

TAX ASPECTS OF BLACK LUNG
LEGISLATION

S. 1538

PREPARED FOR THE USE OF THE
COMMITTEE ON FINANCE
BY THE STAFFS OF THE
JOINT COMMITTEE ON TAXATION
AND THE
COMMITTEE ON FINANCE



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I. INTRODUCTION AND BACKGROUND

S. 1538, the Black Lung Benefits Reform Act of 1977, was referred to the Committee on Finance after having been reported by the Committee on Human Resources on May 16, 1977 (S. Rept. 95-209).

Similar legislation was before the committee in the 94th Congress. H.R. 10760 was reported to the Senate by the Committee on Labor and Public Welfare on September 16, 1976 (S. Rept. 94-1254). That bill was then referred to the Committee on Finance, which reported it with tax and trust fund provisions on September 24, 1976 (S. Rept. 94-1303). That bill died at the end of the 94th Congress. S. 1538, the bill now before the committee, is similar to the 94th Congress legislation; as reported by the Committee on Human Resources, S. 1538 includes tax and trust fund provisions.

Black lung benefits legislation in the House of Representatives (H.R. 4544) has been reported by the House Committee on Education and Labor (H. Rept. 95-151). No action has been taken by the House of Representatives on that bill thus far.

Part II of this pamphlet outlines basic issues presented to the Committee on Finance by S. 1538.

Part III discusses each of those issues in turn, describing the provisions of S. 1538, the provisions of H.R. 10760 of the 94th Congress (as reported by the Committee on Finance last year), the provisions of H.R. 4544 (as reported by the House Committee on Education and Labor), and other alternatives that have been presented.

The Constitution provides that bills for raising revenue must originate in the House of Representatives. If the committee decides to report S. 1538 with its existing tax provisions or some modification of them, it may wish to include in its report a recommendation that the Senate either retain the bill on the calendar until an appropriate House bill has been passed by that Body or that the Senate act on the bill but not send it to the House until its text can be substituted for an appropriate House-passed bill.

II. ISSUES

The bill presents a number of basic issues to the Committee on Finance, including the following:

1. Whether costs of the black lung benefits program should be financed in whole or in part by the coal industry and, if so, whether this should be done through the tax system and whether it should be done by use of a trust fund.

2. If such a program should be enacted, what the length of the program should be.

3. If such a program should be financed in whole or in part through the tax system, what should be the nature of the tax program (e.g., excise tax on sale of coal) and what should be the level or levels of tax.

4. If the program should be financed by use of a trust fund, what should be the structure, powers, and obligations of the trust fund.

5. If obligations are imposed on individual coal mine operators (as distinguished from the industry as a whole), whether such operators should be permitted to establish trust funds for their contingent liabilities, with special tax treatment (as proposed in S. 1656).

III. ANALYSIS

1. Obligations of Coal Industry; Trust Fund; Tax

Present law

The present black lung benefits program provides benefits to miners totally disabled by black lung disease (pneumoconiosis) and to their dependents and survivors.

For claims filed on or before June 30, 1973, benefits are paid out of general revenues and administered by the Social Security Administration. This program (the "part B" program) is permanent; that is, a successful claimant under this program is entitled to benefits for life, or for as long as the claimant remains eligible.

For claims filed after June 30, 1973, for payment on or after January 1, 1974 (the "part C" program, administered by the Department of Labor), benefits are payable by the responsible coal operator (as in traditional workers' compensation programs), if such an operator can be identified, and otherwise from the general revenues.¹ Under this part C program, both the Labor Department's liabilities and the responsible operators' liabilities are terminated after December 30, 1981.

In practice, about 75 percent of the claims filed after June 30, 1973, are being paid from the general revenues. The Committee on Human Resources has found that, although the Department of Labor has assigned responsibility for claims in about 25 percent of the cases, in effect the Department is paying for more than 75 percent of the part C claims. Only about 200 claims are being paid by operators, as contrasted to some 4,000 being paid by the Department of Labor. Coal companies are controverting 97 percent of the black lung benefits claims for which they have been determined responsible by the Department of Labor. As a result, substantially all of the costs of the part C program are being borne by the general fund of the Treasury.

S. 1538

S. 1538 would retain the present requirement that the part B program be financed from the general fund of the Treasury. As to the part C program, S. 1538 would retain (with some modifications) the current approach that "responsible operators" are to pay for the black lung benefits provided with respect to their former employees. The bill would change present law by making the coal industry as a whole responsible for the remaining costs of the part C program. In addition, the coal industry as a whole would be responsible for reimbursing

¹ Under the statute, this program is to be administered by State workers' compensation agencies, meeting minimum standards, or by the Secretary of Labor where such standards are not met. No States have as yet met the minimum requirements, and so the entire part C program is administered by the Secretary of Labor.

the general fund of the Treasury for the Labor Department's obligations under the part C program prior to enactment of this bill, as well as the Labor Department's obligations under the part C program with respect to claims where the miner's last coal mine employment was before January 1, 1970.

The obligations of the coal industry as a whole would be met by payment of a newly-created tax (a manufacturers excise tax on the sale of coal) and appropriating the revenues from that tax to a newly-created Governmental trust fund. The part C program costs not paid for by "responsible operators" would be financed entirely through the trust fund.

The bill, S. 1538, has been referred to the Committee on Finance because of the tax and trust fund provisions which it includes. The amount of the tax necessary, however, is affected by the various benefit eligibility changes also included in the bill, and described below. In dealing with similar legislation during the last Congress (which was not enacted), the Committee on Finance determined that it would be appropriate to set the tax rate at a level below what would be necessary to fund all of the benefit changes proposed in the bill and to include an authorization of appropriations to pay any excess. The rationale for this decision was stated in the committee report as follows:

The Committee bill authorizes general revenue contributions to the fund to pay any excess of benefit costs over the amount received from the coal tax. The Committee estimates that the proceeds of the tax will be less than the amount of benefits payable from the trust fund. The Committee believes that this need for a general revenue contribution to the trust fund will call the attention of the Senate to the size of the costs involved in this program.

Because the benefit provisions of S. 1538 are important to the committee's decisions concerning the tax and trust fund aspects of the bill, item 2 below presents a more detailed analysis of those parts of S. 1538 which have a significant impact on program costs.

H.R. 10760 (94th Cong.)

H.R. 10760, as reported by the Committee on Finance at the close of the last Congress, would have provided the same general scheme as under S. 1538, with some differences in the structure of the tax on coal and the details of the trust fund.

H.R. 4544

H.R. 4544, as reported by the House Committee on Education and Labor, also would impose on the coal industry the obligations of funding so much of the part C program as is not paid for by "responsible operators." However, this would be accomplished by establishing a trust fund controlled by the coal industry (all the trustees would be elected by the coal industry). The trust fund would receive premiums and assessments paid by coal companies. That bill does not describe those items as taxes created by that bill.

Areas for Committee Consideration

Last year, the Committee on Finance did not agree to fund all of the costs of the part C program (other than those borne by responsible

operators) through a tax borne by the coal industry as a whole. The provisions relating to benefits and procedures to be used in determining benefits under S. 1538 are not precisely the same as under the bill approved by the committee last year. In addition, the costs of the program as it would be amended by the other provisions of S. 1538 are now estimated to be substantially higher than the amounts set forth in the report of the Committee on Human Resources. Under these circumstances, the committee may wish to consider, if it provides for a tax-and-trust-fund system whether it is appropriate to provide for additional coal tax revenues to cover the entire cost of the part C program not paid for by responsible operators.

Another approach that has been suggested would be to have the industry fund the costs indirectly, either by imposition of a separate tax or by reduction of the benefit of existing tax provisions applicable to the coal industry. Under this approach, no trust fund would be established and no effort would be made to match the cost of the part C program, on the one hand, with the additional tax burden imposed on the industry, on the other hand.

Another suggestion presented at the hearing is to retain essentially the present system, under which the general fund of the Treasury would bear so much of the cost of the part C program as is not borne by responsible operators.

2. Provisions of S. 1538 Affecting Program Costs

In addition to making a basic change in the method of financing the black lung benefits program, S. 1538 significantly liberalizes benefit provisions so as to increase estimated total part C benefit costs by an average \$267 million per year over the next 5 years, provides for the repayment of certain past costs to the general fund of the Treasury, and shifts certain liabilities from the Federal Government to individual mine operators. The most significant of these provisions affecting program costs are described below.

Provisions opposed by Administration

In testimony at the hearing on June 17, 1977, the Department of Labor indicated Administration opposition to two of the proposed benefit changes in S. 1538. One of these changes would prohibit the Department of Labor from challenging the interpretation of an X-ray submitted by a claimant in support of his claim if read by a Board-eligible or Board-certified radiologist. The Department of Labor would retain the right to challenge an X-ray if there was reason to suspect fraud or if the quality of the X-ray was insufficient to permit a determination. However, in the absence of these factors, the Department would be required to accept the findings as to whether or not the X-ray established the existence of black lung disease, if those findings were made by any Board-certified or Board-eligible radiologist. Under current practice, the findings of the claimant's radiologist may be challenged by a radiologist on behalf of the Labor Department. This change is estimated to increase annual benefit costs by an average of \$50 million over the next 5 years (see table 1, below).

A second benefit change in S. 1538 opposed by the Department of Labor would create a presumption of eligibility for survivors of miners who worked for 25 years or more in coal mining prior to June 30, 1971. Benefits would be payable to such survivors unless the Department of Labor can establish that the miner, at the time of his death, was neither totally disabled nor partially disabled from black lung disease. This provision has an estimated average annual benefit cost of \$35 million over the next 5 years (see table 1, below).

Other Benefit Provisions

The bill includes many other changes to the black lung benefits program. The more significant changes (the additional costs of which are presented in table 1, below) are:

(1) *Refiling of previously denied claims.*—The bill would permit individuals whose claims were previously denied to reapply under the revised benefit standards. These claims could be filed without regard to certain time limitations otherwise applicable and could have retroactive effect to the time of the initial claim (but not before January 1, 1974). The cost of this provision has not been separately calculated but is included in the cost estimates for the various benefit liberalizations. Because of the retroactivity involved, those changes are shown

as having substantially higher costs in the next 3 years than in later years.

(2) *Changes in definitions.*—The bill would *modify the definition* of pneumoconiosis and the definition of miner. The change in definition of pneumoconiosis is estimated to have no cost. The change in definition of miner would expand the coverage of the program to include workers around a coal mine, processors and transporters of coal, and coal mine construction workers. This has an estimated average cost of about \$1 million per year over the next 5 years.

(3) *Evidence of disability.*—S. 1538 provides for the Secretary of Labor to revise the regulations defining what constitutes disability for purposes of the black lung program and setting forth the criteria for determining whether the definition is met. The estimated average cost over the next five years of these new standards is \$160 million per year. The bill also includes a number of specific provisions related to eligibility determination. For example, it would prohibit a finding that a miner was not disabled at the time of his death solely on the basis that he was actually employed at that time. Similarly, a living miner would be permitted to apply for benefits while still employed (although he would not be permitted to receive the benefits until after his employment terminates). Another provision would permit the use of affidavits in determining the disability of deceased miners in the absence of other sufficient evidence.

(4) *Field offices and clinical facilities.*—The bill would authorize the establishment of Labor Department field offices to handle claims under the Black Lung program and would make permanent a \$10 million annual authorization for the establishment and operation of clinical facilities for the treatment and examination of miners with respiratory impairments. The estimated average annual cost of these two provisions is approximately \$13 million. The bill contains separate authorizations for these two provisions. Since they are provided for in part C of the Black Lung Benefits Act, it appears that they could also be funded through the trust fund. The Committee may wish to clarify whether or not these two provisions come within the scope of the trust fund.

Provisions Relating to Liability for Benefits

Under existing law, after December 31, 1973, black lung benefits based on claims filed after June 30, 1973, are the liability of the last coal mine operator for whom the miner worked. If no liability can be established, however, the claims are paid by the Secretary of Labor from appropriated funds out of the general funds of the Treasury. The bill would, in the future, shift this liability from the general funds of the Treasury to the coal-tax financed black lung trust fund. It would also provide that the trust fund would pay all eligible claims with respect to miners whose last coal mine employment was before January 1, 1970. In addition, the bill would provide that the Federal Government be reimbursed for all previous part C payments.

The bill also includes a provision under which coal mine operators who acquire mines from previous operators would be required to assume liability (apparently concurrently with the prior operator) for the payment of black lung benefits to individuals previously employed in the mine. This provision has retroactive effect, applying to changes in ownership taking place since December 31, 1969. Over the next 5 years, it is estimated that responsible operator liability will average \$65 million per year.

TABLE 1.—*Estimated costs of S. 1538. Fiscal years 1978-82*

[In millions of dollars]

Provision	1978	1979	1980	1981	1982	5-year total
Expanded definition of coal miner-----	0.3	1.3	1.3	1.4	1.5	5.8
Revised disability standards-----	105.1	197.6	266.2	112.9	118.7	800.5
Prohibition against reinterpreting X-rays-----	36.0	69.1	76.9	33.4	34.6	250.0
Presumption of eligibility after 25 years work---	24.9	47.6	61.7	21.2	21.5	176.9
Changed cutoff date for operator liability-----	3.4	3.8	4.1	0	0	11.3
Clinical facilities-----	10.0	10.0	10.0	10.0	10.0	50.0
Field offices-----	2.6	2.8	3.0	3.1	3.3	14.8
Other administrative costs-----	10.0	6.0	4.0	3.0	3.0	26.0
Total new costs (operator and Federal)---	192.3	338.2	427.2	185.0	192.6	1,335.3
Current law costs (operator and Federal)-----	34.3	38.8	40.2	34.0	34.0	181.3
Operator liability-----	-40.2	-70.9	-89.2	-60.9	-63.1	-324.3
Repayment from trust fund to general fund for past Labor Department costs-----	40.0					40.0
Trust fund liability under S. 1538-----	226.4	306.1	378.2	158.1	163.5	1,232.3

Note: Source of estimate is June 20, 1977, estimate by Department of Labor except that "Other administrative costs" and "Repayment from trust fund to general fund for past Labor Department costs" were estimated by Finance Committee staff after consultation with Labor Department estimators. The June 20, 1977, estimate of the cost of the prohibition against reinterpreting X-rays is

\$250,000,000 for the first 5 years as compared with an \$832,000,000 estimate previously made by the Department. The change is based on an assumption that the interpretations originally submitted by claimants' radiologists will be more accurate as a result of training and other technical assistance by the Labor Department.

3. Length of Program

Present law

Under present law, the part B program is permanent. The part C program, however, expires on December 30, 1981. That is, all liabilities cease, even for people whose eligibility for benefits had been established before that date.

S. 1538, H.R. 10760 (94th Cong.), and H.R. 4544

Under S. 1538, last year's bill, and this year's House bill, the part C program would be made permanent. No change would be made in the present permanent nature of the part B program.

Areas for Committee Consideration

It was suggested at the hearing that, if a tax-and-trust-fund approach were to be agreed to, then an automatic expiration date should be applied to force Congressional review of the program. Suggestions were made for 3-year and 5-year terms.

Of course, even in the absence of an automatic termination date, the Congress could reexamine the program at any time. In view of the speculative nature of the cost estimates, it is likely that reexamination would be required at least with respect to the tax provisions, in order to assure that the tax provisions are adequate to fund so much of the benefits as are appropriate to be funded in this manner, and yet are not so high as to impose unreasonable burdens on the coal industry and its customers.

4. Nature and Level of Tax Provisions

Present law

Present law does not include any Federal tax on coal extraction or sales, as such. (Profits are, of course, subject to income taxation and, in that context there are several provisions of particular application to coal.)

S. 1538

S. 1538 would impose a manufacturers excise tax upon the producer's sale of coal at a rate determined by the coal's heat value per ton. The tax would be 30 cents per ton on coal which has a British Thermal Unit (Btu) value of 11,000 or more per pound, 15 cents per ton on coal which has a Btu value of more than 8,000 and less than 11,000 per pound, and 7.5 cents per ton on coal which has a Btu value of 8,000 per pound or less. The Btu value would be determined by the Bureau of Mines. The Committee on Human Resources has recommended that the tax rates be graduated in this manner because coal with a high Btu content is believed to be more likely to cause a black lung disease.

Most of the rules generally applicable to manufacturers excise taxes, including the collection provisions, would apply to this coal tax. However, the following exemptions which apply to other manufacturers excise taxes would not apply to this tax on coal: Sales for further manufacturing, for export, for use as supplies for vessels or aircraft, for the use of a State or local government, or for the use of a non-profit educational organization. Discretionary authority now granted to the Secretary of the Treasury to exempt sales for the use of the United States, from this manufacturers excise tax would not be available in the case of this tax.

Under the general rule applicable to manufacturers excise taxes, use by a producer is treated as a sale by that producer. The bill would modify this rule to impose a tax upon "the production" of coal by a producer for its own use (for example, coal mined by a steel company for its own use), thereby causing the taxable event to occur earlier than it would under the general rule.

Revenue to the trust fund resulting from the new tax is estimated by the staff of the Joint Committee on Taxation at \$160 million for fiscal 1978; \$180 million for fiscal 1979; \$185 million for fiscal 1980; \$195 million for fiscal 1981; and \$205 million for fiscal 1982.

H.R. 10760 (94th Cong.)

H.R. 10760 would have imposed a manufacturers excise tax at a rate of 15¢ per ton on the sale of anthracite coal which is extracted by shaft, drift, or slope mining techniques from underground deposits. All other coal (including lignite) would have been subject to the tax at a rate of 10¢ per ton. The determination of what coal is considered

to be anthracite coal would have been made in accordance with the conventional industry definition of that type of coal.

As is the case under S. 1538, most of the rules applicable to manufacturers excise taxes would have applied to this coal tax, but the various exemptions to be eliminated under S. 1538 (as described above) would also have been eliminated under H.R. 10760. Unlike S. 1538, H.R. 10760 would have followed the general manufacturers use tax provisions as to when a use by the manufacturer is to be considered a sale.

It was estimated that revenues to the trust fund resulting from the tax under H.R. 10760 would have been \$30 million for fiscal 1977; \$74 million for fiscal 1978; \$77 million for fiscal 1979; \$80 million for fiscal 1980; and \$84 million for fiscal 1981.

H.R. 4544

The House bill would require that the operators of coal mines in any State which does not have a qualifying workers' compensation law would have to pay premiums into a trust fund in amounts sufficient to ensure the payment of part C benefits. The premium rate would be established by the Secretary of Labor as a rate per ton of coal mined. The bill would require any such premium rate to be uniform for all mines, mine operators, and amounts of coal mined. The trustees of the trust fund would adjust the premium rate to provide sufficient revenue to meet the obligations of the trust fund, and the Secretary of Labor would be authorized to further adjust the rate.

The premiums would be collected by the Internal Revenue Service "in the same manner as, and together with, quarterly payroll reports of employers." If an operator fails or refuses to pay any required premiums, the fund trustees would bring civil suits for these amounts. Also, the Secretary of the Treasury would be authorized to assess civil penalties up to 100 percent of the premiums due and to bring civil suits to collect those penalties.

Initial premium rates would be set by the Secretary of Labor. The House report does not indicate what that premium rate would be expected to be. That report indicates the following estimate of costs: \$358.8 million for fiscal 1978, \$320.6 million for fiscal 1979, \$224.3 million for fiscal 1980, \$217.4 million for fiscal 1981, and \$208.7 million for fiscal 1982.

Although H.R. 4544 is drafted in terms of "premiums" and "assessments" rather than in terms of "taxes," these premiums would be assessed as a rate per ton of coal. When similar legislation passed the House in the 94th Congress, the Finance Committee concluded that this type of assessment constituted an exercise of the Federal taxing power whether or not the term "tax" was used. On this basis, the committee requested and obtained referral of the bill after it had been reported by the Committee on Labor and Public Welfare.

Areas for Committee Consideration

It was indicated at the hearing that the Treasury and Labor Departments believe that it would be difficult to administer the tax on the basis provided in S. 1538. Specifically, concern was expressed that in many cases it would be difficult to determine the Btu value of coal with sufficient precision to determine whether the 30-cent-per-ton rate should

apply or the 15-cent-per-ton rate should apply. It appears that substantial amounts of coal are generally rated between 10,500 Btu per pound and 11,000 Btu per pound.

The approach of H.R. 4544 in requiring a uniform rate per ton would eliminate the difficulties of drawing lines between categories of coal or of types of coal mines. However, it would result in the impact of the tax varying substantially with respect to different types of coal. The staff understands that coal prices range from as little as about \$3 per ton for lignite to as much as \$45 per ton for anthracite. If the revenues estimated to be produced under S. 1538 were to be produced by a flat-rate tax, that rate would have to be approximately 24 cents per ton. That tax could be as high as 8 percent of the price of lignite, but as little as one-half percent for more expensive anthracite.

The staffs have been informed by the Bureau of Mines that it is technically feasible and administratively practical for the Bureau of Mines to determine whether coal is anthracite, bituminous, subbituminous, or lignite, in the case of 99 percent of the coal mined in the United States. However, in a significant number of cases a single mine will produce both bituminous and subbituminous coal. Weighing these factors, it would appear to be feasible for the Internal Revenue Service to administer a 3-tier tax system, with the highest tax applicable to anthracite coal, the lowest tax applicable to lignite, and an intermediate rate applicable to bituminous and subbituminous coal. It should be noted, however, that subbituminous coal prices range down to \$5 or \$6 per ton and bituminous coal prices (especially metallurgic grades) range up to \$35 per ton. As a result, the impact of the intermediate rate of tax, as a percentage of the price, could be as much as seven times as great for the lower priced subbituminous as it would be for the higher priced bituminous.

Another apparently feasible approach to setting a tax base would be to make the tax *ad valorem*, that is, based on the manufacturers sales price. Several of the existing manufacturers excise taxes are *ad valorem*—the truck tax, the truck parts tax, the fishing equipment tax, the bows and arrows tax, and the firearms tax. The staff understands that, in many cases, coal is used by or sold to persons affiliated with the coal producer. Since those cases would not involve sales at arm's length, an *ad valorem* approach would require the use of constructive sales prices in such cases. Presumably, such constructive sales prices could follow the present rules for other *ad valorem* manufacturers taxes. It should be noted that administration of constructive sales price rules may well be simpler in the case of the proposed coal tax than is the case under the existing *ad valorem* manufacturers taxes because of the interrelationship between the constructive sales price for purposes of the proposed coal tax and the constructive sales price for percentage depletion limitation purposes.

5. Trust Fund

Present law

Present law does not include a trust fund for financing black lung benefits.

S. 1538

S. 1538 would establish a trust fund (the "Black Lung Disability Fund"). The bill would automatically appropriate to the trust fund amounts equal to the coal tax described above. Also, the bill would authorize appropriations of other sums necessary to meet the fund's obligations; these amounts would have to be repaid to the general fund of the Treasury. The fund would be required to pay benefits if there is no "responsible operator," or if the operator is in default, and would be required to pay benefits with respect to all claims in which the miner's last coal mine employment was before January 1, 1970. In cases in which the Government has already paid benefits for periods of eligibility since January 1, 1974, the fund would have to reimburse the Government for these payments. This would, in effect, transfer those costs from the Government to the industry (by way of the trust fund revenues from the tax on coal) in accordance with the general intent of present law that liability for payment of black lung benefits should have been transferred from the Government to the coal industry as of January 1, 1974. The expenses of the operation and administration of the claims program to be financed through the fund, plus the expenses of administering the fund as such, would be paid by the fund.

Under the bill, if the Secretary of Labor were to determine (in accordance with existing procedures, which provides for administrative and judicial appeals) that a coal mine operator was responsible for the payment of certain benefits, but those benefits have in fact been paid out of the fund, then the coal mine operator would be obligated to reimburse the fund. If the operator were to refuse to reimburse the fund, then a lien would arise in favor of the United States for the entire amount that the operator would be required to repay. This lien would attach to all the assets of the coal mine operator and would be given essentially the same status as a Federal tax lien.

The trustees of the fund would be the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare; the Secretary of the Treasury to be managing trustee. Receipts of the fund in excess of amounts needed to meet current withdrawals would be invested only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States, except that the fund would be permitted to purchase special Second Liberty Bond Act obligations if the purchase of regular obligations would not be in the public interest.

The fund also would be given standby authority to provide insurance for coal mine operators to cover their liabilities under the program.

H.R. 10760 (94th Cong.)

The trust fund provisions of the 1976 bill were essentially the same as those of S. 1538, described above. The major difference is that H.R. 10760 did not have the provision authorizing the trust fund to insure employer liabilities.

The bills also differ in the following respects:

S. 1538 would require the fund to pay benefits with respect to all claims in which the miner's last coal mine employment was before January 1, 1970. H.R. 10760 had no similar provision.

S. 1538 specifies that the fund would be responsible for all expenses of operation and administration of part C "including those of the Department of Labor." H.R. 10760 did not include that reference to the expenses of the Department of Labor.

S. 1538 would obligate the Secretary of the Treasury to report on proposed adjustments in the coal tax rate. H.R. 10760 included no such provision.

S. 1538 would obligate a coal mine operator who acquires a mine on or after January 1, 1970, to assume liability for the obligations that the prior operator would have incurred if the acquisition had not occurred and the prior operator had continued to be a coal mine operator. H.R. 10760 would have applied this requirement in the case of acquisitions on or after January 1, 1959.

H.R. 4544

H.R. 4544 would establish a trust fund (the "Black Lung Disability Insurance Fund"). It would authorize appropriations to the trust fund of 50 percent of the trust fund's expected payments for the first 12 months of operation. Any amount so appropriated would be an advance that would have to be repaid to the general fund of the Treasury. The fund also would receive assessments on coal mine operators for amounts of benefits that they were responsible for, and premiums imposed on coal mine operators based on tonnage of coal mined. The fund would be required to pay all the benefits in the future under part C, as well as all the benefits under part C on account of obligations imposed on the Department of Labor before the effective date of the trust fund provisions. The trust fund's assets would be available only to pay benefits under the fund and the cost of administering the fund. Under H.R. 4544, the fund would be permitted to appeal determinations by the Department of Labor as to benefit eligibility. Coal mine operators would not be permitted to bring any proceeding (or intervene in any proceeding) in benefit claim determinations.

The fund would have seven trustees, all of whom would be elected by coal mine operators. The fund would be permitted to invest in any assets, so long as those investments would meet the diversification requirements imposed on trustees of private pension plans under the Employee Retirement Income Security Act of 1974 (ERISA). H.R. 4544 would specifically authorize the trustees to vote shares of stock held by the fund.

Areas for Committee Consideration***Contingent liability insurance***

S. 1538 would provide standby authority for the trust fund to insure the liabilities of responsible operators. The Treasury Department

opposes this provision, stating that "The Treasury Department does not believe that it is a proper function of the Federal Government to enter into the insurance business as an underwriter of what is essentially workmens compensation insurance. Especially the trust fund should not be jeopardized by having it subject to insurance underwriting losses."

The Department of Labor urges that a standby insurance provision be retained. It is concerned, as were several of the industry witnesses before the committee, that some operators seem to be unable to secure private insurance for their liabilities and others are able to secure such insurance only at very high premium rates. The Department of Labor has indicated that it would not object to removal of Treasury Department involvement in the creation and operation of this insurance system and it would consider appropriate the keeping of funds relating to the insurance program in separate accounts from those relating to the fund's basic part C liabilities. It urges that such separate accounts, and the premium rates and other terms of insurance, be developed on sound actuarial principles.

Concern has been expressed that, unless the tax receipts and other assets that are in the trust fund for purposes of the trust fund's basic part C obligations are kept separate from money relating to the insurance program, then the workers' compensation aspects of the responsible operator provisions could be eroded and there would be a possibility that the tax receipts would in effect be used to cover possible underwriting losses of the insurance program.

The committee may wish to consider, in this respect, what was done under the Pension Benefits Guaranty Corporation provisions of ERISA. The statute in that case provided that the PBGC should establish a system for insuring employers' contingent liabilities. The statute specifically provided that the premiums for this contingent liability insurance "shall be chargeable at a rate sufficient to fund any payment by the corporation becoming necessary under such coverage."

Trustees

S. 1538 provides that the Secretary of Labor would be the managing trustee of the fund. The Treasury Department testified that the Secretary of the Treasury should not be included "as a policy determination official of the fund" and suggests that the Secretary of the Treasury merely be the "manager" of the fund and that the Secretary of Labor be the sole trustee.

Enforcement of liens

S. 1538 provides that the liens arising in favor of the fund on account of operators' liabilities be treated generally in the same manner as Federal tax liens and authorizes the Secretary of the Treasury to enforce those liens. The Treasury Department has urged the committee to remove this authority from the Secretary of the Treasury and, instead, authorize the Attorney General or the Secretary of Labor to institute such collection suits. The Department of Labor has suggested that the Secretary of Labor be given this power.

Under ERISA, liens arising in favor of the Pension Benefits Guaranty Corporation on account of employer contingent liabilities also have the status of tax liens. In that Act, the PBGC was given authority to sue to collect on such liens.

Investments

S. 1538 would require that fund assets not need to meet current withdrawals be invested only in U.S. obligations or obligations guaranteed by the United States both as to principal and interest. The bill also would impose a number of detailed restrictions on those investments. The Treasury Department recommends that the fund's investment be limited to public debt securities, but that most of the detailed restrictions be removed so as to "give the Secretary of the Treasury the flexibility to tailor the investment program for the optimum return to the fund."

Expenses of administration and operations

S. 1538 would provide that "all expenses of operation and administration under this part [part C], including those of the Department of Labor" are to be paid from the trust fund. Last year's bill also authorized expenses of operation and administration under part C to be paid from the trust fund, without referencing the Department of Labor. The committee may wish to consider making it clear that the expenses of both the Labor Department and the Treasury Department with relation to the trust fund and collection of trust fund taxes would be payable from the trust fund.

6. Operators' Trusts for Contingent Liabilities (S. 1656)

Present law

Generally, the tax law does not permit taxpayers current deductions for amounts set aside in a self-insurance fund to satisfy contingent liabilities which may arise in the future¹ and does not provide a tax exemption for trusts used to provide funds to satisfy contingent liabilities.² Current deductions are allowed, however, for premiums paid on commercial insurance policies which cover contingent liabilities.³

Under the Employee Retirement Income Security Act of 1974 (ERISA), private employee welfare plans are subject to Federal reporting and disclosure requirements and must comply with Federal standards regulating fiduciaries and self-dealing. The rules relating to reporting, disclosure, fiduciaries, and self-dealing are administered by the Department of Labor. ERISA preempted State laws regulating employee welfare plans.

Issues

Because black lung benefits are payable to both miners and their survivors, the obligation to provide benefits with respect to an employee may continue for a considerable period. It has been estimated by some that the cost of providing these benefits may be between \$1.35 and \$5.00 per ton of coal (depending upon such factors as the amount of recoverable coal and the age of the miners).

Of those States which have workers' compensation insurance funds, Federal black lung coverage is provided in North Dakota, Ohio, Pennsylvania, and West Virginia. Arizona, California, Maryland, Oregon, Utah, and Wyoming workers' compensation funds do not write coverage for the Federal black lung risk. The State funds in North Dakota, Ohio, and Wyoming are exclusive; that is, no private compensation insurance is written in those States. All other State funds are competitive; that is, private insurance carriers compete with the State funds

¹ For a brief period, the Internal Revenue Code of 1954 permitted taxpayers to deduct additions to reserves for estimated expenses (sec. 462). The provision was included in the Code as originally enacted in 1954 but was retroactively repealed in 1955, when it was determined that the revenue loss for the transition period would be excessive.

² The Internal Revenue Code of 1954 includes special provisions allowing current deductions for contingent liabilities under tax-qualified pension plans (sec. 404) and permits life insurance companies to deduct amounts held in reserve for contingent liabilities under life insurance or noncancellable accident and health insurance policies (sec. 801 *et seq.*). Generally, income and gains on assets held by a trust under a qualified pension, etc., plan are not taxed to the trust. Also, income earned on assets held in a life insurance company's reserve for policyholder claims is not taxed to the company if the income is required to be added to the reserve.

³ Insurance premiums may generally be deducted as ordinary and necessary expenses of a trade or business (sec. 162). Health insurance premiums may be deducted (within limits) as medical expenses by individuals who itemize deductions.

for workers' compensation business in those States. In Wyoming private carriers are permitted to underwrite the Federal black lung risk only, since the fund itself, which is exclusive, will not underwrite the Federal black lung risk.

Commercial insurance premiums for a policy covering an employer's contingent liability under black lung laws may cost as much as 25 percent of payroll for an underground mine and 5 to 10 percent of payroll for a strip mine. Because the insurance policies now available are cancellable by the insurers, an employer cannot be assured that the insurance will remain in force if the insurer determines that the risk of loss is higher than it contemplated. Consequently, some mine operators wish to self-insure for this liability.

Mine operators who have considered self-insurance for black lung liability have found that although they are generally entitled to deduct premiums paid for commercial insurance, they are not allowed to deduct amounts set aside under a self-insurance program until those amounts are used to pay claims. The deduction is not allowed because, until claims are paid, the liability for benefits is considered contingent. Also, the Code does not provide a tax exemption for income on assets set aside in self-insurance funds. (Note that, to the extent income and net short-term capital gains on reserves held under a noncancellable accident and health insurance policy issued by a life insurance company are required to be added to the reserve in order to satisfy contingent liabilities, the income and gain not taxed to the insurer.⁴)

S. 1656 (introduced by Sen. Hansen) is designed to permit an employer to set up a self-insurance program for contingent liability under black lung laws, with substantially the same tax consequences as those that would result if the employer had purchased noncancellable accident and health insurance covering that liability.

Proposal (S. 1656)

Generally, S. 1656 would provide tax-exempt status for a trust used by a coal mine operator to satisfy its liabilities under Federal black lung benefits laws. The bill would apply where a person contributes to a trust created or organized in the United States if the purpose of the trust is (1) to satisfy that person's liability under Federal black lung benefits laws,⁵ and (2) to pay "administrative and other incidental costs of such trust (including, without limitation, legal, accounting, actuarial, and trustee expenses) in connection with the operation of the trust and the processing of claims".

Under the bill, contributions to the trust could not exceed amounts deductible under reasonable actuarial assumptions specified in Treasury regulations.⁶ Additionally, the tax exemption would be limited to funds under which trust corpus and income could be used only to satisfy liabilities under the black lung benefits laws. Also, under the

⁴ Net long-term capital gain is taken into account in computing life insurance company taxable income but may be wholly or partially offset by special deductions allowed to life insurance companies.

⁵ The Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefit Act of 1977, and any other Federal or State laws, and Acts amendatory or supplementary thereto, and all Federal or State rules or regulations pursuant thereto.

⁶ Contributions by insurance companies would not be permitted.

bill, after all those liabilities are satisfied by a trust, under Treasury regulations the person who made contributions to the trust may choose to have any amounts remaining in the trust paid to another such trust or to a tax-qualified pension, etc., plan.

Areas for Committee Consideration

The committee may wish to consider (1) providing a tax exemption for a trust used by an employer to self-insure for liabilities under Federal and State black lung laws and (2) providing a deduction for amounts contributed to the trust by the employer. Under this program, the committee may wish to provide that deductions would be computed under a funding method approved by the Treasury, based on actuarial assumptions which are reasonable in the aggregate and which represent an enrolled actuary's best estimate of anticipated experience.

The committee might also wish to consider limiting payments from an exempt black lung trust for administrative and incidental costs to amounts which, if paid by the employer directly, would be considered ordinary and necessary expenses of the trade or business. In addition, the committee may wish to consider providing that no deductions would be allowed for contributions to an exempt black lung trust after all of the employer's liabilities under the black lung laws are satisfied and all proper expenses have been paid.

Where benefits paid by a black lung trust are later found to be excessive, the committee may wish to provide that the excess benefits are to be recovered by the trust rather than the employer.

The committee may also wish to provide that, within a reasonable time (for example, 1 year) after all black lung liabilities of an employer are satisfied, any amounts remaining in the trust (after payment of proper expenses) should be transferred to another exempt black lung trust which has liabilities for benefits, or contributed to the Black Lung Disability Fund.

In considering the concept presented in S. 1656 the committee should be aware that trusts established under that bill may be regarded as employee welfare plans subject to the Labor title of ERISA. Under those circumstances, consideration should be given to the extent to which those provisions of ERISA impose requirements that may conflict with requirements that would be appropriate under the Internal Revenue Code.

