April 6, 1999

A. L. Singleton
Chief of Staff
Committee on Ways and Means
Subcommittee on Oversight
U. S. House of Representatives
1136 Longworth House Office Building
Washington, D. C. 20515

Dear Mr. Singleton:

The enclosed comments of the National Coordinating Committee for Multiemployer Plans ("the NCCMP") and statements from multiemployer plan participants and administrators are for inclusion in the printed record of the March 23, 1999, hearing on pension issues before the House Ways and Means Subcommittee on Oversight.

The NCCMP comments address the provisions of the Comprehensive Retirement Security and Pension Reform Act (H.R. 1102) that would have an impact on multiemployer plans and participants.

The statements of multiemployer plan participants and administrators are in support of the provisions in H.R. 1102, which would provide multiemployer plan relief from benefits limitations imposed under Internal Revenue Code section 415.

If we can provide additional information, please call me at the above number.

Sincerely,

Lori Wyatt
Director

enclosures

COMMENTS OF THE
NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS
FOR INCLUSION IN THE RECORD OF THE
MARCH 23, 1999 HEARING ON PENSION ISSUES
BEFORE THE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT

April 6, 1999

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates the opportunity to testify at the March 23, 1999, hearings of the House Ways and Means Subcommittee on Oversight, and to submit this statement for the record, on the Comprehensive Retirement Security and Pension Reform Act (H.R. 1102) introduced last month by Representatives Portman and Cardin.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. In furtherance of this purpose, the NCCMP monitors the development of laws and regulations relating to the structure and administration of multiemployer plans. The more than 240 Affiliate and Associate Affiliate members of the NCCMP encompass plans and plan sponsors in every major segment of the multiemployer plan universe. The NCCMP is a nonprofit organization.

At the outset, the NCCMP would like to express its support for H.R. 1102 ("the bill" or the "Portman-Cardin bill"). The NCCMP particularly appreciates the explicit consideration and thoughtful attention given to issues specifically relating to multiemployer plans and to the advances that the bill would make in promoting defined benefit pension plans, which we believe provide the strongest promise of real retirement income security for working Americans.

This statement focuses on selected provisions of the bill having particular relevance for NCCMP affiliates, and supplements our March 23 written and oral testimony in support of the bill's reforms in Code[1] section 415 limits as they apply to multiemployer plans.

1. Section 415 Limits

a. The Dollar Limit

The NCCMP has long supported relief from the dollar limits under Code section 415 and strongly supports the proposal in the bill to raise the retirement-age dollar limit on annual benefits from $130,000 to $180,000. Although $130,000 is currently far higher than all but the rarest pension under a typical multiemployer plan benefit, the limit does present problems when it is actuarially reduced for early retirement in the manner currently required by the Code

Many multiemployer plans offer unreduced or subsidized pensions after what amounts to a full career in the industry, such as 25 or 30 years. These plans typically cover people whose jobs involve very physically demanding work (such as roofers, ironworkers, carpet-layers and other construction workers), who may have started

[1] All references to the Code shall be to the Internal Revenue Code of 1986, as amended.

working in the industry directly from high school. Under these circumstances, it is often unrealistic for a plan participant to expect or try to work much past his early or mid-fifties. Because these multiemployer plan participants commonly retire ten to fifteen years or more before Social Security retirement age, the required actuarial adjustment under section 415 can dramatically reduce the pensions they are allowed to receive. Because of this drastic reduction, multiemployer plan participants who are no longer physically able to maintain full-time employment must retire with incomes well below what they have earned through years of hard work.

For these reasons, we have long supported the bill's proposal to treat multiemployer plans like the plans of government and tax-exempt organizations for purposes of applying the section 415 limits to early retirement. Currently, the plans of government and tax-exempt organizations are subject to a floor below which the section 415 dollar limits may not be reduced when adjusted for early retirement. The bill proposes amending Code section 415(b)(2)(F) to establish that the actuarial reduction for early retirement under those types of plans cannot reduce the dollar limit below $130,000 per year for benefits beginning at or after age 55, and the actuarial equivalent of $130,000 per year at age 55 for benefits beginning before age 55. This provision would do a great deal to alleviate the harsh effects of the dollar limit on multiemployer plan participants who retire early.

b. The Compensation Limit

The NCCMP has also long supported, and now embraces, the bill's proposal to exempt multiemployer plans from the compensation limit under Code section 415. Code section 415(b)(1)(B) limits the benefits that can be paid in a year to the average of the participant's compensation for the three consecutive calendar years in which compensation was the highest. The compensation limit can have a particularly harsh effect on lower paid participants in multiemployer plans. Because multiemployer plans typically base a participant's annual retirement benefit on the worker's total covered service and do not take compensation into account, a low paid worker who has worked in the trade for many years may end up with a benefit that exceeds the average of his highest three years of compensation. Limiting the benefits of these workers—the lowest paid workers—runs counter to section 415's overall purpose of preventing highly paid employees from sheltering too much money in pension plans.

Also, the working patterns of participants in multiemployer plans differ from those of participants in single-employer plans such that the average of the three highest years of compensation may result in an artificially low amount. In the typical single-employer context, the steady increase of wages due to inflation means that a participant's highest paid three years will often be his last three years. However, participants in multiemployer plans, particularly in physically demanding industries, may find it difficult as they grow older to find steady or continuous work. As a result, the highest three years of compensation may have been many years ago when the participant was younger and able to work more steadily. In that case, however, the participant is deprived of the increases in wages occasioned by inflation over the years. Even if the worker has been able to avoid physical debility, work in these industries is often episodic. A worker's best years may be interrupted by breaks that keep them from being consecutive. Again, application of the section 415 limits to multiemployer plans turns the policy behind section 415 on its head—rather than protecting against abuses by high paid workers, the limits deprive lower paid workers of the full benefits they have rightfully earned.

c. Aggregation

The bill also provides that multiemployer plans need not be aggregated with any other plans for purposes of applying the section 415 limits. The NCCMP would welcome this change because it would make the section 415 limits much simpler to administer. Under current Treasury regulations, multiemployer plans are not required to be aggregated with other ***multiemployer*** plans for purposes of applying the section 415 limits. The Treasury regulations acknowledge that multiemployer plan sponsors would face enormous administrative difficulties (and substantial expense) if required to identify every contributing employer for whom a participant worked in order to ensure that a benefit paid to the participant does not violate section 415. The bill codifies this administrative simplification and extends it such that multiemployer plans need not be aggregated with single-employer plans either for purposes of the section 415 limits.

This change in the rule would be particularly helpful in the context of applying the ***de minimis*** rule under section 415 which permits plans to avoid section 415 testing for benefits under $10,000 per year. Under the rule proposed in the bill, plans could simply pay these small benefits without incurring the substantial administrative costs involved in determining whether the participant had ever been covered by, for example, a 401(k) plan of the employer.

d. Defined Contribution Limit

The NCCMP also supports the proposal in the bill to increase the compensation limit for defined contribution plans to 100% of compensation. In multiemployer defined contribution plans, employers typically agree to make the same hourly contribution for all covered employees, regardless of what each of them is paid. Further refinement of the contribution obligation would create confusion and expense for contributing employers, who are often small companies that do not have sophisticated payrolls systems. The defined contribution compensation limitation poses a problem in the context of multiemployer plans that cover people at widely different pay levels, such as apprentices and journeymen. Since they are just learning their craft, apprentices are paid substantially less than journeymen. When the same dollar amount of contributions is credited to their plan accounts, it represents a larger percentage of their section 415 compensation. The plan administrator is not in a position to monitor or alter the contribution in order to ensure that it stays within the 25% of compensation limit. It is certainly an unfortunate anomaly that this limit prevents the lowest paid workers from taking full advantage of contributions made on their behalf to defined contribution plans. This example is just one of many which illustrates that increasing the benefit limits for multiemployer plans will provide greater retirement benefits to lower paid, rank and file workers, rather than focusing primarily on benefits for wealthy executives, professionals, business owners, and the others for whom the limits were intended.

e. Conclusion

Relief from the section 415 limits has long been a major priority for the NCCMP and we very much appreciate the thoughtful treatment these issues receive in the Portman-Cardin bill. The changes proposed would go a long way towards relieving workers from the harsh limits that have often prevented them from receiving the full benefits they have worked so hard to earn.

1. Deduction Limits

We support the proposal in the bill to give multiemployer plans the same right as single-employer plans to override the general deduction limits under section 404 of the Code and fund up to the amount of "unfunded termination liability (determined as if the proposed termination date referred to in section 4041(b)(2)(A)(i)(II) of the Employee Retirement Income Security Act of 1974[2] were the last day of the plan year)." The NCCMP believes that allowing deductible contributions to be made in an amount sufficient to insure full funding, as measured by a readily identifiable actuarial standard, is a positive change that will protect the sound funding of multiemployer pension plans. It may be advisable to confirm in legislative history that single-employer Title IV termination liability (otherwise inapplicable to multiemployer plans), rather than some adaptation of the special Title IV rules applicable to multiemployer plans (regarding withdrawal liability), is nonetheless the standard for determining this deduction limit. The single-employer measurements will be much more readily determinable and therefore less expensive and confusing to apply.

[2] Hereinafter "ERISA."

The bill also contains two provisions relating to the deduction limits for profit-sharing plans. First, the bill proposes to exclude from the section 404 deduction limits elective deferrals under 401(k) plans. Second, the bill increases the maximum deductible amount for contributions to stock bonus and profit-sharing trusts from 15% to 25% of compensation with compensation defined to include elective deferrals. The NCCMP supports both of these proposals. Multiemployer plans offer many types of benefits to their participants, and we applaud these increases in the deduction limits because they will remove impediments to the establishment of multiemployer capital-accumulation, 401(k) and other savings plan in industries where the union and employers agree that such arrangements are appropriate.

2. Vesting Upon Partial Termination

Like many others, the NCCMP has long recognized that the Code's partial termination rules are inappropriate for multiemployer plans, and therefore typically inapplicable to them. Therefore, we strongly support the bill's provision to codify a formal multiemployer plan exemption from the Code's requirement that upon a partial termination, affected participants become vested to the extent the plan is funded.

Generally speaking, a partial termination occurs when an employer excludes a substantial portion of a plan's participants from plan coverage. In multiemployer plans, of course, the actions of any one employer do not affect the broader base of plan coverage, or the opportunity of the people who worked for that employer to continue their coverage under the plan by taking a job with another contributing employer—or, often, with an employer elsewhere in the country that contributes to another multiemployer plan with which the first plan is linked through a reciprocity agreement.

Even looking beyond the circumstances of individual workers and employers, given the cyclical, even seasonal, nature of the industries in which multiemployer plans are most frequently encountered, a drop in coverage for a substantial number of participants at any given time may be temporary (such as, for instance, upon completion of a major local construction project). The affected employees may well return to plan coverage when work in the area again picks up. Participants may move in and out of a given plan's jurisdiction throughout their careers, as the level of available work covered by the plan rises and falls with market conditions. Among other things, it could be very difficult to determine when a multiemployer plan has experienced the permanent substantial decline that is the hallmark of a partial termination.

Furthermore, multiemployer plans do not present the potential for abuse that the partial withdrawal rules were meant to foreclose. The partial termination rules were intended to prevent discriminatory plan funding and abusive reversions of plan assets to employers. This possibility does not exist in the context of multiemployer plans because these plans are, by definition, broad-based in their coverage—those remaining in the plan are rank and file workers, just like those leaving the plan—and the Taft-Hartley Act and ERISA prohibit reversions of assets to employers contributing to multiemployer plans.

3. 401(k) Safe Harbor—Definition of Compensation

The NCCMP supports the proposal to revise the definition of "compensation" used for purposes of the 401(k) safe harbors. To make 401(k) savings opportunities fully available to multiemployer groups, the ADP tests have to be reasonably adapted to the administrative capabilities of multiemployer plans. Multiemployer plan benefits are rarely directly related to participants' pay and plan administration is wholly independent of the contributing employers and their payroll systems. As a result, it would be difficult and expensive for multiemployer plans to try to obtain full compensation data on all eligible employees, and would create new reporting burdens for the contributing employers. Without an accommodation of some type in the comparative deferral testing required for 401(k) plans, many multiemployer groups might find themselves barred, as a practical matter, from using that type of retirement savings program. Given the egalitarian nature of multiemployer plan coverage and benefit formulas, the safe harbor based on a 3% of compensation employer contribution for everyone offers, in concept, the perfect solution.

Contributions to multiemployer plans, however, are typically based on regular hours. Most plans can determine the negotiated wage level for a regular hour of work based on the applicable collective bargaining agreements. Participants' compensation, on the other hand, may include premiums for overtime and other irregular compensation. Identifying those hours and calculating total compensation in a way that gives proper weight to the hours of premium pay would be next to impossible for a plan. The bill proposes to define compensation, for 401(k) safe harbor purposes, in a manner that allows the exclusion of "all irregular and additional compensation." This would make it clear that multiemployer plans can use the 401(k) safe harbors based on a definition of compensation which can be determined on the basis of data that is reasonably available to them.

4. Tax Credit for Establishing Qualified Plans

The NCCMP supports the proposal in the bill to provide a tax credit for small employers who adopt qualified plans. The NCCMP applauds this effort to encourage employers to contribute to their employees' retirement and wants to ensure that otherwise eligible small employers who adopt multiemployer plans will be entitled to receive such tax credits. The proposal speaks in terms of the costs of establishing a plan in a way that appears to contemplate the creation of a new plan rather than signing up for an existing plan. Of course, we assume that the intent is to provide the credit regardless of the manner in which the employer introduces the qualified plan coverage, for example, even if the employer subscribes to an existing prototype plan.

Unlike the typical single-employer plan, the costs associated with setting up and running a multiemployer plan are embedded in the employer contribution rates, as it is those contributions, plus fund earnings, that pay for plan operations. The individual employer in a multiemployer pension plan generally does not incur significant ***direct*** administrative expenses in connection with adopting a multiemployer plan, other than whatever systems adjustments they must make to be sure that they calculate and pay the required contributions properly and timely. Although plan administrative expenses are not assessed to each employer separately, these costs are no less real to small employers adopting multiemployer plans and those employers should not forfeit the tax credit solely because of the collectively bargained and financed nature of the plans they offer. Consequently, we suggest that the legislative history clarify that, for eligible employers adopting multiemployer plans, the plan's administrative costs may, if calculated as a percentage of required contributions for the plan as a whole, be treated as "qualified startup costs" within the contemplation of the proposed tax credit. (This overall percentage would be multiplied by the employer's actual contributions during the applicable period to establish "qualified startup costs.")

5. Benefit Statements.

At present, multiemployer plans are exempted by ERISA from the obligation to provide, upon the request of the participant, a benefit statement showing the participant's total benefits accrued and the portion of such benefits which are vested (or the earliest date on which they will become vested). It is more difficult for multiemployer than for single-employer plans to issue such statements because multiemployer plans frequently do not have ready access to all of the information necessary to calculate an individual active participant's total accrued and vested benefits, including, especially, verified records of service with different contributing employers during different time intervals and at different contribution levels (all of which may yield differing benefit accruals). Some plans use validated statistical data for funding, but verify individual covered service and other variables only at the time of retirement.

The new reporting requirement could increase administrative burdens and costs for NCCMP affiliates. Nevertheless, we support the goal of making retirement income information available to workers while they still have time to adjust their financial planning. To accommodate the multiemployer plan data dilemma, we would propose that there be included in the legislative history confirmation that multiemployer plans may include with the requested benefit statement a disclaimer indicating that the statement is based upon the information reasonably available to the plan at that time and that the participant's actual benefit may be different once all relevant facts are determined.

6. Permissive Aggregation of Collectively Bargained and Non-Collectively Bargained Employees for Non-Discrimination Testing

The NCCMP supports the proposal in the bill to permit employers to aggregate the pension coverage they provide for collectively bargained employees with coverage under plans for non-bargained employees for purposes of showing that their non-bargained plans meet the minimum coverage requirements of Code section 410(b). We believe that the current rule requiring disaggregation of bargained and non-bargained employees in all cases is unfair to employers who contribute to pension plans for their collectively bargained workers, since they cannot take that coverage into account when the IRS judges the nondiscriminatory nature of their other pension plans. We do not believe an employer providing pensions for its rank and file workers should get credit for that coverage if those workers are ***not*** represented by a union, but not get credit when they are.

Of course, it should be made clear that this permissive aggregation in no way affects the fact that, under Code sections 401(a)(4), 410(b) and 413(b), as implemented by the applicable Treasury regulations, retirement plan coverage for collectively bargained employees is treated as automatically meeting the general discrimination and minimum coverage standards.

7. Retirement Planning Services

The NCCMP strongly supports the bill's proposal permitting employers to provide retirement planning services to their employees on a tax-free or salary-reduction basis. The NCCMP applauds any effort to foster employees' understanding of their future retirement income needs.

8. Suspension of Benefits Notices

The NCCMP welcomes, in certain circumstances, the additional flexibility afforded by the proposal in the bill permitting the suspension of benefits notice requirements under ERISA section 203 to be met by a description in the summary plan description. We endorse this proposal, however, only as it applies to participants who continue working past normal retirement age without interruption. With respect to these participants, it does not makes sense to issue a notice that benefits have been suspended when the participant has not yet begun receiving benefits and, because he was still working, did not anticipate that benefits would commence. On the other hand, participants who retire, commence receiving benefits, and then subsequently return to work, may be surprised if benefits stop. We believe that responsible plan administration would call for a separate, contemporaneous notice to affected re-employed retirees, explaining that their benefits are being suspended. Some additional leeway on the precise timing of that notice, though, would be welcome, particularly in multiemployer cases where the plan may not learn of the retiree's return to prohibited employment until several months after the fact.

9. Effective Date

Section 101 of the bill, which generally increases various dollar limits, has a delayed effective date for collectively bargained plans: the later of the January 1, 2000 or the date on which the current collective bargaining agreement expires but no later than January 1, 2004. The NCCMP appreciates the sensitivity of the bill's drafters to the general need for sponsors of collectively bargained plans to have advance warnings so that they can adapt to new rules when they next have the opportunity to bargain over benefits and compensation. Here we suspect that the delayed effective date is intended to protect collectively bargained plans against an abrupt change in required funding as the ceiling on benefits is lifted. However, because we doubt that this will be a problem for the majority of multiemployer plans and we know how eagerly their participants and retirees await section 415 relief, we suggest that the bill allow the sponsors of collectively bargained plans to apply the new limits earlier, while keeping the delayed outside date for those plans for which the change might cause a problem.

For the multiemployer plan participants who are affected by the section 415 limits as they apply to early retirement, it seems unduly harsh to force them, in every case, to live through several more years of underpayments even when their plans can afford to restore their full benefits. In the majority of cases, the percentage of retiring participants in any given plan who would be affected by the 415 limits is likely to be small enough that no significant funding issues will be raised by the change in the benefit limits. In the event the changes in the section 415 limits would create a funding issue for the plan, plan sponsors could choose not to elect the earlier effective date so that they have an opportunity to negotiate the necessary funding.

Congress took a very similar approach to the one we suggest in establishing the effective date of the GATT rules for calculating lump sum benefits—plan sponsors had to comply by an outside date, but could choose to do so earlier.

*   *   *   *   *

The NCCMP appreciates the opportunity to submit this statement on the provisions of the Portman-Cardin bill which are of particular importance to multiemployer plans. Please contact the NCCMP at (202) 737-5315 if you have any questions or would like additional information.