The original documents are located in Box C39, folder "Presidential Handwriting, 4/26/1976" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

[f.c. 4/26/76]

MEMORANDUM

THE PRESIDENT HAS SEEN....

THE WHITE HOUSE

WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: Jim Cannon

SUBJECT: Equal Employment Opportunity Coordinating Council Report on Sex Discrimination in the Area of Pension Benefits

As you may recall, last year, when you were reviewing HEW's Title IX Regulation, your attention was called to the fact that different Federal agencies have taken different approaches to the question of what constitutes sex discrimination in the provision of pension benefits.* Because of the potential impact of inconsistent Federal regulations in this area on the private sector, you requested that the Equal Employment Opportunity Coordinating Council (EEOCC) review this matter and report to you its recommendations for developing a uniform governmentwide approach.

The EEOCC has completed its review and has submitted to you a report recommending that you seek legislation which would clarify the issue. Specifically, the Council recommends that you ask the Congress to enact legislation which would:

- require that all persons retiring on or after a date certain under the terms of an employee retirement plan providing periodic benefits receive periodic payments which do not reflect a differentiation based on sex; and

- require that if an employee retirement plan provides for retirement benefits in the form of a lump-sum, such lump-sum shall be in an amount sufficient to purchase a life annuity which would provide periodic payments which do not vary because of the sex of the pensioner.

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* HEW and Labor take the position that a pension plan does not discriminate on the basis of sex if: (a) the employer is required to make equal contributions to the plan on behalf of all employees, male and female; <u>or</u> (b) equal periodic benefits are paid to male and female retirees. The Equal Employment Opportunity Commission, on the other hand, takes the position that a pension plan does not discriminate on the basis of sex <u>only</u> if equal periodic benefits are paid to male and female retirees. Thus, a plan which would be approved by HEW or Labor could nonetheless be disapproved by EEOC.

We are still reviewing this recommendation and, therefore, are not prepared to present it for your decision. However, because of the general public interest in this issue, I thought you should be aware of the thrust of the recommendation.

The complete report is attached at Tab A.

Attachment

A

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

April 15, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

As Chairman of the Equal Employment Opportunity Coordinating Council, I believe I owe you an explanation for the absence of one member agency's signature--that of the Equal Employment Opportunity Commission--on the attached letter to you from the Council.

This pension study, as you know, represents the combined efforts of six agencies, with differing jurisdictions and consequently differing outlooks on the pension issue. Achieving unanimous agreement on a common recommendation was no small task. Nevertheless, at our meeting on March 30 of this year, the Council reached unanimous agreement on the substance of its letter, subject to certain redrafting and expansion of details thereof and the preparation of a proposed draft bill. Agreement on the expanded letter and the proposed bill was achieved on or about April 13, 1976.

On April 14 and 15, however, the Equal Employment Opportunity Commission was unwilling to sign the letter, for reasons which would have required reopening the inter-agency discussions at this late date. As the April 15 deadline for this letter already represents the entire six months' time extension which you so graciously granted this Council, I chose not to recommence our efforts.

Respectfully,

Harold R. Tyler, Jr.

Harold R. Tyler, Jr.

Attachment

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

April 14, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In response to your request, the Equal Employment Opportunity Coordinating Council has been working to develop a uniform approach to questions of law and policy regarding differentiation in retirement plan benefits on the basis of sex. The differentiation results from the use of sex-based actuarial tables. That is, when an employer makes equal contributions for men and women to a retirement benefit plan, female employees because of their longer average life span, receive lower periodic benefits than similarly situated men under a single life annuity.

The basic issue is whether employers who sponsor retirement benefit plans for their employees are required to provide equal periodic benefits to male and female employees at retirement. The Labor Department interpretations under the Equal Pay Act and Executive Order 11246, as amended, and the regulations of the Department of Health, Education, and Welfare under Title IX of the Education amendments of 1972 state that an employer is in compliance if it makes equal contributions to the retirement plan for similarly situated employees. EEOC, on the other hand, has taken the position in its 1972 Guidelines on Discrimination in Employment Because of Sex and in court cases that the only way to comply with Title VII of the Civil Rights Act of 1964, as amended, is to provide equal periodic benefits.

All the member agencies of the Coordinating Council and HEW (which has been meeting with the Council on this issue) are agreed that it is a matter of sound public policy that periodic payments made to retired employees pursuant to the terms of employee benefit plans should not reflect a differentiation based on sex. This belief is grounded on the view that employees who have received equal pay and status during their working years ought to be assured of an equal income during retirement.

Because Congress has not made this position completely clear in existing statutes, the Council is recommending that you ask the Congress to enact legislation which would

-- Require that all persons retiring on and after a date certain, e.g. January 1, 1980, under the terms of an employee retirement plan providing periodic benefits based on the employee's life receive periodic payments which do not reflect a differentiation based on sex.

-- (EEOC believes that sound policy and the Congressional intent indicated in Title VII and ERISA mandate that an equal periodic payment requirement should also apply to survivors options and would want to request of the Office of Management and Budget authorization to testify concerning its belief in this regard.)

-- Require that if an employee retirement plan provides for retirement benefits in the form of a lump sum on and after the effective date, such lump sums shall be in amounts sufficient to purchase life annuities which provide periodic payments which do not vary because of the sex of the purchaser.

While the legislation is pending, EEOC will continue to process charges and implement its present perception of the law in court.

The Commission on Civil Rights believes that Title VII prohibits the current practice of paying unequal periodic benefits to men and women. The Commission believes that the current EEOC Guidelines can be fully justified by case law. The Commission sees no need for legislation. If, however, legislation is proposed, the Commission believes that Congress should consider mandating sex-neutral practices by the insurance industry, applicable to all forms of insurance.

We have enclosed for your consideration a preliminary draft of proposed legislation to implement our recommendation; a copy of a report prepared for the Council by actuaries who estimated the cost of the proposed changes, and memoranda by the Solicitor of Labor and the Chairman of the EEOC setting forth the background of the issues in this area.

Sincerely,

Harold R. Tyler, Jr.
Deputy Attorney General
and
Chairman, Equal Employment
Opportunity Coordinating
Council

W. J. Usery, Jr.
Secretary of Labor

David Mathews
Secretary of Health, Education, and Welfare

Arthur S. Flemming
Chairman, Commission on Civil Rights

Robert E. Hampton
Chairman, Civil Service Commission

A BILL

To provide for equal periodic retirement benefit payments regardless of sex, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Retirement Benefits Act of 1976."

Findings and Purpose

Section 2.(a) The Congress finds that the use of sex-based actuarial tables in computing periodic retirement benefit payments has resulted in the payment of lower periodic retirement benefits to women electing single life annuities and that such lower payments deny equality to female employees and have an adverse impact on the general welfare and on interstate and foreign commerce.

(b) Therefore, the Congress declares it to be the purpose of this Act to assure that similarly situated male and female participants in employee pension benefit plans receive equal periodic benefit payments.

Requirement of Equal Periodic Benefit Payments

Section 3.(a) Notwithstanding any other provision of law, it shall be unlawful for any employee pension benefit plan which offers benefits in the form of periodic payments [based upon the single life of the employee to fail to provide equal periodic payments to similarly-situated male and female participants.]*

(b) In the case of any employee pension benefit plan which offers benefits only in the form of a lump sum, such plan shall permit its participants to make a binding election at the time of retirement (within a period of time and in a manner prescribed by the Secretary of Labor) to purchase a periodic payment annuity which is not subject to cancellation. To all participants who have made such a binding election, the employee pension plan must provide lump sum amounts which will enable the participants to purchase annuities providing equal periodic benefit payments to similarly-situated male and female participants.

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* Position of the Civil Service Commission and the Departments of Justice; Labor; and Health, Education, and Welfare. EEOC would insert in lieu of Section 3(a) an alternate section which would reflect their current position as stated in the covering letter.

(c) In determining a participant's vested and accrued benefits under an employee pension benefit plan, benefits accrued under any fund established and maintained solely for the purpose of complying with the requirements of this Act shall not be taken into account.

Enforcement

Section 4.(a) In addition to such remedies as may already be authorized by law, the Secretary of Labor is authorized to enforce the provisions of this Act by bringing civil actions for appropriate relief in appropriate United States District Courts. Orders of such Courts shall be reviewable as provided in sections 1254 and 1291 of title 28, United States Code.

(b) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary of Labor in any civil litigation brought under this Act, but all such litigation shall be subject to the direction and control of the Attorney General.

Regulations

Section 6.(a) The Secretary of Labor is authorized to prescribe such regulations as the Secretary deems necessary or appropriate to carry out the purpose of this Act.

(b) No other provision of law shall be interpreted or enforced with respect to retirement plans in a manner inconsistent with this Act.

Definitions

Section 7. For the purpose of this Act, the terms "employee pension benefit plan" and "participant" shall mean the same as defined in section 3 of the Employee Retirement Income Security Act of 1974 (88 Stat. 829).

Effective Date

Section 8. The provisions of this Act shall apply only with respect to participants retiring on or after January 1, 1980.

Retirement Benefits and Sex-Based
Actuarial Tables

A. Issue

The EEOCC is currently reviewing the question of whether Title VII of the Civil Rights Act of 1964, as amended, the Equal Pay Act of 1963, Executive Order 11246, as amended, and Title IX of the Education Amendments of 1972 ought to be viewed as prohibiting sex-based disparities in retirement benefit levels.

The Courts have not yet directly addressed the issue of the legality of sex-based disparities in retirement benefits under any of the EEO statutes or the Executive Order. Recent decisions of the Supreme Court in the sex-discrimination area do not give clear guidance as to the Court's direction on this question. Similarly, those District Court's which have discussed this issue have done so inferentially and have not provided an analytical discussion of the issues.

To fully appreciate the equal employment ramifications of an equal benefits policy, it is necessary to understand the existing variety of retirement plans and the possible impacts on those plans which would be caused by a change in the EEO policy. It is also necessary to incorporate an analysis of relevant I.R.C. and ERISA provisions both as to their respective impact on retirement plans and also as to the impact a change in EEO policy would have in these two areas.

B. The Government Positions

In September 1965 the Wage and Hour Division in the Department of Labor issued its Interpretative Bulletin on the newly enacted Equal Pay Act of 1963 (EPA). The Interpretative Bulletin stated that pension plans which require either equal benefits or equal contributions would not violate the EPA (29 CFR 800.116(d)). Since the issuance of the Interpretative Bulletin, significant and comprehensive developments have occurred in the EEO area, including the issuance of Executive Order 11246, administered by the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor, and enactment of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

Each of these EEO programs initially adopted the Wage-Hour position on fringe benefits. Although the scope of sex-based discrimination practices proscribed by E.O. 11246 and Title VII are considerably broader than the prohibitions contained in the EPA, neither OFCCP nor EEOC conducted a major examination of the wage-hour fringe benefits position and none has been made since the equal benefits-equal contributions position was adopted in 1965. Subsequently (1972), however, EEOC did amend its guidelines on sex discrimination (29 CFR 1604.9) interpreting Title VII to require equal benefits for men and women alike under fringe benefit programs. The extent to which the EEOC examined the issues and the ramifications of the changes which the 1972 amendment implemented is not clear.

ESA conducted hearings in September 1974 pursuant to an earlier published proposal to amend the Labor Department's Sex Guidelines (41 CFR Part 60-20) including the fringe benefit provisions. OFCCP determined a few months ago that it was unable to make a determination on the fringe benefit issue on the basis of the hearing record before it and referred the matter to the EEOCC so that a uniform requirement could be developed and implemented under all Federal EEO laws. Earlier this year HEW, in its Title IX regulations, adopted the DOL approach rather than the EEOC approach as an interim measure pending the development of a uniform Government approach. As will be discussed <u>infra</u>, IRS has adopted sex based actuarial tables in promulgating rules affecting estate taxes.

When the President approved HEW's Title IX regulations this spring, he referred the fringe benefit issue to the EEOCC and instructed the Coordinating Council to report back to him by October 15. The Domestic Council has expressed interest in the EEOCC's deliberations.

C. Nature and Variety of Retirement Plans and Forms of Benefits

There are two major types of retirement plans. The first is a defined benefit plan, which provides a definitely determinable retirement benefit usually based on a combination of an employee's years of covered service and his or her compensation level. In such a plan, the plan sponsor's (the employer's) funding obligation is the actuarially determined amount necessary to "buy" the promised benefit. Included among the factors used by the actuary in determining the amount necessary for sound funding are an investment return or interest assumption and workforce characteristics, such as turnover rate, age and life expectancy. Sex-based tables are used in calculating life expectancies because women, on the average, live several years longer than men.

Retirement benefits normally take the form of an annuity (for life or, less frequently, for a term of years) which is either paid directly from the plan to the retirees in equal monthly installments, or is purchased by the plan from an insurance carrier and is paid in equal monthly installments by the carrier to the retirees. Because the sex factor is part of the actuarial calculations made to determine funding levels in a defined benefit plan, such a plan automatically provides benefits that are equal for similarly situated males and females. To put it another way, unequal contributions, based on the greater longevity of females, results in periodically paid benefits which are equal.*

The second major type of retirement plan is a defined contribution plan. In such a plan, the plan sponsor's (the employer's) obligation is not a promise to pay a definitely determinable benefit at retirement, but rather, to contribute a fixed sum to the plan, such as a percentage of payroll or a percentage of profits. This "defined" contribution is allocated to individual accounts of employees, and the total amount of an employee's retirement benefit depends on the sum in his or her account at the time of retirement. The account balance may be used to purchase an annuity, but, unlike the situation in a defined benefit plan, the greater longevity of females has not yet been considered. When, upon retirement, annuities are provided

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* This is a simplification of the use of sex-based actuarial tables. Actually most plans never use a female life expectancy table in calculating total costs. Generally, a plan will simply add up the number of women in various age categories, and then add each of those numbers with the number of men in the next lowest age category--a five year setback in recognition of longer female life expectancy. So, for example, if a workforce is compared of 100 men age 25-29 and 25 women age 30-34, the plan would base its actuarial assumptions on a workforce of 125 men age 25-29.

(directly by the plan) or purchased (from an insurance carrier) for a male and a similarly situated female, the greater longevity of the female is considered and the periodic payment under her annuity will be less than that under the male's annuity.

As noted above, for either type of plan, the life annuity is the normal form of benefit. However, many options are available. Receipt of the benefit as a lump sum rather than an annuity is one such option.* Another is a joint and survivor annuity, under which payments will continue to be made to a surviving spouse after the retiree's death. Early retirement is yet another.

While males and females receive equal periodic payments under a single life annuity in a defined benefit plan, the operation of sex-based actuarial tables results in inequality when an option is chosen. For example, where the lump sum option is chosen, a female will receive a larger amount than a similarly situated male because the defined benefit plan will have already considered her assumed greater longevity and sufficiently greater contributions will have been made to provide her with an annuity that will pay periodic

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* The lump sum option, and the option of taking direct payments from one's account (in a defined contribution plan), is rarely offered or exercised because both bear the uncertainty that the beneficiary will live longer than there are funds to support him or her.

installments equal to those of the male. And, under the joint and survivor option, the male's periodic benefit is reduced more than that of the similarly situated female, because it is assumed that the female spouse will live longer than the male spouse.

The nature of a defined contribution plan is such that at retirement, there is an equal amount in the individual accounts of all similarly situated employees. Sex-based actuarial tables dictate that the annuity this sum will buy for the male participant will yield higher periodic payments than the annuity which may be purchased for the female. And, as in the defined benefit plan, if a similarly situated male and female each choose a joint and survivor option, the male will suffer a greater reduction in his payments during his life time than will the female. In a defined contribution plan, the choice of lump sum or direct payment options yields an equal amount for similarly situated males and females.

D. <u>Problems Involved in Adopting and Equal Benefits Approach</u>

1. With the Continued Use of Sex-Based Actuarial Tables

For defined benefit plans, equal periodic benefit payments and equal employee contributions can be achieved where most options are chosen in the same way that these plans now provide equal periodic payments under the normal form of benefit--the single life annuity. The goal of equal benefit payments is actuarially taken into account in determining the size of the employer's contribution to fund for single life annuities, and the same goal could be taken into account respecting options. Already, most defined benefit plans reduce periodic benefits under the early retirement option by formula and not by sex, so the impact in that option area would be minimal.*/ Because a lump sum option in defined benefit plans is very rare, the impact of equalizing differing lump sum benefits where similarly situated employees of different sexes are involved would be limited to the few plans which offer such an option, and in those plans, only to a minimal extent, because few employees opt for it.

Regarding defined benefit plans, the primary impact of an equal benefits rule would be in the area of joint and survivor options. ERISA, at section 205(g)(3), requires that payments to a participant under a joint and survivor option be at least the acturial equivalent of payments under a single life annuity. Sex-based tables dictate that the reduction in periodic payments during the life of the participant is greater for males than for females because the predicted life spans of the spouses are taken into consideration in determining the amount of the reduction. An equal benefits

*/ Testimony of George S. Buck Associates, Sept. 10, 1974 (Vol. II, T. 140) (ESA hearings).

rule would requre that the reductions be equal. If the larger male reduction were to be fastened on as the "equal benefit" for males and females, the females would not be receiving the actuarial equivalent of her payment under a single life annuity, but a smaller amount, in violation of that section of ERISA.*/ Thus, the female's reduction would have to be used, rather than the male's or some average in between.*/

For defined contribution plans, the continued use of sex-based tables presents some problems of concurrent compliance with the equal benefits rule and regulations under the Internal Revenue Code and ERISA. Equal periodic payments could be achieved by placing part of an employer's designated contribution in a side fund which could be used to "top off" the individual accounts at retirement of women who choose a single life annuity and men who choose the joint and survivor annuity option. The "topping off" fund would allow the individual accounts of similarly situated males and females to

*/ This conclusion represents a tentative Labor Department interpretation of ERISA, section 205(g)(3). It is to be noted that the Internal Revenue Code, as amended by ERISA, contains a provision identical to section 205 (g)(3) (section 401(a)(11)(G)(iii)), and that, under Title III, ERISA, the interpretation of these identical provisions is a matter for which IRS has been given primary responsibility.

*/ This presents a cost increase to the plan which will be discussed more fully below.

remain equal, so that if a lump sum option were chosen, the amounts in each employee's account would be equal. Moreover, the side fund would not alter the allocation formula for the individual accounts, thereby avoiding a possible violation of the IRS' requirement that allocation be on the basis of a formula which is nondiscriminatory (26 CFR 1.401-1(b)(1)(ii)).

This option has some serious legal difficulties which need further discussion with the Office of Employee Benefits Security at the Labor Department and with the IRS. First, the IRS does not generally permit side funds in this situation. Second, the side fund might be considered a plan within the meaning of ERISA, and thus be subject to that Act's vesting, funding and participation requirements, which the fund proposed here would not meet. Third, the IRS requires that contributions which are made to a side fund be allocated in accordance with the main plan's definite nondiscriminatory formula (Revenue Ruling 70-125). Here the side fund would not be allocated according to the same formula.

It should be noted that the IRS has accepted sex-based actuarial tables in a number of tax contexts. So, for example, such tables were recently adopted as the appropriate mechanism for computing life interests under the estate tax provisions of the code. (Sec. 20.2031, Estate Tax Regs.) (cf. also secs. 72 and 664, IRC).

2. With Merged Tables

If instead of using sex based tables to determine cost to the employer and benefit levels for the employee, plan actuaries merged their experience into a sex-neutral table, compliance with an equal benefits rule would present no problems and, according to one expert, no appreciable cost increase.*/

For a defined benefit plan, the reduction in periodic payments under a joint and survivor annuity would be the same for similarly situated men and women, and would be the actuarial equivalent of the payment under a single life annuity when one considers that the actuarial table being used is a merged one, not differentiating on the basis of sex. For defined contribution plans, the amounts in similarly situated male and female participants' accounts would be the same but the amount necessary to purchase annuities yielding equal periodic benefits would also be the same, at a level somewhere between what are now the male and female amounts. Moreover, since the reductions for joint and survivor benefits would be based on merged experience tables, the amount would be the same for similarly situated men and women, alleviating the need for a topping off fund.

*/ Testimony of George S. Buck Associates (Actuaries), Sept. 10, 1974 (Vol. II, t. 130). Indirect cost impact is discussed more fully below.

Merged tables currently are used to determine benefit levels in the Federal Civil Service Retirement System.

Insurance companies object to the use of merged tables on several grounds. First, they say that one unisex table for all industry would be unworkable because it would not reflect the experience of composition of the work force that the individual carrier is insuring. However, it should be noted that a merged table does not require a standard unisex table. The insurance companies would be free to devise a merged table on the basis of their own experience and the composition of the work force they insure. Insurance companies also object to merged tables because of the competitive disadvantage which they see the use of such tables creating. They predict that retirement plans covering predominantly male groups will choose to self-insure and plans covering predominantly female groups will search for an insurance company using a table which is more favorable than one based on the plan's own experience. This will raise costs and employers will be charged more for annuities. The experience with life insurance, where merged tables are generally in use, would be of assistance in analyzing the potential impacts suggested by the insurance carriers. In making any cost comparisons between retirement plans and life insurance plans, it is important to remember that the comparative cost of retirement benefits far exceeds that of life insurance benefits for almost all employers. Therefore, a percentage increase in costs for retirement purposes would be significantly more costly than the same percentage increase for life insurance purposes.

The insurance industry also argues that compelling the use of merged tables would be an illegal federal regulation of this industry. Under the McCarran Act, regulation of the insurance industry was expressly left to the states. An equal benefit requirement would not itself mandate the use of merged tables by insurance carriers, but it might very well have that effect directly.

E. Cost Impact

There are two types of cost impact involved. The first is the direct impact--the additional cost of higher contributions that will be necessary to bring female benefits up to the level of the male benefit in defined contribution plans, and to bring male benefits to the level of female benefits in option areas under all types of retirement plans.*/

*/ As noted above, this cost impact allegedly has significance only if merged tables are not used to compute cost and benefits.

For defined benefit plans which already provide equal periodic benefits for single life annuities, a cost increase will be felt in the area of joint and survivor options. That cost increase results from the mandate in ERISA's section 205 (g)(3) that payments during the life of the participant be at least the actuarial equivalent of what he or she would have received under a single life annuity. The amount of the increase would vary with the sex mix of the participants and their salaries and option choice.*/

For defined contribution plans, there would be the same increase in the joint and survivor area, and there would also be the increase resulting from the necessity of equalizing benefits under a single life annuity.

These increased costs result only if present benefit levels are maintained. It is not clear whether the Equal Pay Act would permit a reduction in benefits in order to meet the equal benefits rule if that rule were mandated by Labor Department regulations.

*/ It should be remembered that ERISA has effectively made the joint and survivor option the normal form of benefit, in as much as a qualified plan is now required not only to offer such an option to all employees married longer than a year, but also the plan must assume that such employees want the joint and survivor option unless the participant elects out in writing.

The ESA hearings produced estimates that an equal benefits rule would have a cost increase of 2-4 percent systemwide, although that figure will vary with the sex and salary mix of the group. It must also be noted that this increase comes on the heels of other increases necessitated by ERISA, which themselves are not fully known as yet, although some plans have evidenced increased costs ranging from 30-50 percent. Additional cost analyses are imperative. It must be noted however, that the cost estimates are based solely on the estimates given by George S. Buch Associates at the OFCCP hearings. It would be extremely helpful for an independent cost survey to be made of the various options as they would be affected by an equal benefits requirement.

F. Other Considerations

A collateral problem which must be faced if it is decided that an equal benefits rule should be adopted is the effect of that rule on current pensioners and on current plan participants. In terms of cost, it would be prohibitive to require that benefits currently being received by pensioners be equalized. Moreover, since those benefits are in many instances no longer being controlled by the employer but rather are being paid by insurance companies, the McCarran Act raises a substantial question of Federal jurisdiction. Furthermore, benefits currently being paid out were funded on the basis of past rules which did not require equality--thus, employers would have a valid Portal-to-Portal Act defense against the requirement that they make up what would now be considered a deficiency in past contributions, although the level of those contributions was legal and expressly permitted at the time when they were made.

At the other end of the pole, the rule could be applied only to participants who enter the plan after the rule's effective date. In that case, however, it would be 15-30 years before the equal benefits rule applied to the entire covered work force. This position is difficult to defend if it has been determined that the effect of the present rule is contrary to public policy.

If it is required that all present participants receive equal benefits upon their retirement after the effective date of a new rule, deficiencies in funding over the years of the participants' service would have to be made up. Clearly the burden would be greater with respect to those employees who are close to retirement age. The impact would be slightly less for defined benefit plans, since that type of plan already provides equal periodic payments in the area of single life annuities. However, since benefit levels are guaranteed in defined benefit plans, the employer would have to come up with an additional contribution to equalize the benefits of currently retiring employees without changing the benefit levels of all participants. These plans could conceivably amortize this past service liability over 30 years, resulting, according to one estimate, in annual funding costs increases of 6-7 percent to cover the past service.*/

For defined contribution plans, immediate compliance for all current participants could be most easily achieved if merged tables were used for the determination of benefits at retirement. The benefit level would be an average of what men and women would have received using sex-based tables; no additional contributions would have to be made since no benefit levels are guaranteed; and there would consequently be no cost impact. However, without using merged tables, and in light of present IRS regulations, an employer would have to top off the individual accounts of each retiring employee

*/ It is possible that the IRS might interpret the higher costs necessary to meet an equal benefits rule for all present participants as an actuarial deficiency rather than as past service liability. Such a ruling would condense the amortization period to about 5 years, rather than 30, with a concommitant increase in funding cost.

depending on his or her sex or option choice. That amount could result in an estimated increase in cost of as much as 13.5 percent for each retiring employee.

The collective bargaining consequences of these options need also to be explored. The use of merged tables, for example, will have dramatic effects on the expectations of individuals--regardless of their "legal right" to hold such expectations. Each of these options effects in some way the relative standing and interests of groups of employees; no collective bargaining representative could afford to ignore those interests and the possible trade-offs in other terms and conditions of employment that would have to be made in order to accommodate any particular interests. So, too, on the employer's side. Retirement-date topping off, for example, is violative of the concept of finality-of-cost which is the keynote to bargained-for contribution levels insofar as the employer is concerned.