credited.

A further policy issue in the area of participation and eligibility arises from the provision in ERISA allowing workers within five years of normal retirement age to be excluded from participation in a plan.¹¹⁶ Originally included in ERISA to remove a disincentive for employers to hire the older worker, the provision's current appropriateness is questionable, particularly if the minimum vesting standards are lowered. If it is true that few employers hire older workers anyway, it is hard to justify exclusion of those who manage to gain employment. Yet, it is clear that the cost of providing a pension for older workers with short work careers is great. A compromise policy would be to repeal the provision, while making clear that workers hired within five years of normal retirement age must meet the minimum vesting standards to qualify for benefits and that benefits would not automatically vest when workers reached age sixty-five. Moreover, a special funding or accrual rule could be developed to ease the employer's cost of providing the benefit.

C. Vesting Options

Most covered workers do not receive benefits because they change jobs before they have worked long enough to vest. Vesting refers to the time at which a worker's right to a benefit is nonforfeitable, even if that worker terminates employment

115. See, e.g., H.R. 3071, 98th Cong., 1st Sess., introduced by Congressman John Erlenborn (R-Ill.) on May 19, 1983 (§ 1307).

116. ERISA § 202(a)(2)(B), 29 U.S.C. § 1052(a)(2)(B) (1982).

before retirement. ERISA established three vesting options: ten year cliff vesting, graded vesting beginning at twenty-five percent vesting after five years and rising to 100% vesting after fifteen years, and the rule of 45, in which vesting is based on a combination of age and service.¹¹⁷ Employers can choose any one of the three vesting schedules, or, of course, can establish one that is more generous. Most use ten year cliff vesting, because it is the easiest to administer.

Employers generally regard pensions as a way to attract and retain employees. Pensions were initially viewed as gratuitous rewards for the faithful full-career employee. Consequently, employers used to require employees to work until retirement to be eligible for benefits. ERISA ended that. But the current debate over whether ERISA's vesting schedules should be shortened has its roots in the fundamental tension between employment policy and retirement income policy.¹¹⁸ On one hand, long vesting periods disadvantage mobile workers, because these workers are unlikely to qualify for benefits. On the other hand, shorter vesting encourages mobility, and that rightly concerns employers who depend on experienced workers to maintain productivity and profitability.

Additionally, the debate over shorter vesting exposes the divergent views of organized labor. Unions representing service and professional employees, for whom turnover is common, generally support shorter vesting, while crafts unions generally do not. The latter unions share the same concerns as the employers. Both the union and the employer make a substantial investment to train workers to perform a particular task, and shorter vesting makes it easier for workers to leave the job before the employer and the union have reaped the benefit of their respective investments. Longer vesting periods tie workers to their jobs, and make them less likely to leave and work for competitors.¹¹⁹

The first move to mandating shorter periods for vesting oc-

117. ERISA § 203(a)(2)(3), 29 U.S.C. § 1053(a)(2)(3) (1982).

118. For a discussion of this issue, see Munnell, *supra* note 12, at 64-65.

119. Arguably, where one stands on the question of whether ERISA's vesting standards should be changed is a function of whether one believes that the law should conform to the reality of work force behavior or that work force behavior must conform to the law. In other words, some people believe that the vesting standards ought to remain as they are. They believe that to lower the current standards would encourage worker mobility which, from a business point of view, they argue is unsound labor policy. Others argue that, as a matter of pension policy, if Congress's aim is to improve benefit delivery then it makes sense to lower the current standards in recognition of the reality of the workplace, namely, that many workers do not remain on the job long enough to earn benefits under the current vesting rules.

curred in 1982 when Congress enacted the Tax Equity and Fiscal Responsibility Act (TEFRA), which prescribed more stringent vesting rules for "top-heavy" plans.¹²⁰ Congress defined top-heavy plans as those in which at least sixty percent of the accrued benefits or aggregate of the account balances under the plan belong to key employees.¹²¹ A top-heavy plan must satisfy special rules, including providing for faster vesting and a minimum nonintegrated benefit. Top-heavy plans must either provide 100% vesting after three years, or six-year graded vesting.¹²² These rules became effective for plan years beginning after December 31, 1983.

Prior to TEFRA, the Carter Commission had urged voluntary movement to shorter vesting schedules. Although many had urged the Commission to endorse five-year vesting, the Commission did not do so, in part because no universal system for portability of vested benefits exists. The Commission recognized that shortening the period for vesting would enable more workers to become vested, thus increasing the likelihood that short service mobile workers would receive small benefit amounts. Those amounts would most probably be consumed currently, rather than saved for retirement, and the Commission opposed the use of vested pensions for that purpose.¹²³

From a retirement income security point of view, the Commission's logic was sound, given the then current state of the law. Practically speaking, however, because most small pension plans are now required to provide faster vesting under the top-heavy rules, it is time for Congress to reexamine the issue of faster vesting at the same time that it addresses the need for portability of vested benefits.

Each of the last two Congresses has considered amending ERISA to require five-year vesting.¹²⁴ Legislators have also discussed the possibility of 100% vesting after three years, coupled with an age twenty-one and one year of service rule. Were Con-

120. Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 240, 96 Stat. 324, 514-20.

121. 26 U.S.C.A. § 416(i)(1) (West Supp. 1985). The term "key employee" was originally defined in § 240(a) of TEFRA. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 524(a)(1), 98 Stat. 494, 872, however, changed the definition of key employee to exclude officers who earn less than one and a half times the dollar limit on contributions under a defined contribution plan. For 1984, the limit was \$45,000.

122. 26 U.S.C. § 416(g)(1)(A) (1982).

123. PRES. COMM'N REP., *supra* note 15, at 45.

124. See, e.g., H.R. 3396, 97th Cong., 1st Sess., introduced by Congressman Claude Pepper (D-Fla.) on May 1, 1981 (§ 1101); 130 CONG. REC. E4378 (daily ed. Oct. 9, 1984) (remarks of Congresswoman Geraldine Ferraro (D-N.Y.)).

gress to change the current ERISA vesting rules, a threshold policy decision it would face is whether more than one vesting option ought to be continued or whether a single vesting schedule ought to be mandated. Although the latter would be simpler, the flexibility of the former makes it more politically advantageous as a tradeoff for the increased costs employers would incur.¹²⁵

D. Portability

Shortening the period for vesting would result in greater numbers of workers eligible for benefits but, by itself, would not necessarily result in greater retirement income security. To the extent that employers may distribute benefits to employees upon termination of employment, or to survivors of a deceased employee, or that employees choose to receive their vested benefits in a lump sum prior to retirement, there is little assurance that these vested benefits will be saved for retirement. In fact, according to recent statistics from the Employee Benefit Research Institute, of the 6.6 million workers who reported having received lump-sum distributions from a prior job, only 4.4% said they used the money for retirement.¹²⁶ A national retirement income policy must recognize this fact, and accordingly assure that vested benefits are used to provide income for retirement rather than for current consumption.

One way to achieve this goal would be to establish a universal portability system into which all lump-sum distributions from a plan prior to retirement would be channeled. Much has been written about the types of portability and the problems of setting up systems to accommodate these various types.¹²⁷ A central portability clearinghouse was part of an early pension reform bill the Senate passed, but debate focused on whether participation in this clearinghouse should be mandatory or voluntary.¹²⁸

If Congress is serious about establishing a national retirement

125. If a worker does not vest, the benefit amounts attributable to his or her service are forfeited. Those forfeitures stay in the plan and, in the case of a defined benefit plan, are used to reduce future employer contributions. To the extent that more workers vest, forfeitures decrease, and employer costs thus increase.

126. See Employee Benefit Research Institute Issue Brief, *The World of Pensions Ten Years After ERISA*, Sept. 1984, at 19 (Table 10).

127. See generally E. MEIER & P. BASSETT, *supra* note 17.

128. *Id.* at 39.

policy that will result in employer-provided pensions to supplement social security, any lump-sum distributions from tax-favored plans must be rolled over into a portability account.¹²⁹ This account must accept all types of pension distributions, including those consisting of employee contributions as well as employer contributions.¹³⁰ In addition, because workers in our voluntary pension system often move from covered to uncovered employment, the portability account should be designed so that direct employee contributions, and any employer matching contributions, may be made as part of a national plan to increase coverage.

Moreover, financial institutions across the country should be able to offer these accounts, thus encouraging competition. Employees who move should be free to leave their portability accounts where they are, or ask the financial institution to transfer their account to a financial institution in their new location.

Distributions from this portability account should be made as an annuity. Some consideration should be given as to whether any form of distribution from this account other than an annuity should be permitted. Assuming, however, that strong policy reasons exist to permit lump-sum distributions earlier than retirement age in cases of real hardship—such as serious illness that results in large uninsured medical bills¹³¹—any other lump-sum distributions should be discouraged by the application of a stiff excise tax.¹³²

This type of portability system, maintained by financial institutions, offers several advantages. First, it increases the likelihood that retirement benefits are used during retirement years and not before. Second, it maintains the current flexibility of employers to cash out employees or survivors whose benefit amounts are small while providing a mechanism for employees to accumulate retirement funds. Third, it provides a stream of retirement income. Fourth, because the portability mechanism proposed is not federally controlled, but is a special type of plan sponsored by a financial institution, it avoids criticism suggesting that a new federal bureaucracy needlessly duplicative of

129. See SEN. AGING PRINT, *supra* note 3, at 134 (essay of Donald S. Grubbs, Jr.).

130. Under the current law, employee contributions may not generally be rolled over into an IRA. 26 U.S.C. § 402(a)(5)(B), (E) (1982).

131. Because money in portability accounts is intended to be retirement income, distributions for the purposes of purchase of a residence or college expenses for a dependent should not qualify for any hardship test, and should certainly be subject to a substantially higher excise tax than distributions for other reasons.

132. The current excise tax is 10%. 26 U.S.C. § 408(f)(1) (1982).

social security is being created.

Devising a portability system that is both feasible and attractive is difficult. A national retirement income policy, though, must address the issue of portability and present a proposal for a workable system for handling this issue.

IV. ALTERNATIVES FOR PLANS AND COVERAGE

Once Congress has formulated a national retirement income policy, it will need to consider what the best way to implement that policy might be. Three structural approaches are possible.

Congress could either redesign the current social security program to provide an adequate retirement income for all workers, or establish a second advance-funded tier to provide additional retirement income. The second tier could be mandatory, and could have an opt-out feature so that employers who wanted to provide at least the same level of retirement income through another retirement system could do so. This approach, of course, is similar to the retirement system in the United Kingdom.¹³³

On the other hand, a combination of governmental and private sources could provide retirement income. Social security would remain the basic floor, but other programs would supplement it. The total retirement income provided would be the same as under an expanded social security system. Instead of an expanding federal role, however, this approach would seek to forge a partnership between public and private retirement systems that shared the final goal of providing adequate retirement

133. Retirement income for citizens of the United Kingdom is provided through a composite system of social security and private pensions. In a report published during World War II, Lord Beveridge proposed the first comprehensive national plan for providing retirement benefits. The Beveridge Report called for a contributory social security system that would provide basic subsistence level benefits for all citizens and permit private sector plans to supplement that basic benefit.

This general approach was adopted in the National Insurance Act of 1946, which took effect in 1948. The Act established a flat benefit, regardless of income, funded by a uniform contribution from all employees. No provision for cost-of-living adjustments was made.

In 1959, a second layer of protection was added which took the form of an earnings-related graduated old-age benefit. The first layer was designed to provide a minimum-income floor, while the new second layer was designed to provide higher benefits through an earnings- and service-related formula. An individual employer could "contract out" or "opt out" of this earnings-related layer and cover its workers under a company plan ("occupational scheme") provided that the plan met certain financial and benefit standards. For a fuller discussion of the United Kingdom approach, see generally M. HORLICK & A. SKOLNICK, *MANDATING PRIVATE PENSIONS: A STUDY OF THE EUROPEAN EXPERIENCE* 60-82 (1977).

income.¹³⁴ If this latter approach continues to prevail, Congress will need to decide how defined benefit, defined contribution, capital accumulation plans, and Individual Retirement Accounts will help to assure each worker of an adequate retirement income.

A. *Defined Benefit Plans and Defined Contribution Plans*

One of the most frequently discussed issues today is the trend away from the traditional method of providing retirement income through a defined benefit pension plan.¹³⁵ In recent years, the number of defined contribution plans¹³⁶ has grown at a much faster rate than the number of defined benefit plans.¹³⁷ In part, that growth represents an increase in the number of supplemental plans. Many employers establish defined contribution plans to supplement the retirement benefits defined benefit plans provide their employees. The growth of defined contribution plans, however, also represents a trend toward reliance on these arrangements as the primary source of retirement income for em-

134. For purposes of this Article, I have assumed that the approach that will continue to prevail is the provision of retirement income from a combination of sources. The fundamental question of which approach should prevail must be addressed before any of the other policy issues can be resolved.

135. A defined benefit plan, ERISA § 3(35), 29 U.S.C. § 1002(35) (1982), provides a fixed level of benefits upon retirement, usually based on a formula related to salary and/or years of service. Employers who sponsor defined benefit plans are required to provide the promised benefits.

136. A defined contribution plan, ERISA § 3(34), 29 U.S.C. § 1002(34) (1982), is an individual account plan. Upon retirement, a worker is entitled only to the account balance, not a fixed level of benefits. Employers who sponsor defined contribution plans are only required to make the agreed-upon contributions to the workers' accounts. The most common types of defined contribution plans are profit-sharing plans, employee stock ownership plans (ESOPs) and cash or deferred arrangements (also called "401(k) plans," named for the section of the Internal Revenue Code that authorizes them) which are operated in conjunction with profit-sharing plans.

137. According to the Employee Benefit Research Institute (EBRI), which analyzed Internal Revenue Service (IRS) published data, the creation rates for both types of plans slowed in 1983 to 6.8% growth for defined contribution plans (DCs) and 4.7% for defined benefit plans (DBs). For the previous five years, the rates were as follows:

	<u>DC</u>	<u>DB</u>
1982	11.7%	7.9%
1981	13.8	7.0
1980	13.3	5.6
1979	12.0	5.1
1978	19.4	2.1

Employee Benefit Research Institute Notes, May/June 1984, at 8, Table 1.

ployees. For several reasons, defined contribution plans provide far less retirement income security for employees than defined benefit plans.

First, with a defined contribution plan, the risk of loss for poor investment performance falls on the participant, not the employer. Second, because the participant in a defined contribution plan receives benefits based on the value of the account at the time of retirement, and because that value fluctuates according to the return on the investments of the fund, it is impossible to predict accurately the purchasing power of that balance at retirement. Unlike defined benefit plans, which can be targeted to replace a certain level of preretirement earnings because they provide a fixed level of benefits upon retirement,¹³⁸ most defined contribution plans only distribute benefits in a lump sum. Plan participants may or may not choose to use that money to provide retirement income. Third, defined contribution plans are prospective only. They do not provide a way for an employer to credit service performed before the plan is adopted. This particularly disadvantages workers who are older when a company adopts its defined contribution plan. Finally, because benefits are paid in a lump sum, they cannot be protected from the future effects of inflation. Congress has expressed a clear preference that employee benefit plans pay benefits as an annuity, so that a stream of benefits during retirement is assured.¹³⁹ Lump-sum distributions, which are the normal form of benefits for most defined contribution plans, clearly conflict with this policy.

In response to the foregoing considerations, some have suggested that Congress act to reverse the apparent trend toward defined contribution plans by adopting policies that encourage the adoption and maintenance of defined benefit plans and reduce the attractiveness of defined contribution plans. Undoubtedly, defined benefit plans provide the best assurance of retirement income security for most workers, but defined contribution plans could still be encouraged to provide an adequate benefit for full-career workers who begin accruing benefits under the plan at an early age.

If Congress wants to assure greater retirement income security for workers under defined contribution plans, several options ex-

138. Most defined benefit formulas are tied to pay, such as career average pay or final average pay over a fixed period of time, usually three or five years. Defined benefit plans for union workers often express the benefit in terms of a flat dollar amount per year of service.

139. See, e.g., Retirement Equity Act of 1984, Pub. L. No. 98-397, § 103, 98 Stat. 1426, 1429-33 (amending ERISA § 205, 29 U.S.C. § 1055 (1982)).

ist. First, Congress could require defined contribution plans to provide benefits in the form of a monthly annuity payable at retirement age. Alternatively, Congress could require that if benefits are distributed in a lump sum prior to retirement, they must be rolled over into an Individual Retirement Account (IRA) or into some other pension plan. Of course, Congress could simply prohibit distributions from any qualified plan prior to the participant's retirement. Adoption of any of these proposals would make it more likely that benefits are used for retirement.

B. Retirement Plans v. Capital Accumulation Plans

The preceding discussion of defined benefit and defined contribution plans assumes that Congress will decide that both types of plans should be retirement plans. One reason Congress might make such a decision is the attention that has been given to the tax expenditures and revenue loss resulting from the favorable tax treatment accorded employee benefit plans.¹⁴⁰ The Department of Treasury has proposed many changes in this area as part of its overall tax simplification plan.¹⁴¹ The underlying rationale for the proposed employee benefit changes is to make the system more equitable. To the extent that tax incentives are provided, they ought to go to plans that truly provide retirement income. This would improve the likelihood that benefits are used for retirement.

Rather than force all defined contribution plans to be true retirement plans, however, Congress might decide to draw some distinctions between plans based on the purpose of the plan. For example, many defined contribution plans are not adopted by employers to provide retirement benefits for their employees. Instead, they are arrangements designed to facilitate capital accumulation or savings. Because a savings component is the third leg of the metaphorical three-legged stool of retirement income, encouraging the adoption of employer-sponsored capital accumulation plans would be consistent with a national retirement

140. Employer contributions to qualified pension plans are deductible under 26 U.S.C. § 404(a) (1982) up to the limits prescribed in 26 U.S.C. § 415 (1982). Those contributions are not taxable to the employee on whose behalf they have been made until the retirement benefits are distributed to the employee. Finally, any income earned by the pension trust is exempt from taxation.

141. 2 TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH 336-58 (Nov. 1984) (Treasury Dep't Rep. to the President) [hereinafter cited as TREAS. PLAN].

income policy. Among defined contribution plans with the goal of capital accumulation, the question arises of when the accumulated capital is to be consumed. Congress could distinguish between savings plans providing for retirement savings and savings plans providing for other types of savings, such as home purchase, financing of college education, or financing for other types of consumption. Although none of these latter savings goals are undesirable, they are not savings for retirement and therefore should not be encouraged through tax incentives for qualified plans.

If Congress were to distinguish between plans based on their purpose, certain changes in ERISA would be desirable. For instance, retirement plans should be subject to stricter distribution rules so as to assure payment of retirement income. Capital accumulation plans designed to provide savings for retirement should be subject to similar restrictions, but should be entitled to the same tax benefits as retirement plans. On the other hand, employers could establish other types of capital accumulation plans that would not be given the same favorable tax treatment because they contain features, such as provisions permitting in-service distributions or distributions prior to retirement, that make them unlikely to provide retirement income.

Employers would thus retain the flexibility they enjoy under the current law to establish whatever plans meet their needs. To the extent that plans they establish provide retirement income or retirement savings, the plans should receive the same favorable tax treatment available today.

C. Individual Retirement Accounts

Originally established in ERISA as a source of retirement income for workers not otherwise covered under employer-sponsored plans, individual retirement accounts (IRAs) are an important, yet troubling, new addition to the retirement income that social security and private pensions provide. The expanded availability of IRAs to all workers, regardless of pension plan coverage, introduced by the 1981 Economic Recovery Tax Act (ERTA),¹⁴² has led to a boom in IRA formation accompanied by

142. Pub. L. No. 97-34, 95 Stat. 172 (1981). ERISA, Pub. L. No. 93-406, § 2002, 88 Stat. 829, 958-71, added two new sections to the Internal Revenue Code: I.R.C. § 408 created the IRA and I.R.C. § 219 authorized a deduction for contributions to an IRA. As originally enacted, the IRA was only available to individuals who were not active participants in any other plans and the deduction was limited to the lesser of 15% of compen-

staggering revenue losses.¹⁴³ For several policy reasons, many have been concerned about the growth of IRAs.

First, unlike pension plans that may not discriminate in favor of the highly compensated with respect to benefits or contributions, the universal availability of IRAs makes their utilization highly discriminatory. Not surprisingly, recent data show that IRA usage increases with income level. Nearly forty percent of all workers earning \$30,000 to \$40,000 and nearly fifty-eight percent of all workers earning above \$50,000 have IRAs, in comparison to use of IRAs by only eleven percent of workers earning between \$10,000 and \$15,000 and only seventeen percent of workers earning between \$15,000 and \$20,000.¹⁴⁴ Because the likelihood of coverage under pension plans is closely tied to income level, the percentage of workers covered by both IRAs and employer-sponsored plans is significantly higher among upper income levels.¹⁴⁵

From a policy perspective, given the foregoing statistics, the question must be asked: Is the IRA truly effective in broadening coverage, or is it merely a tax-favored form of savings that provides an additional way for individuals already possessing a supplement to social security to increase their potential retirement income?

If the IRA has not been effective in broadening coverage and is perceived as merely a tax shelter for the middle and upper class, several options are possible. One is to return to the basic concept of IRAs, with some modification. IRAs could be restricted to workers not vested in any other plan, and to vested workers whose employer-provided contributions are less than the IRA contribution limits. Although this poses some valuation problems for defined benefit plans, it addresses the concern that IRAs ought not be used to provide tax-favored benefits to workers who are already likely to have sufficient retirement income.

Another policy option addresses the concern that those most in need of IRAs to supplement other sources of retirement income are the least likely to have them. Tax treatment of IRA contributions could be changed to make the IRA more attractive

sation or \$1500 (I.R.C. § 219(b)). The Economic Recovery Tax Act of 1981 allowed even active participants in employer-sponsored plans to deduct up to the lesser of 100% of compensation or \$2000 (\$2,250 for spousal IRAs) for tax years beginning after 1981.

143. See Employee Benefit Research Institute Issue Brief, *Individual Retirement Accounts: Characteristics and Policy Implications*, July 1984, at 5 (Table 2). The revenue loss in 1982, the first year of universal IRAs, was \$28.4 billion, compared to \$4.8 billion in 1981.

144. *Id.* at 6 (Table 3).

145. *Id.* at 18 (Table 8).

to lower paid workers by utilizing a tax credit, rather than a tax deduction. In addition, the credit could be phased out over a certain income level, to solve the problem of the lack of discrimination standards for IRAs.

Second, there is substantial disagreement over the role of IRAs in providing retirement income. Some argue that the ten percent excise tax¹⁴⁶ is little disincentive to early withdrawal of IRA funds. Thus, the IRA is not very likely to be used for retirement. Conceding that IRAs should actually be used for retirement, several options with respect to enforcement exist. For example, stiffer excise tax penalties could be imposed for withdrawal prior to retirement age¹⁴⁷ or distributions from IRAs could only be made as an annuity.

V. INTEGRATION OF PRIVATE PENSIONS AND SOCIAL SECURITY

Perhaps the most highly charged issue to be addressed in fashioning a national retirement income policy is the question of whether, and to what extent, integration of private pension benefits with social security should be permitted. It would be impossible in this Article to discuss fully the history of integration and all the arguments for and against it.¹⁴⁸ Instead, this Section will focus on the basic theory of integration, and some of the policy options that have been advanced to redress certain inequities in the current rules.

Because social security covers virtually all the private sector work force, most pension plans are designed to supplement social security. Since the early 1940's, the IRS has sanctioned the practice of specifically correlating the benefit formula under the plan to the benefits received under social security.¹⁴⁹ This practice, called social security integration, permits employers to reverse the tilt of social security toward the lower income workers by providing greater benefits under the plan to higher income workers.¹⁵⁰ Because integration appears to offend the normal

146. 26 U.S.C. § 408(f)(1) (1982).

147. The Treasury has proposed raising the excise tax on distributions occurring before the individual's death, disability, or the attainment of age 59½ to 20%, except that if the distribution is used to pay for a dependent's college education or the purchase of the individual's first principal residence, the excise tax would remain at 10%. *TREAS. PLAN*, *supra* note 141, at 343.

148. See generally J. SCHULZ & T. LEAVITT, *PENSION INTEGRATION: CONCEPTS, ISSUES AND PROPOSALS* (1983).

149. See 26 U.S.C. § 401(a)(5) (1982).

150. In a nonintegrated plan, the same benefit formula, such as percentage of pay or

rules prohibiting discrimination in favor of the highly compensated, it is important to note that integrated plans must comply with complicated Internal Revenue Service rules.¹⁵¹ These rules are designed to permit only a limited amount of directing plan benefits toward the highly compensated as a counterbalance to the social security tilt.

The theory upon which integration is based is that employers should set uniform replacement rate targets for their employees. To the extent that social security replaces a portion of that target, employers should be able to lower the percentage of benefit provided under the pension plan. Otherwise, employers argue, to provide an adequate replacement rate for higher paid employees, lower paid employees might receive more than 100% of their preretirement pay.

For example, suppose an employer decides that a reasonable retirement income replacement goal is sixty percent of preretirement career average pay. If, for a worker with a \$10,000 career average, social security provides a fifty percent replacement rate, the employer's plan need only provide ten percent. Similarly, if, for a worker with a \$100,000 career average, social security only provides thirty percent replacement, the plan could provide an additional thirty percent. It is thus apparent that the basic premise of integration—the need for a uniform replacement rate across all salary levels—is flawed. Even accepting that premise and the theory of integration, the practical effect of the current rules is that some workers may be “integrated out” of their entire plan benefit, depending on the type and level of integration chosen. Those most likely to fall into this category are low-income workers, although some higher paid workers with short periods of service may also suffer.

No single definitive study shows the number and types of plans that are integrated. Studies, though, suggest that more than half, and perhaps as many as seventy percent, of all plans are integrated.¹⁵² The two major types of integrated plans are excess plans and offset plans. Excess plans generally provide for benefits only with respect to compensation above a specified

dollar amount per year, applies to all workers, regardless of what they might receive from social security.

151. The integration rules are not set out in either ERISA itself or the Internal Revenue Code. Rather they are derived from revenue rulings issued under the authority of 26 U.S.C. § 401(a) (1982). The most commonly relied on is Rev. Rul. 446, 1971-2 C.B. 187.

152. See R. SCHMITT, *INTEGRATED PENSION PLANS: AN ANALYSIS OF EARNINGS REPLACEMENT 2* (1981) (Congressional Research Service, Library of Congress); J. SCHULZ & T. LEAVITT, *supra* note 148, at 24-35.

level. The integration level in pure excess plans is usually the social security taxable wage base. Thus, in this type of plan, vested workers who earn below the taxable wage base (\$39,000 in 1985) will get *no* benefit from their pension plan. Only vested workers earning above that base will obtain a benefit to supplement social security.

A variant of the pure excess plan is the step rate excess plan. Unlike the pure excess plan with a wage base integration level, the step rate plan provides a benefit to all workers, although earnings above the integration level may have a greater accrual rate.¹⁵³

Offset plans, by contrast, provide for uniform accrual rates across all salary levels, but reduce the pension benefit by a portion of the social security benefit. Although legally an offset plan may only subtract 83⅓% of the primary social security benefit, it is possible even under an offset plan for a worker to wind up with no private pension benefit.¹⁵⁴ The policy debate over integration focuses on at least three questions: should integration be banned completely?; if integration is allowed, should the rules be changed so that all workers will get at least some pension benefit?; and if the rules are changed, what should they be?

The debate over whether the practice of integration should be retained or eliminated usually amounts to a debate over whether integration currently causes under-pensioning for lower income workers, or whether the elimination of integration will cause over-pensioning of lower income workers. Proponents of integration argue that, without integration, it is difficult to design a plan that provides adequate retirement income to the higher paid without providing 100% or more of preretirement income to the lower paid. In addition, they argue that only a small percentage of workers will receive no pension benefits from integrated plans, and that, because TEFRA required top-heavy plans to provide a minimum nonintegrated benefit, small inte-

153. J. SCHULZ & T. LEAVITT, *supra* note 148, at 16-17.

154. In a typical offset plan, the benefit formula provides that the pension may be reduced by 50% of the primary insurance amount under social security. The following example using that approach appears in a booklet the Pension Rights Center published. A hypothetical employee earning \$15,000 per year or \$1250 per month with 10 years of service is about to retire. Assume that his or her earnings have been level for the entire period of employment. The plan benefit is equal to 1.5% of the highest five years of average monthly earnings times years of service. The benefit under the plan would be \$187.50 (1.5% x \$1250 x 10). Given that earnings history, the social security benefit would probably be about \$544 per month. Applying the 50% offset, half of \$544 would then be subtracted from the pension benefit (\$187.50 minus \$272). The employee thus would be entitled to no benefit at all under the pension plan. PENSION RIGHTS CENTER, *THE CASE OF THE DISAPPEARING PENSION 5* (1984).

grated plans are no longer the serious problem they once were. Opponents of integration argue that no one could live on social security alone, and if employer-provided pensions are designed to provide the second leg of the retirement income stool, employers should not be allowed to use one leg, social security, to reduce the need for another leg, pensions. In addition, they argue that higher earners are more likely to have the third leg, savings and investments, than lower earners, and that a higher replacement rate for low earners is necessary to provide adequate retirement income.

The political process will ultimately resolve this debate. If the second two questions described above are answered to the satisfaction of the opponents of integration, the practice of integration is likely to survive. The new rules, though, will be very different from the old.

The second issue, whether the integration rules should be changed so that every worker will receive at least some benefit from the employer-provided plan, is fairly easy to settle. If there is a need for benefits to supplement social security, and most agree that there is, then no employer should be allowed to establish a tax-favored plan that provides no benefit to lower paid workers.

The third issue, how to structure the rules to provide more equitable treatment for lower income workers, is the most difficult to resolve. Over the years, various proposals for change have surfaced.¹⁵⁵ Each represents some improvement over the current system, but some have lacked what many identify as a fundamental tenet of any change in this area, which is simplicity. Because the current rules are far too complicated, they are difficult to explain or police. Therefore, simplification of the rules is a critical policy goal.

Previous proposals have focused primarily on two approaches: a minimum benefit concept, and "tinkering" with the current system by narrowing the difference between the benefits provided the higher and lower paid employees. Both approaches eliminate the possibility of integrating out workers from any benefit under the plan.

The minimum benefit concept, as utilized in the current top-heavy rules, is the simplest to understand and administer. It guarantees a nonintegrated floor of benefits for each worker, and

155. See *id.* at 14-15. See also Employee Benefit Research Institute Issue Brief, *Proposed Changes in Pension Integration Could Lead to Inefficient Policies and Reduced Private Pension Coverage*, Feb. 1983, at 8.

preserves an employer's current ability to integrate the plan above the level of the minimum benefit. Commentators criticize this approach for at least two reasons. First, the approach does not necessarily assure adequate retirement income for all workers. Employers that want to avoid the cost of the minimum benefit could convert their integrated plan into a less generous nonintegrated one. For instance, if a formula similar to the top-heavy one were applied to all integrated non-top-heavy plans, any employer wanting to avoid the two percent of pay rule¹⁵⁶ could establish a nonintegrated plan providing for one percent of pay. The obvious response to this criticism would be to provide a minimum benefit across the board for all plans, although that solution would impose substantial costs on many employers, and would perhaps lead to plan terminations.

Second, a minimum benefit approach is likely to be more costly for defined benefit plans than defined contribution plans, thus accelerating the trend toward defined contribution plans. The effect of a front-loaded minimum benefit formula such as that used in the top-heavy rules is to provide disproportionately large benefits to short service workers. Although that was the method used to redirect the benefits in a top-heavy plan to the lower paid workers,¹⁵⁷ it is not clear that in the context of an overall retirement income policy it would be desirable to reward short service workers at the expense of full career workers.

The second approach would tinker with the current rules to make them more equitable. The 1978 Carter proposal embodied this approach,¹⁵⁸ as did the 1981 Erlenborn proposal,¹⁵⁹ and the 1982 Rangel proposal¹⁶⁰ which set the stage for the adoption of

156. 26 U.S.C. § 416(c)(1)(B) (1982).

157. A top-heavy defined benefit plan must provide a minimum benefit equal to two percent of compensation per year of service, up to 20% of compensation. 26 U.S.C. § 416(c)(1) (1982). Thus, 20% of the worker's total benefit is accrued in the first 10 years of service. Some have called forcing faster accrual in the earliest years of service "frontloading." Although ERISA limits an employer's ability to "backload" benefits by providing for a faster accrual rate after an employee reaches a specified age or years of service, frontloading is permissible. One of the reasons that Congress forced top-heavy plans to frontload benefits was that the plans discriminated in favor of the highly compensated with respect to benefits.

158. This is also called the Halperin proposal, named for the former Assistant Secretary of the Treasury for Tax Policy, Daniel I. Halperin. It was part of President Carter's 1978 tax proposal and initially incorporated in § 251 of H.R. 12,078, 95th Cong., 2d Sess. (1978). For a full discussion of this proposal and its history, see J. SCHULZ & T. LEAVITT, *supra* note 148, at 53-57.

159. This proposal appeared as § 4811 of H.R. 4330, 97th Cong., 1st Sess., introduced on July 30, 1981 by Congressman John Erlenborn (R-Ill.). Senator Don Nickles (R-Okla.) introduced a similar bill, S. 1541, 97th Cong., 1st Sess. (1981).

160. See 128 CONG. REC. H2353 (daily ed. May 19, 1982) (remarks of Congressman

the top-heavy rules. These proposals reflect several policy choices. The Carter proposal introduced the concept of a ratio for step rate plans. Benefits or contributions above the integration level could not exceed benefits or contributions below that level by a ratio of 2:1.¹⁶¹ For offset plans, the percentage of social security that was offset could be no greater than the percentage of pay in the plan's benefit formula. For instance, in a plan providing fifty percent of final average pay, no more than fifty percent of the primary social security benefit could be offset. Although this proposal originally generated a groundswell of opposition from the business community, many believe today that this approach is sound and merits Congress's serious consideration.¹⁶² The Erlenborn proposal was similar to the Carter proposal, but introduced a new element: a target replacement rate with a minimum of fifty percent of preretirement earnings for the lower paid workers, and a total cap of eighty percent for all workers.¹⁶³

The Rangel proposal was the most complicated of the three, but restricted the amount of the benefit subject to reduction to the annual benefit that could be purchased with the share of the social security tax paid by the employer providing the pension. This proposal was an attempt to limit the "credit" an employer could get for the employee's social security benefit to that portion of the benefit that was "bought" with the employer's own payroll tax contributions.¹⁶⁴

In fashioning a national retirement income policy, some changes in the current rules governing integration are necessary. At minimum, pure excess plans and offset plans that provide no benefits to lower paid workers should be outlawed. A much simpler and more equitable set of rules limiting the ability of employers to reverse the tilt in social security toward lower paid workers is clearly desirable. If changes can be made to eliminate the inequities and reduce the potential for abuse, there will be less need to abolish the practice of formally integrating private pensions with social security.

Charles Rangel (D-N.Y.). Section 4 of H.R. 6410, 97th Cong., 2d Sess. (1982) contained the integration proposal.

161. The original proposal, *supra* note 158, called for a ratio of 1.8 to 1. The proposal was subsequently changed to require a 2:1 ratio. See J. SCHULZ & T. LEAVITT, *supra* note 148, at 53 n.2.

162. Cynics point out that one of the key reasons that this approach is more politically viable today is the enactment of the top-heavy rules that are far more costly and difficult to administer than this proposal.

163. J. SCHULZ & T. LEAVITT, *supra* note 148, at 58-59.

164. *Id.* at 59-60.

VI. OTHER CONSIDERATIONS IN DEVELOPING A NATIONAL POLICY

Many other issues exist that should be addressed in the context of developing a national retirement income policy. Each deserves attention and study, and could easily be the subject of a separate Article if given the treatment deserved. This Article's cursory mention of them should not be interpreted to mean that they are unimportant. Rather, this Article identifies them as areas requiring more consideration at a later date.

Chief among the issues that this Article has not addressed is the investment of pension plan assets. With plan assets projected to be in excess of one trillion dollars,¹⁶⁵ policymakers must address the fundamental questions of ownership and control. How these assets are invested, how investment decisions are made, who makes the decisions, and what factors they consider, are but a few of the questions that need to be explored. Various legislative proposals suggest channeling investment towards a particular type of investment¹⁶⁶ or away from a particular type of investment.¹⁶⁷ Another growing area of concern is the use of pension assets in the corporate takeover context. The development of a national retirement income policy must include careful consideration of investment-related issues.

Among the other areas requiring policy development are plan termination issues, including the need for reform in the single-employer plan area, and questions relating to the termination of so-called overfunded plans that result in a reversion of assets to the employer; the desirability of federal reporting, disclosure, and fiduciary standards for state and local pension plans; reexamination of the exclusion of governmental and church plans from ERISA's rules; and analysis of the effect of ERISA's broad preemption language on various aspects of worker rights and protections that would otherwise be handled under state law.

165. H. GRAY, *NEW DIRECTIONS IN THE INVESTMENT AND CONTROL OF PENSION FUNDS* 7 (1983).

166. For example, H.R. 4243, 97th Cong., 1st Sess., introduced by Congressman Ron Wyden (D-Or.) on Oct. 27, 1983, and H.R. 1179, 98th Cong., 1st Sess., introduced by Congressman John Erlenborn (R-Ill.) on Feb. 2, 1983, were designed to encourage greater pension plan investment in residential mortgages.

167. On Feb. 4, 1985, Congressman Augustus Hawkins (D-Cal.) introduced H.R. 925, 99th Cong., 1st Sess., requiring each pension plan to report its investments in South Africa to the Secretary of Labor through a new separate schedule attached to Form 5500. Presumably, once disclosure of these holdings is made, pressure will be exerted on the plan to cease investing in companies doing business in South Africa.

CONCLUSION

The lack of a rational and coherent national retirement income policy has caused conflicting legislative and regulatory signals and goals. The most efficient way to assure adoption of a single, consistent set of goals would be to consolidate all policymaking, administrative, regulatory, and enforcement functions relating to all types of retirement income sources—public and private—in an executive branch agency, and consolidate all legislative and oversight functions with respect to the same sources in a congressional committee.

Because neither of these consolidations is likely to occur in the near future, it is particularly important that one component of retirement income security, namely employer-provided private pensions, be treated consistently through the development of a national retirement income policy for private pension plans. This Article has identified many of the problems and policy options involved in the formulation of such a policy. Retirement income goals must be set, and each legislative enactment and regulatory proposal must move us toward the attainment of these goals. American workers and society are entitled to no less.