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Collection Name FIELDING, FRED: FILES

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File Folder CABINET COUNCIL ON LEGAL POLICY 02/10/1983

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TELES

27

DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	MEMO	PETER RUSTHOVEN TO FIELDING RE 2/10/83 MEETING OF CCLP (PENSION EQUITY ISSUES) THE ABOVE DOCUMENT IS PENDING REVIEW IN ACCORDANCE WITH E.O. 13233	3	2/15/1983	<i>Open</i> <i>11/13/09</i> <i>KDCC</i>

Freedom of Information Act - [5 U.S.C. 552(b)]

- B-1 National security classified information [(b)(1) of the FOIA]
- B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 2-9-83 NUMBER: 077792CA DUE BY:

SUBJECT: Cabinet Council on Legal Policy - February 10, 1983 2:00 p.m.

Roosevelt Room

	ACTION	FYI		ACTION	FYI
ALL CABINET MEMBERS	<input type="checkbox"/>	<input type="checkbox"/>	Baker	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Vice President	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Deaver	<input type="checkbox"/>	<input type="checkbox"/>
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Attorney General	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Jenkins	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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			CCNRE/Boggs	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: There will be a meeting of the Cabinet Council on Legal Policy Thursday, February 10, 1983 at 2:00 p.m. in the Roosevelt Room. The Agenda and paper is attached.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☒ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

THE WHITE HOUSE
WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

February 10, 1983

2:00 p.m.

Roosevelt Room

AGENDA

1. Pension Equity for Women (CM#297)

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D. C.
20210

CM # 297

FEB 8 1983

MEMORANDUM FOR: CABINET COUNCIL ON LEGAL POLICY

FROM: RAYMOND J. DONOVAN
Secretary of Labor



SUBJECT: Recommendations of the Working Group
on Equal Pension Benefits

On January 26, 1983, the Cabinet Council on Legal Policy met to discuss whether and how to require employers to provide equal pension benefits to similarly-situated men and women. The Attorney General and other members of the Council expressed a desire to resolve the matter as quickly as possible. In order to assist this process, the Manhart Working Group, chaired by T. Timothy Ryan, Jr., convened last week to formulate its recommendations on what position the government should take on the equal benefits question.

This memorandum discusses the views and concerns of the Working Group on the following topics:

- ° Whether pension benefits need be equal for similarly-situated men and women;
- ° how an equal benefits approach should be implemented; and
- ° what avenue should be used for effecting any policy decision.

(1) Whether Pension Benefits Need Be Equal for Similarly-Situated Men and Women

In the main, the Working Group members believed the government should adhere to the position expressed to the Supreme Court in the Spirt case that pension benefits generally

should be equal for men and women. The bases for the various agency conclusions ranged from the view that this position was legally and equitably necessary, to more pragmatic policy concerns for the government. Several agencies, however, such as the Council of Economic Advisers (CEA), questioned whether women are in fact discriminated against when they receive smaller periodic payments of equal actuarial value. It was noted that the circuit courts are divided on this issue, and the Supreme Court has not yet ruled on the matter.

Most of the Working Group members recommended that the government's position on equal pension benefits leave open the possibility that employers could provide unequal forms of pension benefits so long as other, equal benefit forms were also offered (referred to as the "equal normal" rule, or the "open-market" exception). The Supreme Court, it was noted, has the opportunity to adopt this approach in the Norris case.

(2) How the Equal Benefits Approach should be Implemented

As noted in our January 17 memorandum (at 7-10), the Working Group has focused on four options for implementing an equal benefits policy:

- ° Requiring that total benefits of future retirees be calculated using sex-neutral actuarial tables.
- ° Requiring the topping up of benefit payments of the disfavored class.
- ° Requiring the use of sex-neutral tables to calculate benefits attributable to future service, and topping up for benefits attributable to past service (a hybrid approach).
- ° Requiring the use of sex-neutral tables for benefits accruing in the future.

With the exception of two members (whose concerns are described below), the Working Group was of the view that only future accrued benefits should be equalized (option four). This approach was thought to best balance the employees' individual Title VII right with the financial needs and ERISA concerns of pension plans. CEA additionally suggested that any retroactive equalization might well constitute an unconstitutional taking of property--either from insurance companies or pension plans which had to fund the equalization, or from the disfavored sex whose accrued benefits might be reduced.

Treasury neither rejected nor embraced the fourth (or any other) option. It did, however, express the opinion that it might be inappropriate for the government to adopt a position which would cut back the extent of relief some courts are now granting (as the prospective sex-neutral approach would do).

EEOC, while agreeing that the prospective sex-neutral option may be theoretically appropriate in some circumstances, suggested that the government's aim should be to accord victims of discrimination the fullest possible relief in any given case. EEOC felt that the possibility of according such relief should be left open and the selection of the preferable remedy should be decided on a case-by-case basis in light of all the relevant circumstances (including affordability).

All the other members of the Working Group supporting the fourth option felt strongly that the approach should be implemented across-the-board, rather than on the case-by-case basis suggested by EEOC. Two reasons were noted: (1) if prior experience is any indicator, the lower courts--which would be largely responsible for determining any remedy under the case-by-case approach--are unlikely to limit relief to a purely prospective basis, and (2) if the extent of retroactive liability turns on the financial capability of a given plan, in effect plans which have been well-managed would be penalized for this fact, and those which have been poorly managed would be rewarded. 1/

(3) What Avenue Should Be Used

The Working Group has not formulated a position on whether an equal benefits rule should be pursued in the regulatory, legislative, or litigative arenas. 2/ There are nonetheless

1/ Notwithstanding their substantive endorsement of the sex-neutral prospective option, several agencies (e.g., Justice, CEA) noted that political criticism was likely to be forthcoming from the women's groups. These groups would predictably view the government's adoption of this option as a retreat from the position it expressed in Spirt and from the President's support of sex equity in his State of the Union address. (Discussed in text that follows.)

2/ Several agencies expressed preliminary views on this matter. The Department of Justice has expressed a concern with respect to the propriety of introducing legislation before the Supreme Court has acted in Norris and Spirt (because such action might suggest that Title VII does not currently authorize the approach described in the bill). The Labor Department believes a legislative strategy could be crafted so as to avoid this difficulty.

three recent developments which the Working Group wanted to bring to the Cabinet Council's attention:

- ° The press release issued by the White House in conjunction with the President's State of the Union Address stated that "Legislation to remedy inequities based on sex discrimination under Title VII in employer pension systems will be submitted [by the Administration] later this year."
- ° Congressman Florio has scheduled hearings for February 22-24 on H.R. 100, which would require equal benefits in all forms of insurance on a partially retroactive, topping up basis. The Congressman has invited the Administration to testify on his bill on February 22. Those hearings would of course present a visible forum for expression of the government's views.
- ° On January 26, Senator Dole introduced S. 19, a bill similar but not identical to the pertinent sections of S. 888, which would amend ERISA "to assure equality of economic opportunities for women and men under retirement plans." The bill has been jointly referred to the Committee on Labor and Human Resources, and the Committee on Finance.

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 2-10-83 NUMBER: 077792CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - Thursday, February 10, 1983

2:00 p.m. in the Roosevelt Room

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REMARKS: The Cabinet Council on Legal Policy will meet, as previously announced, Thursday, February 10, 1983 at 2:00 p.m. in the Roosevelt Room. An additional paper is attached.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☒ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

MEMORANDUM

COUNCIL OF ECONOMIC ADVISERS

February 10, 1983

MEMORANDUM FOR THE CABINET COUNCIL ON LEGAL POLICY

FROM: William A. Niskanen ~~W.A.N.~~

SUBJECT: The Effects of Requiring Gender Neutrality
in Prospective Pension Benefits

I have attached a brief paper on "The Economics of Requiring Gender Neutrality in Prospective Pension Payments." This paper was prepared by Tom Kniesner of the CEA staff. The basic conclusion of the paper is that a strictly prospective gender neutral standard would yield no benefits to women and only small long-term costs. Both the benefits to women and the total costs would be substantially larger if the effective action requires employers to pay higher total pension benefits to women.

A copy of the recent Fortune article on this general issue is also attached for your interest.

Attachments (2)

The Economics of Requiring Gender Neutrality in Prospective Pension Payments

I. Background

Pension plans currently structure their benefits in one of the two following ways:

(1) Defined-Contribution Plans - Here the employer makes contributions which are allocated to individual employees' accounts. When an employee retires, he or she is entitled to the benefit that can be purchased by the account balance. The normal form of benefit under this type of pension plan is a lump sum, the amount which has accumulated in the individual's account (including his or her own contributions plus interest). This benefit is typically equal for similarly situated men and women and no question of sex discrimination arises. However, defined-contribution pension plans frequently offer the option of converting the lump sum to an annuity. (Approximately 60 percent of defined-contribution plans currently offer an annuity option.) Many participants (74%) have their benefits converted with a sex-based actuarial table. Because women as a group live longer, their benefits will on average be paid over a greater number of years than men. As a result, annuity option purchased by a given lump sum provides smaller monthly benefits for a woman than for a similarly situated man.

(2) Defined-Benefit Plans - Here an employer provides a specified benefit form and amount upon retirement. This type of pension is the sole or primary pension for approximately 90 percent of employees in the private pension system. The typical benefit received under this type of plan is the single life annuity, in which the same amount is paid to similarly situated male and female retirees. In this case, no sex discrimination issues arise. However, the defined-benefit plan may provide certain optional forms of benefits to employees such as a joint and survivor (J&S) option. (ERISA currently requires defined-benefit plans to offer retirees the J&S option.) These optional benefits are typically based on actuarial values of the normal benefits, and sex segregated actuarial tables are frequently used to determine the value. (Currently about 45 percent of participants in defined-benefit plans are subject to sex-based benefit conversion tables.) Because women outlive men on average, when a female retiree elects a joint and survivor annuity, her monthly benefit is reduced by less than is the monthly benefit of a similarly situated male retiree.

The basic issue at hand surrounds the fact that gender is an accurate and inexpensive predictor of mortality at time of retirement. Recent estimates are that a man who is 65 years old can expect to live about another 14 years whereas a woman who is 65 can expect to live almost another 19 years. Moreover, despite the casual impression that women are becoming more like men in terms of labor market behavior, career goals,

and bad health habits, the sex difference in life expectancy at age 65 has been growing over time. In particular, in 1940 there was very little sex difference in life expectancy at age 65. A 65 year old male could expect to live 12 more years whereas a 65 year old female could expect to live approximately 13.6 more years.

This paper summarizes some key economic effects of requiring (prospectively) that (1) retirees with defined-benefit pension plans who take the J&S option receive equal monthly payments and that (2) retirees with a defined-contribution pension plan who take annuities receive equal monthly payments. The focus is on the economic impact of such requirements on (a) insurance companies' pension plan offerings and (b) employers' wage and employment practices. This paper is intended to serve as a complement to the cost calculations displayed in the study by the Department of Labor entitled, "Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits."

II. Requiring Gender Neutrality in Prospective Pension Payments: Defined-Contribution Plans

The economic forces at work can be best seen in the context of a simple numerical example. Consider a typical defined-contribution plan that offers a lump sum payment that is equal for males and females of similar salary and service and, in addition, offers the option to convert this lump sum to

an annuity using a sex-based table. Assume that all retirees are unmarried, so that joint and survivor (J&S) options can be ignored. (The J&S option will be of crucial interest in our later discussion of defined-benefit plans.) In this example, females who reach age 65 will live 18 more years on average and males will live 14 years on average. Thus, annuity payments for women will be lower to adjust for the larger number of expected payments.

Suppose, for example, a male and female are each entitled to a lump sum equal to \$100,000. Using a zero rate of interest for simplicity, the male's annuity option would be an annual payment equal to \$7,140 ($= \$100,000/14$) per year. The female would collect an annuity equal to \$5,550 ($= \$100,000/18$). This example situation describes the typical annuity option in a defined-contribution plan as of now.

Suppose, though, that plans are required to provide identical annuity stream to men and women, as well as the option of (equal) lump sums. Suppose further that the new pension rules specifically require a plan to use a uni-sex actuarial table, which can be rated according to the actuarial experience of the plan. This means that if the plan is comprised of 50 percent males and 50 percent females, men and women aged 65 will each be treated as living 16 more years on average. In terms of the above example, males and females would now each receive \$6,250 per year ($= \$100,000/16$). The following economic implications are predictable:

Basic Economic Effects

1. Because annuities for males were previously based on 14 years of expected life, their annuities will be reduced (from \$7,140 to \$6,250). Because annuities for females were previously based on 18 years of expected life, their annuities will be increased (from \$5,550 to \$6,250).

2. The lump sum option then becomes preferable for males because they can take their lump sum to an insurance company and purchase an annuity based on their expected 14 additional years of life, rather than 16. That is, the lump sum is worth \$100,000. The revised pension annuity is worth only \$87,500 (14 years (expected life) times \$6,250). On the other hand, the annuity option is preferable for females because its present value exceeds the lump sum option. The lump sum option is worth \$100,000 to the females but the annuity is worth \$112,500 (18 years (expected life) times \$6,250). In short, males will initially tend to opt for the lump sum and females will initially tend to opt for the (uni-sex) annuity.

3. The reactions described in step 2 now cause a problem for the plan sponsor. If all males take the lump sum (which is equivalent to their total benefits under the status quo) but all females take the more favorable uni-sex annuity (which exceeds their total benefits under the status quo), the plan will experience a deficit. In the above example, each female

who takes the uni-sex annuity will collect an average of \$12,500 more (\$112,500 - \$100,000) than the sum of pension contributions made on her behalf.

4. The plan sponsor will not merely accept the deficit because this firm must compete with firms that do not pay pensions (and with male-dominated firms). Thus, to keep total wage plus pension payments in line, the plan sponsor must ultimately find a way to reduce the overall level of pension benefits.

The firm will therefore take one of three steps.

(i) The plan can adjust its uni-sex table on the basis of actual experience. Specifically, the plan in our example initially anticipated that the average length of life of its retirees would be 16 years. But since only females opt for the annuity, actual experience suggests that 16 years is unrealistically low. The plan can increase its expectation of how many years the average community recipient will live to 18 years. This means the annuity will become $\$100,000/18$, which equals \$5550 - exactly what females received before the new regulations were enacted.

(ii) Alternatively, the plan could anticipate the "selectivity" problems encountered above (i.e., females choose annuities; males choose lump sums) and simply set the uni-sex annuity equal to \$5550 from the start. In this case, no male

will ever opt for the plan annuity (males can obtain \$6250 annuities from insurance plans) and females will be indifferent between annuities offered by the plan and insurance companies. In this case, the firm avoids the short-term deficits experienced under scenario (i) above.

(iii) Finally, the plan could eliminate the annuity option entirely. In this way, males and females must purchase annuities from insurance companies using their lump sums. Because insurance firms use sex-based life tables, males and females will receive the same annuities as they do under the status quo. However, to the extent that insurance company costs are higher for single versus group annuities, retirees who choose the annuity option may now face less favorable terms in their annuity conversions than they did previously.

Summary of the Basic Economic Effects of Gender Neutral Prospective Payments in the Case of a Defined-Contribution Pension Plan

The net effects of the proposals can therefore be summarized as follows:

- o Females will not receive higher benefits than they do under the status quo.

- o Males will lose the option of choosing an annuity through the plan. They will ultimately purchase their annuities through insurance companies. If the plan reverts to a lump-sum-only option, all employees will lose the annuity option through the plan. To the extent that single annuities are less generous than group annuities, retirees will suffer reductions in their pension payments.
- o The plan sponsor will be no better or worse-off than before. Total pension costs should remain the same.

In sum, firms can ultimately avoid undesirable economic effects in (prospective) pension payments. Females will not receive higher annuity benefits, but pension plans will be disrupted in the short run and retirees may lose group annuity discounts.¹

¹ It is important to note that these conclusions, which indicate a fairly benign effect if the gender-neutral requirement for pension payments are changed dramatically, if additional constraints are introduced to force employers to ultimately pay women higher (total) pension benefits than men. In this case: (1) males will reduce their demand for pensions, leading firms in the long run to deemphasize pensions compared to cash wages, (2) firms will be induced to reduce female cash wages or to hire fewer women and more men, and (3) sex-segregated employers will be encouraged because males will be better off if they work for male-dominated firms where their pension incomes will not be substantially affected by transfer to females.

III. Requiring Gender Neutrality in Prospective Payments:
Defined-Benefit Plans

ERISA currently requires that the normal form of payment in a defined-benefit plan be a joint and survivor benefit. Individuals can currently "opt-out" of such a benefit structure to accept a pension without joint and survivor (J&S) protection. Approximately one-half of defined-benefit retirees now accept the J&S form of benefit payment.

Again, a numerical example is useful. To facilitate the calculations to follow, assume that the J&S payment made to a beneficiary upon death of a retiree is equal to the J&S payment made up to the time of the retiree's death. (In reality, the beneficiary's payment is less than the payment received to a living retiree.) Reasonable numbers for the purpose of our example are that the expected number of years of payment on a J&S is 19 compared to 14 years of expected life for a male-only payment stream and 18 years of expected for a female-only payment stream.

Now consider a male and a female with the same service and wage history. Without J&S, the male and female each receive \$6250 per year in the form of an annuity. The J&S annuity calculated as follows: the extra time that a male retirees' wife will outlive him is calculated - say four years; thus, additional payments of \$25,000 ($= 4 \times \6250) are expected to be made to those males who choose J&S. Female retirees' who

choose J&S are expected to add fewer payments to the regular payment because females generally outlive males. Suppose one year of extra payment is expected to be made to females who choose J&S. In this case, pension costs will increase by \$6250 when a female opts for the J&S.

The value of the J&S annuities, therefore, typically now differ between males and females. In particular, if the annual pension benefit of \$6250 is calculated on an expected lifetime for all retirees of 16 years (a likely value for a uni-sex life table in a firm with an equal number of males and females) male J&S annuities would fall to \$5000 ($20 \times \$5000 = \6250×16) and females' J&S annuities would fall to \$5880 ($\$5880 \times 17 = \6250×16). Under these conditions, male or female retirees receive the same total value of pension benefits (assuming the discount factor of zero) whether or not they take the J&S option.

Basic Economic Effects of Requiring Gender Neutrality in Prospective

Now suppose that the J&S payment must be equal for males and females. To satisfy this requirement, the plan sponsor in our example would be required to provide a J&S annuity somewhere between \$5000 and \$5880 per year. The result is that (a) females will be better off "opting-out" of the J&S option and (b) males will be better off "opting for" the J&S payment. This will cause a short-term problem for plan sponsors. If all

females opt out of the J&S option and all males opt for the J&S payment, plans will pay out more in total pension payments. Moreover, in the above example, males that take the J&S option will collect on average more than female workers who take the J&S option.

Summary of the Basic Economic Effects of Gender Neutral
Prospective Payments in the Case of a Defined-Benefit Pension
Plan

Plan sponsors will not simply accept the additional payments described above because they must compete with firms who do not pay pensions. In particular, employers will seek to keep total wage plus pension payments in balance by finding a way to reduce the overall level of pension benefits. A long-run (equilibrium) result should find:

- o The J&S option used only by males (the J&S annuity in terms of the above example will equal \$5000, the actuarial equivalent of a male accepting \$6250 without J&S protection).
- o Females will not choose the J&S option.
- o No one is better-off financially, and females are left without J&S protection for their spouses.

IV. Summary

The proposal discussed in this paper (gender neutrality in prospective payments) can be dealt with relatively easily, by the parties involved. This conclusion is also the opinion of eight prominent actuaries in their amicus brief concerning the Norris case.) Certain disruptions to pension plans will be experienced nonetheless. These disruptions will not be incurred without cost, but by incurring these costs, plans/plan sponsors can avoid even higher costs in the long run that will result if they do not change their plans. In addition, some options which are now available in most plans may be closed to certain (particularly male) participants. In exchange for these disruptions, no significant increases in pension amounts will be received by females. Thus, a cost will be incurred without any corresponding benefits. Finally, no substantial "supply-side effects" of the proposed changes on occupational choices are anticipated, unless the legislation (court action, regulation, etc.) also requires employers to pay higher total pension benefits to women.

INSURANCE AND THE PRICE OF SEX

■ One of the strangest issues you will have to make up your mind about this year is an entry that's usually labeled sex discrimination in insurance. At the moment, the moral high ground seems to be controlled by those who believe there's a big, big problem out there and that government must provide a solution. However, a case can be made for viewing the issue as a big, big nonproblem.

This is definitely not the view of Republican Senator Bob Packwood of Oregon, who is pushing a bill to end what he proclaims to be unconscionable discrimination by the insurance industry against women. His bill would also prevent the industry from discriminating on the basis of race, color, religion, or national origin, but since hardly anybody contends there is discrimination in these areas, virtually all the testimony in the Senate Commerce Committee has concerned sex. Packwood's bill was reported out of committee last fall but Congress never got to it in the hectic lame duck session, and so the Senator is starting over again this year. A similar bill has been introduced in the House by John Dingell of Michigan.

Also upset about sex discrimination in insurance is Solicitor General Rex E. Lee, who recently filed a brief attacking "sex-based actuarial tables," thereby lining up the Reagan Administration with the women's movement and numerous members of the judiciary who also don't like the tables. The tables, though, are innocent. They just reflect the reality that in certain matters highly relevant to insurance, men and women are, statistically speaking, very different. The tables show, for example, that on average women live longer than men; at age 60 a woman's life expectancy in the U.S. is 22.1 years, a man's only 17.1 years. Accordingly, insurers price insurance differently for men and women.

These differences in prices have been at issue in several major court cases in recent years. In 1978 the U.S. Supreme Court held that the Department of Water and Power in

Los Angeles violated the 1964 Civil Rights Act by requiring women to make larger contributions to a pension plan to get the same monthly benefits men got. A related case out of Arizona will be coming before the Supreme Court this year. The issue in that one is whether women must settle for smaller monthly benefit checks from a deferred-compensation plan though women and men had made equal contributions to it over the years.

IT IS PERHAPS not surprising that the American Association of University Women, the National Women's Political Caucus, the Coalition of Labor Union Women, and other "movement" organizations are backing such lawsuits, but there are some anomalies in the movement's support of the Packwood bill. One anomaly is discernible in that chart on the facing page, which makes it clear that the insurance industry's present systems of sex classification *favor* women much of the time.

Indeed they may favor women on balance. Testifying before Packwood last summer, Mavis A. Walters, a member of the Committee on Risk Classification of the American Academy of Actuaries, stated that the Senator's bill would have these effects: "Women would pay more for life insurance; men would pay less. Women would pay less for annuities; men would pay more. Women would pay more for auto insurance; men would pay less. Women would pay less for disability insurance and men would pay more." Taking one thing with another, she added, "our study has found that women

as a group will pay more for insurance if this bill is passed." George K. Bernstein, a witness representing the American Insurance Association at the hearings, put women's additional cost for automobile insurance alone at \$700 million a year. Asking himself why the movement was nevertheless supporting the bill, Bernstein said the only explanation he could think of was "ideology."

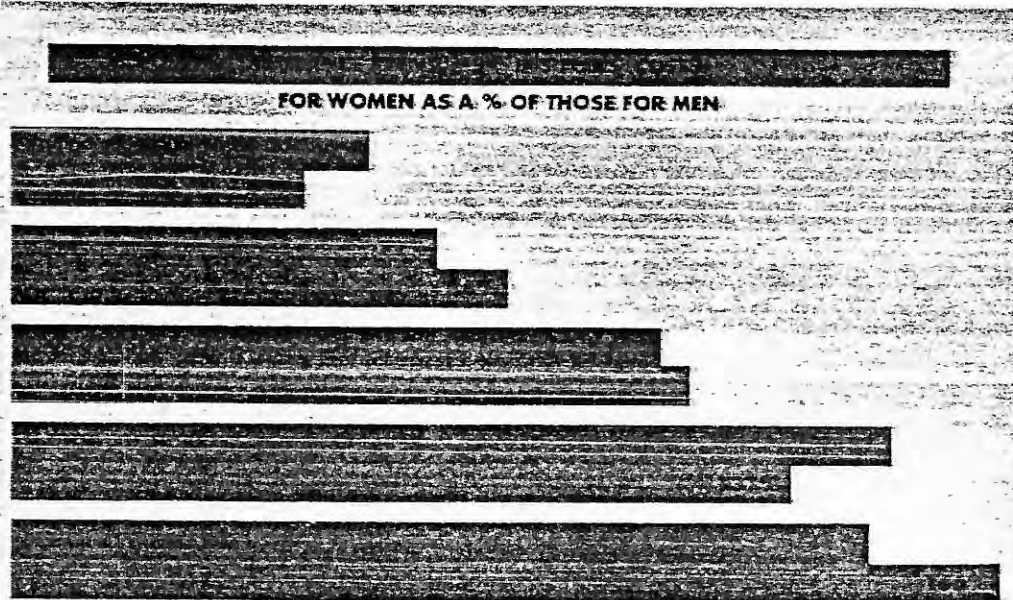
It's hard to see why anybody without an ideological slant should view the insurance industry's sex-based distinctions as discriminatory. If young women have fewer automobile accidents than young men—which they do—why shouldn't the women get a better rate? If the industry's experience shows—as it does—that women spend more time in the hospital than men, why shouldn't women pay more for health policies? If female mortality rates are lower than those for males—which they are, at every age from day one to year 100—why shouldn't females pay less for life insurance? And more for pensions and annuities? There is broad agreement that the industry's pricing reflects not bigotry but actual experience. So why should anybody view it as discriminatory?

Those inclined to the big, big problem view of the case have approached these questions in several ways. Some of them, including Packwood, see antidiscrimination laws in insurance as a natural follow-on to the laws that have successively banned sex discrimination in employment, housing, credit, and other areas. Having long since forgotten that the point of those other laws was to combat inaccurate and prejudicial stereotyping, they have now arrived at a mental way

station where discrimination is defined as any difference at all in the treatment of the sexes. In an effort to sustain this view, witnesses before the Packwood committee kept saying that it's unfair to discriminate on the basis of sex because sex is an immutable human characteristic: like race and color, they said, sex is something nobody can change (a slightly debatable point these days). But none of the witnesses ever explained why immutability should be a factor in actuarial decisions. People also can't control their ge-

action front. [In the course of arguing against quotas and other kinds of race-conscious preference, the Administration keeps saying that we have to get away from group rights and concentrate on individual rights. This is certainly a logical and commendable rule to apply to employment cases, but extending the rule to insurance just seems mindless. Insurance *requires* group classifications. It needs the law of large numbers to work with. Though nobody knows when a particular person will die, the law of large numbers en-

The insurance industry is naturally quite upset about the trend in the courts and the possibility of having to cope with the Packwood standards. The worst case for the industry would be a law, or a court decision, that required existing as well as future policies to conform to unisex standards in pricing. (Packwood apparently wants to cover existing policies, but he sounds as though the issue is negotiable.) By some industry estimates, the worst-case scenario would cost several billion for pensions alone to



Sources: American Council on Life Insurance, National Association of Insurance Commissioners, New York State Department of Insurance



netic heritage. If you're born with some life-threatening genetic defect, should you get insurance at the same price as someone who's in normal health?

HOWEVER, THE ULTIMATE confusion about sex-based discrimination resides in an argument that seems to be sweeping the country these days. It's the argument that prevailed in those California and Arizona cases and that has now been embraced by Solicitor General Lee. The argument proceeds as follows. We agree that women as a class live longer than men. However, we do not agree that an individual woman should be treated as a member of the class when it comes to writing insurance; she may, after all, die tomorrow, while a man her age may live for decades. Indeed, treating people as members of a class, rather than as individuals, is precisely what we mean by discrimination—and is precisely what was forbidden by the Civil Rights Act, at least with respect to classes involving race, color, religion, national origin, or sex.

In buying this line of argument, the Reagan Administration has plainly been influenced by its encounters on the affirmative-

Equal They're Not

Sex is here to stay—at least in the facts-of-life statistics that underlie differences in insurance prices for men and women. Ranged against the efforts to require unisex pricing are some stubborn realities. One is that men and women have different life expectancies at all ages, which implies different costs for carriers offering life and annuity policies. Another is that men and women behave differently, which affects the costs of auto, major medical, and disability insurance. (The chart data for auto insurance pertain to drivers under 25. The data for annuities pertain to age 65. For the other categories, the age is 45.)

ables us to predict with considerable accuracy when an average member of a group will die. In agreeing that women as a group live longer, but insisting that it's unfair to apply this fact to individual cases, the courts and the Administration have stepped into a huge intellectual bog. Presumably we are all agreed that the insurance industry is entitled to classify people by age. But the argument that we must view people as individuals, and not as members of a class, could also be applied to age classifications. After all, some young people die early and some old people just get a lot older.]

bring benefits for women up to male levels.

Packwood himself thinks the true cost for additional pension benefits would be much lower, probably more like \$500 million, "a relatively minor amount," he says, when measured against the industry's assets. He also likes to speculate that the industry might go unisex without his bill. "If one or two of the major companies were to crack," he said hopefully the other day, "the rest would go like a dam with a hole in it."

■ Insurance executives are divided on the effect unisex pricing would have on the terms and availability of policies offered in the future. Coy Eklund, the chairman of Equitable Life Assurance and a consistent out-front supporter of the women's movement, says he "could accept" a public policy decision to go unisex. Other students of the subject believe that, overall, insurance premiums would rise, and that pension plans for companies with predominantly female employees might be hard to get. Meanwhile, the possibility that most insurance people find most attractive is a different one—the possibility that at some point the courts and Congress might discover there's no problem. **E**

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

✓
file
ccp

February 15, 1983

FOR: FRED F. FIELDING
FROM: PETER J. RUSTHOVEN *PJR*
SUBJECT: February 10, 1983 Meeting of
Cabinet Council on Legal Policy
(Pension Equity Issues)

On Thursday, February 10, 1983, I attended in your stead a meeting of the Cabinet Council on Legal Policy. The meeting, chaired by Deputy Attorney General Ed Schmults, was devoted to pension equity issues. No substantive decisions about the Administration's position on pending or prospective legislation were made. A detailed summary follows.

Pending Legislation -- S. 888 and S. 19

The first portion of the meeting was a continuation of Labor Solicitor Tim Ryan's description of S. 888, "The Economic Equity Act of 1981 [sic]," introduced by Senator David Durenberger (R.-Minn.), and S. 19, "The Retirement Equity Act of 1983," introduced by Senator Robert Dole (R.-Kan.). Both bills would amend relevant portions of ERISA and the Internal Revenue Code relating to private and Government pension rules. The provisions of these bills (and the essence of Ryan's presentation) are summarized in the materials attached at Tab A. The only gloss I would add is that Senator Dole's bill appears to be somewhat less ambitious (and less intrusive in terms of its effects on private and State interests) than does Senator Durenberger's.

Alleged "Sex Discrimination" in Pension Plans

The next portion of the meeting was devoted to discussion of the various approaches to eliminating alleged "sex discrimination" in pension plans (i.e., "discrimination" based on taking into account the actuarial fact that women have longer life expectancies than men). As you know, the possible "remedies" one could adopt, involving various mixes of retrospective and prospective "relief," have been the subject both of various reports that are included in your files on this matter and of previous Cabinet Council meetings. Some of the issues involved

and the possible financial impacts of different "solutions" are summarized in the materials attached at Tab B. */

At this particular meeting, the bulk of the discussion was devoted to a paper and accompanying presentation made by William Niskanen of the Council of Economic Advisers on the "prospective only" approach. Both from the discussion and from my review of the materials in your file, it appears that this is the least costly and least disruptive proposal. Niskanen's paper (attached at Tab C) and presentation strongly indicate, however, that even this approach would have a number of unintended and disruptive effects on private pension plans, with the net result being that both men and women would not be better off (though other approaches, involving retrospective relief, would probably involve greater financial costs.) I strongly recommend that you review Niskanen's paper before the next meeting, if you have an opportunity to do so.

As a personal reaction, I would add that this entire area appears to be an example of the problems that seem inevitably to arise when market-based (and, in this case, actuarial) calculations are interfered with in pursuit of other goals. One gets the strong sense that it is impossible to "impose" certain outcomes in the pension area without causing some degree of planning and financial havoc in that field, whose results (even in terms of the external goals one is trying to advance) may be mixed at best.

It was agreed that the "Working Group" on this problem would continue to work, and would try to come up with more figures on possible financial costs of the alternative approaches.

Hearings Before Representative James Florio (D.-N.J.)

The final portion of the meeting was a discussion of what positions, if any, the Administration should take at hearings on pension matters scheduled by Representative Florio for February 22 and 23. The general consensus was that we should adopt an educational/"we're studying this" approach, since (a) it is unlikely that the House is as deeply into the issue, at this point, as we are; (b) we want to get across some sense of the scope and complexity of the problems; and (c) we do not want to get "out front" on any particular approach, in part because the politics are uncertain and in (larger) part because we are far from certain what approach merits support.

*/ These materials (and those at Tab A) were stapled and distributed in a different order at the meeting; I have rearranged them in what strikes me as a more logical fashion.

In this discussion, Labor Secretary Donovan appeared to be in favor of endorsing, to one degree or another, a "prospective only" approach; Transportation Secretary Dole (who at several points emphasized that this area was "the" issue for women's groups at this time) did not want us to commit to any specific approach. The Dole view appeared to be favored by Schmultz and, it seemed, by most others (though nothing was "put to a vote" or the like). Draft statements by Ryan (and perhaps others) are to be prepared and circulated in advance of the hearings.

Let me know if you have any questions or otherwise wish to discuss this further. Thank you.

Attachments

ECONOMIC EQUITY ACT OF 1981

(S. 888)

SECTION 102 — Joint and Survivor Annuity Requirements

SECTION 103 — Assignment and Alienation of Benefits

SECTION 104 — Lowering of Participation Age

SECTION 105 — Maternity/Paternity Benefits

SECTION 107 — Military Retirement

SECTION 108 — Civil Service Retirement

SECTION 102 JOINT AND SURVIVOR ANNUITY REQUIREMENTS

CURRENT LAW

- No Survivor Benefits Option Required Until Early Retirement Age or 10 Years Before Normal Retirement Age (Whichever Is Later)
- Election Out of Joint and Survivor Benefits May Be Made Without Spouse's Consent; 2-Year Rule

CHANGES UNDER S. 888

- Survivor Annuity Required Once Participant Has 10 Years Vesting Credit, Payable When Participant Could Have Received Benefits
- Survivor Benefit Presumed; Election Out of Survivor Benefit Only with Spouse's Consent; Repeal of 2-Year Rule

ADVANTAGES OF S. 888

- Added Protection of Survivor, but Additional Benefits Small if Participant Dies Young
- Elections May Be Carried Out Immediately; No Need to Wait Until Expiration of 2-Year Period

DISADVANTAGES OF S. 888

- Cost: \$92-255 Million for Additional Cost of Survivor Option

SECTION 103 ASSIGNMENT OR ALIENATION OF BENEFITS

CURRENT LAW

- General Prohibition Against Assignment or Alienation
- Exception Created Judicially for Court-Ordered Support and Alimony Payments

CHANGES UNDER S. 888

- Codification of Above Exception, on Condition that Court Order Does Not Alter Form or Amount of Payments

ADVANTAGES OF S. 888

- Eliminates Current Confusion
- Plan Need Not Be Party To Suit
- Added Benefits to Spouse

DISADVANTAGES OF S. 888

- Small Increase in Administrative Costs

SECTION 104

LOWERING OF PARTICIPATION AGE

CURRENT LAW

- Plan Can Limit Participation To Employees 25 or Over
- Even With Age 25 Requirement, Vesting Credit Given to Age 22 (If Working for Employer at that Age)

CHANGES UNDER S. 888

- Participation Required at Age 21

ADVANTAGES OF S. 888

- Additional Credit for Ages 21-25, When Women's Labor Force Participation Rate is Highest
- Small Additional Benefit Cost To Employers
- Aids Employees Who Stay With Employer from Age 21 Through Vesting Period

DISADVANTAGES OF S. 888

- Administrative Costs
- Little Actual Increase In Benefits To Women

SECTION 105

MATERNITY AND PATERNITY BENEFITS

CURRENT LAW

- Plan May Deny Service Credit if Employee Works Less Than 1,000 Hours in a Year
- No Break in Service Occurs if Employee Works 501-999 Hours in a Year
- No Credit Required During Unpaid Maternity or Paternity Leave and Break in Service May Occur

CHANGES UNDER S. 888

- Employees in Approved Maternity or Paternity Leave Programs Must Receive Credit of 20 Hours Per Week, Up to 52 Weeks, Toward Participation, Vesting and Benefit Accrual

ADVANTAGES OF S. 888

- Additional Accrual of Benefits and No Break in Service, Thus Helping Some Women Greatly
- Maternity Leave Treated Same As Veterans' Reemployment

DISADVANTAGES OF S. 888

- * • Cost May Result in Elimination of Leave Programs; No Cost Figures Available
- Would Help Only Small Numbers of People

SECTION 107

MILITARY RETIREMENT

CURRENT LAW

- Whether Military Retirement Pay is Subject to Divorce Settlement or Decree is Matter of State Law
- Marriage Must Have Lasted 10 Years
- Ex-Spouse May Receive Up To 50% of Disposable Retirement Pay

CHANGES UNDER S. 888

- Ex-Spouse Automatically Entitled to Benefits if Marriage Lasted 10 Years
- Share Related to Length of Marriage, Up to 50% if Marriage Lasted During Entire Military Career

ADVANTAGES OF S. 888

- Automatic Entitlement; No Court Order Required

DISADVANTAGES OF S. 888

- Reduction of Benefits to Military Personnel
- Cost; Figures Unavailable
- Military Ex-Wives Already Eligible for Social Security Dependent Benefits
- Interference With State Property Laws

SECTION 108 CIVIL SERVICE RETIREMENT

CURRENT LAW

- No Entitlement by Ex-Spouse to Federal Employee's Retirement Benefits, Except Under Divorce Decree or Property Settlement

CHANGES UNDER S. 888

- Similar to Changes as to Military Retirement

ADVANTAGES AND DISADVANTAGES OF S. 888

- Similar to Those as to Military Retirement

Retirement Equity Act of 1983

(S. 19, Senator Dole)

SECTION 2: LOWERING OF PARTICIPATION AGE

- Participation Age Lowered From 25 To 21 (Tracks S. 888)

SECTION 3: MATERNITY AND PATERNITY BENEFITS

- No Break In Service For A Period Following Childbirth
(Variable, Up To 1 Year)
- Unlike S. 888, No Participation, Vesting Or Benefit Accrual Required

SECTION 4: JOINT AND SURVIVOR ANNUITY REQUIREMENTS

- Election Out of Survivor Benefit Allowed Only With Spouse's Consent
- Unlike S. 888, No Change Made In
 - 2 Year Rule
 - Availability of Early Survivor Annuity

SECTION 5: ASSIGNMENT OR ALIENATION OF BENEFITS

- Exception To Anti-Alienation Rule Created For Court-Ordered Support and Alimony Payments (Largely Tracks S. 888)
- Unlike S. 888, Adds Rules Governing Distributions to Ex-Spouses
(e.g., Separate Life Annuities Required; Tax-Breaks Given)

ISSUES

- Must Employers Provide Equal Pension Benefits to Men and Women Despite Their Different Lifespans?
- If So, How Should This Requirement Be Implemented?

THE FORMS THAT PENSION BENEFITS GENERALLY TAKE

SINGLE LIFE ANNUITY

- Periodic Payments for the Rest of the Retiree's Life

JOINT AND SURVIVOR ANNUITY

- Periodic Payments Over the Lifetimes of the Retiree and His Surviving Beneficiary (Usually the Spouse)

LUMP SUM

- A Single Payment of the Total Benefit Owed the Employee

DEFINED CONTRIBUTION PLANS

WHAT IS DEFINED?

- Employer Promises to Set Aside a Specified Contribution for Each Worker

PORTION OF PENSION UNIVERSE INVOLVED

- 71% of the Plans in Operation are Defined Contribution Plans
- 35% of the Workers in the Pension System Receive At Least Some Benefit From These Plans
- 74% of These Employees Are in Plans That Use Sex-Segregated Tables
- Female Employees Receive Smaller Single Life Annuity Payments When These Tables are Used

DEFINED BENEFIT PLANS

WHAT IS DEFINED?

- Employer Promises to Give Retirees a Specified Benefit

PORTION OF PENSION UNIVERSE INVOLVED

- 29% of the 450,000 Pension Plans in Operation Are Defined Benefit Plans
- 90% of the 30.5 Million Workers in the Pension System Receive Their Sole or Primary Benefit From These Plans
- 45% of These Employees are in Plans That Use Sex-Segregated Mortality Tables
- Male Employees Receive Smaller Lump Sum and Joint Survivor Benefit Payments When These Tables are Used

OPTIONS FOR RESOLVING THE EQUAL BENEFITS ISSUE

- Only Employee Contributions, Not Benefits, Must Be Equal
- Only the Normal Benefit Form, Not Optional Ones, Must Be Equal
- All Forms of Benefits Must Be Equal

THE TWO FACETS OF IMPLEMENTATION

HOW THE NEW BENEFIT LEVEL IS SET

- Using Sex-Neutral Mortality Tables
or
- “Topping Up” the Disfavored Sex's Benefits

Example:

Sex-Segregated	: Mr. A. gets \$800	Mrs. B. gets \$900
Sex-Neutral	: Mr. A. gets \$825	Mrs. B gets \$825
Topping Up	: Mr. A. gets \$900	Mrs. B gets \$900

HOW QUICKLY THE REQUIREMENT IS PHASED IN (FOR CURRENT WORK FORCE)

- Equalize Total Benefits—Both Those Benefits Which Have Already Accrued Because of Past Service, and Those Which Will Accrue in the Future
or
- Equalize Only Benefits Which Will Accrue in the Future

OPTIONS FOR IMPLEMENTING AN EQUAL BENEFITS REQUIREMENT

- Calculate Total Benefits Using Sex-Neutral Tables
- Top Up Total Benefits
- Top Up Past Service Benefits; Calculate Future Service Benefits Using Sex-Neutral Tables (Hybrid)
- Calculate Future Accrued Benefits Using Sex-Neutral Tables

COSTS AND BENEFITS (IN MILLIONS OF DOLLARS)

	<u>ANNUAL COST TO PLANS</u>	<u>ANNUAL INCREASE IN FEMALE EMPLOYEES' BENEFITS</u>	<u>ANNUAL INCREASE IN MALE EMPLOYEES' BENEFITS</u>
I. SEX-NEUTRAL TABLES FOR TOTAL BENEFITS	\$163-\$181	\$10	\$146-\$164
II. TOPPING UP TOTAL BENEFITS	\$817-\$1,300	\$249-\$543	\$568-\$717
II. TOPPING UP— SEX-NEUTRAL TABLE HYBRID	\$475-\$676	\$116-\$239	\$356-\$434
V. SEX-NEUTRAL TABLES FOR FUTURE ACCRUED BENEFITS	\$85-\$93	\$10	\$68-\$76

EXAMPLE OF DIFFERENCES IN TREATMENT IN THE DEFINED BENEFIT PLANS

CURRENT BENEFITS USING SEX-SEGREGATED MORTALITY TABLES FOR JOINT AND SURVIVOR ANNUITIES

Employee A (A 65 Year Old Male)

Predicted Lifespan: 10 Years
Single Life Annuity: \$1,000 Yr.
Joint and Survivor Annuity:
 \$800 a Year for Mr. A.
 \$400 a Year for Mrs. A
 after he dies

Employee B (A 65 Year Old Female)

Predicted Lifespan: 15 Years
Single Life Annuity: \$1,000 Yr.
Joint and Survivor Annuity:
 \$900 a Year for Mrs. B.
 \$450 a Year for Mr. B
 (in the few cases where he
 outlives his wife)

WHEN BENEFITS ARE EQUALIZED

"Top up" J&S

\$900 a Year for Mr. A.

"Top up" J&S

\$900 a Year for Mrs. B.

"Sex-Neutral" J&S

\$825 a Year for Mr. A

"Sex-Neutral" J&S

\$825 a Year for Mrs. B.

FEB 10

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 2-10-83 NUMBER: 077792CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - Thursday, February 10, 1983

2:00 p.m. in the Roosevelt Room

	ACTION	FYI		ACTION	FYI
ALL CABINET MEMBERS	<input type="checkbox"/>	<input type="checkbox"/>	Baker	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Vice President	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Deaver	<input type="checkbox"/>	<input type="checkbox"/>
State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Clark	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Treasury	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Darman (<i>For WH Staffing</i>)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Defense	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Harper	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Attorney General	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Jenkins	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Interior	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>F. Fielding</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Agriculture	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Commerce	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Labor	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
HHS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
HUD	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Transportation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Energy	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Education	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Counsellor	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
OMB	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
CIA	<input type="checkbox"/>	<input checked="" type="checkbox"/>	CCCT/Gunn	<input type="checkbox"/>	<input type="checkbox"/>
UN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	CCEA/Porter	<input type="checkbox"/>	<input type="checkbox"/>
USTR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	CCFA/Boggs	<input type="checkbox"/>	<input type="checkbox"/>
CEA	<input type="checkbox"/>	<input type="checkbox"/>	CCHR/Carleson	<input type="checkbox"/>	<input type="checkbox"/>
CEQ	<input type="checkbox"/>	<input type="checkbox"/>	CCLP/Uhlmann	<input checked="" type="checkbox"/>	<input type="checkbox"/>
OSTP	<input type="checkbox"/>	<input type="checkbox"/>	CCMA/Bledsoe	<input type="checkbox"/>	<input type="checkbox"/>
ACUS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CCNRE/Boggs	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>			

REMARKS: The Cabinet Council on Legal Policy will meet, as previously announced, Thursday, February 10, 1983 at 2:00 p.m. in the Roosevelt Room. An additional paper is attached.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☒ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

MEMORANDUM

COUNCIL OF ECONOMIC ADVISERS

February 10, 1983

MEMORANDUM FOR THE CABINET COUNCIL ON LEGAL POLICY

FROM: William A. Niskanen ~~WV~~

SUBJECT: The Effects of Requiring Gender Neutrality
in Prospective Pension Benefits

I have attached a brief paper on "The Economics of Requiring Gender Neutrality in Prospective Pension Payments." This paper was prepared by Tom Kniesner of the CEA staff. The basic conclusion of the paper is that a strictly prospective gender neutral standard would yield no benefits to women and only small long-term costs. Both the benefits to women and the total costs would be substantially larger if the effective action requires employers to pay higher total pension benefits to women.

A copy of the recent Fortune article on this general issue is also attached for your interest.

Attachments (2)

The Economics of Requiring Gender Neutrality in Prospective Pension Payments

I. Background

Pension plans currently structure their benefits in one of the two following ways:

(1) Defined-Contribution Plans - Here the employer makes contributions which are allocated to individual employees' accounts. When an employee retires, he or she is entitled to the benefit that can be purchased by the account balance. The normal form of benefit under this type of pension plan is a lump sum, the amount which has accumulated in the individual's account (including his or her own contributions plus interest). This benefit is typically equal for similarly situated men and women and no question of sex discrimination arises. However, defined-contribution pension plans frequently offer the option of converting the lump sum to an annuity. (Approximately 60 percent of defined-contribution plans currently offer an annuity option.) Many participants (74%) have their benefits converted with a sex-based actuarial table. Because women as a group live longer, their benefits will on average be paid over a greater number of years than men. As a result, annuity option purchased by a given lump sum provides smaller monthly benefits for a woman than for a similarly situated man.

(2) Defined-Benefit Plans - Here an employer provides a specified benefit form and amount upon retirement. This type of pension is the sole or primary pension for approximately 90 percent of employees in the private pension system. The typical benefit received under this type of plan is the single life annuity, in which the same amount is paid to similarly situated male and female retirees. In this case, no sex discrimination issues arise. However, the defined-benefit plan may provide certain optional forms of benefits to employees such as a joint and survivor (J&S) option. (ERISA currently requires defined-benefit plans to offer retirees the J&S option.) These optional benefits are typically based on actuarial values of the normal benefits, and sex segregated actuarial tables are frequently used to determine the value. (Currently about 45 percent of participants in defined-benefit plans are subject to sex-based benefit conversion tables.) Because women outlive men on average, when a female retiree elects a joint and survivor annuity, her monthly benefit is reduced by less than is the monthly benefit of a similarly situated male retiree.

The basic issue at hand surrounds the fact that gender is an accurate and inexpensive predictor of mortality at time of retirement. Recent estimates are that a man who is 65 years old can expect to live about another 14 years whereas a woman who is 65 can expect to live almost another 19 years. Moreover, despite the casual impression that women are becoming more like men in terms of labor market behavior, career goals,

and bad health habits, the sex difference in life expectancy at age 65 has been growing over time. In particular, in 1940 there was very little sex difference in life expectancy at age 65. A 65 year old male could expect to live 12 more years whereas a 65 year old female could expect to live approximately 13.6 more years.

This paper summarizes some key economic effects of requiring (prospectively) that (1) retirees with defined-benefit pension plans who take the J&S option receive equal monthly payments and that (2) retirees with a defined-contribution pension plan who take annuities receive equal monthly payments. The focus is on the economic impact of such requirements on (a) insurance companies' pension plan offerings and (b) employers' wage and employment practices. This paper is intended to serve as a complement to the cost calculations displayed in the study by the Department of Labor entitled, "Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits."

II. Requiring Gender Neutrality in Prospective Pension Payments: Defined-Contribution Plans

The economic forces at work can be best seen in the context of a simple numerical example. Consider a typical defined-contribution plan that offers a lump sum payment that is equal for males and females of similar salary and service and, in addition, offers the option to convert this lump sum to

an annuity using a sex-based table. Assume that all retirees are unmarried, so that joint and survivor (J&S) options can be ignored. (The J&S option will be of crucial interest in our later discussion of defined-benefit plans.) In this example, females who reach age 65 will live 18 more years on average and males will live 14 years on average. Thus, annuity payments for women will be lower to adjust for the larger number of expected payments.

Suppose, for example, a male and female are each entitled to a lump sum equal to \$100,000. Using a zero rate of interest for simplicity, the male's annuity option would be an annual payment equal to \$7,140 ($= \$100,000/14$) per year. The female would collect an annuity equal to \$5,550 ($= \$100,000/18$). This example situation describes the typical annuity option in a defined-contribution plan as of now.

Suppose, though, that plans are required to provide identical annuity stream to men and women, as well as the option of (equal) lump sums. Suppose further that the new pension rules specifically require a plan to use a uni-sex actuarial table, which can be rated according to the actuarial experience of the plan. This means that if the plan is comprised of 50 percent males and 50 percent females, men and women aged 65 will each be treated as living 16 more years on average. In terms of the above example, males and females would now each receive \$6,250 per year ($= \$100,000/16$). The following economic implications are predictable:

Basic Economic Effects

1. Because annuities for males were previously based on 14 years of expected life, their annuities will be reduced (from \$7,140 to \$6,250). Because annuities for females were previously based on 18 years of expected life, their annuities will be increased (from \$5,550 to \$6,250).

2. The lump sum option then becomes preferable for males because they can take their lump sum to an insurance company and purchase an annuity based on their expected 14 additional years of life, rather than 16. That is, the lump sum is worth \$100,000. The revised pension annuity is worth only \$87,500 (14 years (expected life) times \$6,250). On the other hand, the annuity option is preferable for females because its present value exceeds the lump sum option. The lump sum option is worth \$100,000 to the females but the annuity is worth \$112,500 (18 years (expected life) times \$6,250). In short, males will initially tend to opt for the lump sum and females will initially tend to opt for the (uni-sex) annuity.

3. The reactions described in step 2 now cause a problem for the plan sponsor. If all males take the lump sum (which is equivalent to their total benefits under the status quo) but all females take the more favorable uni-sex annuity (which exceeds their total benefits under the status quo), the plan will experience a deficit. In the above example, each female

who takes the uni-sex annuity will collect an average of \$12,500 more (\$112,500 - \$100,000) than the sum of pension contributions made on her behalf.

4. The plan sponsor will not merely accept the deficit because this firm must compete with firms that do not pay pensions (and with male-dominated firms). Thus, to keep total wage plus pension payments in line, the plan sponsor must ultimately find a way to reduce the overall level of pension benefits.

The firm will therefore take one of three steps.

(i) The plan can adjust its uni-sex table on the basis of actual experience. Specifically, the plan in our example initially anticipated that the average length of life of its retirees would be 16 years. But since only females opt for the annuity, actual experience suggests that 16 years is unrealistically low. The plan can increase its expectation of how many years the average community recipient will live to 18 years. This means the annuity will become $\$100,000/18$, which equals \$5550 - exactly what females received before the new regulations were enacted.

(ii) Alternatively, the plan could anticipate the "selectivity" problems encountered above (i.e., females choose annuities; males choose lump sums) and simply set the uni-sex annuity equal to \$5550 from the start. In this case, no male

will ever opt for the plan annuity (males can obtain \$6250 annuities from insurance plans) and females will be indifferent between annuities offered by the plan and insurance companies. In this case, the firm avoids the short-term deficits experienced under scenario (i) above.

(iii) Finally, the plan could eliminate the annuity option entirely. In this way, males and females must purchase annuities from insurance companies using their lump sums. Because insurance firms use sex-based life tables, males and females will receive the same annuities as they do under the status quo. However, to the extent that insurance company costs are higher for single versus group annuities, retirees who choose the annuity option may now face less favorable terms in their annuity conversions than they did previously.

Summary of the Basic Economic Effects of Gender Neutral
Prospective Payments in the Case of a Defined-Contribution
Pension Plan

The net effects of the proposals can therefore be summarized as follows:

- o Females will not receive higher benefits than they do under the status quo.

- o Males will lose the option of choosing an annuity through the plan. They will ultimately purchase their annuities through insurance companies. If the plan reverts to a lump-sum-only option, all employees will lose the annuity option through the plan. To the extent that single annuities are less generous than group annuities, retirees will suffer reductions in their pension payments.
- o The plan sponsor will be no better or worse-off than before. Total pension costs should remain the same.

In sum, firms can ultimately avoid undesirable economic effects in (prospective) pension payments. Females will not receive higher annuity benefits, but pension plans will be disrupted in the short run and retirees may lose group annuity discounts.¹

¹ It is important to note that these conclusions, which indicate a fairly benign effect if the gender-neutral requirement for pension payments are changed dramatically, if additional constraints are introduced to force employers to ultimately pay women higher (total) pension benefits than men. In this case: (1) males will reduce their demand for pensions, leading firms in the long run to deemphasize pensions compared to cash wages, (2) firms will be induced to reduce female cash wages or to hire fewer women and more men, and (3) sex-segregated employers will be encouraged because males will be better off if they work for male-dominated firms where their pension incomes will not be substantially affected by transfer to females.

III. Requiring Gender Neutrality in Prospective Payments:

Defined-Benefit Plans

ERISA currently requires that the normal form of payment in a defined-benefit plan be a joint and survivor benefit. Individuals can currently "opt-out" of such a benefit structure to accept a pension without joint and survivor (J&S) protection. Approximately one-half of defined-benefit retirees now accept the J&S form of benefit payment.

Again, a numerical example is useful. To facilitate the calculations to follow, assume that the J&S payment made to a beneficiary upon death of a retiree is equal to the J&S payment made up to the time of the retiree's death. (In reality, the beneficiary's payment is less than the payment received to a living retiree.) Reasonable numbers for the purpose of our example are that the expected number of years of payment on a J&S is 19 compared to 14 years of expected life for a male-only payment stream and 18 years of expected for a female-only payment stream.

Now consider a male and a female with the same service and wage history. Without J&S, the male and female each receive \$6250 per year in the form of an annuity. The J&S annuity calculated as follows: the extra time that a male retirees' wife will outlive him is calculated - say four years; thus, additional payments of \$25,000 ($= 4 \times \6250) are expected to be made to those males who choose J&S. Female retirees' who

choose J&S are expected to add fewer payments to the regular payment because females generally outlive males. Suppose one year of extra payment is expected to be made to females who choose J&S. In this case, pension costs will increase by \$6250 when a female opts for the J&S.

The value of the J&S annuities, therefore, typically now differ between males and females. In particular, if the annual pension benefit of \$6250 is calculated on an expected lifetime for all retirees of 16 years (a likely value for a uni-sex life table in a firm with an equal number of males and females) male J&S annuities would fall to \$5000 ($20 \times \$5000 = \6250×16) and females' J&S annuities would fall to \$5880 ($\$5880 \times 17 = \6250×16). Under these conditions, male or female retirees receive the same total value of pension benefits (assuming the discount factor of zero) whether or not they take the J&S option.

Basic Economic Effects of Requiring Gender Neutrality in Prospective

Now suppose that the J&S payment must be equal for males and females. To satisfy this requirement, the plan sponsor in our example would be required to provide a J&S annuity somewhere between \$5000 and \$5880 per year. The result is that (a) females will be better off "opting-out" of the J&S option and (b) males will be better off "opting for" the J&S payment. This will cause a short-term problem for plan sponsors. If all

females opt out of the J&S option and all males opt for the J&S payment, plans will pay out more in total pension payments. Moreover, in the above example, males that take the J&S option will collect on average more than female workers who take the J&S option.

Summary of the Basic Economic Effects of Gender Neutral
Prospective Payments in the Case of a Defined-Benefit Pension
Plan

Plan sponsors will not simply accept the additional payments described above because they must compete with firms who do not pay pensions. In particular, employers will seek to keep total wage plus pension payments in balance by finding a way to reduce the overall level of pension benefits. A long-run (equilibrium) result should find:

- o The J&S option used only by males (the J&S annuity in terms of the above example will equal \$5000, the actuarial equivalent of a male accepting \$6250 without J&S protection).
- o Females will not choose the J&S option.
- o No one is better-off financially, and females are left without J&S protection for their spouses.

IV. Summary

The proposal discussed in this paper (gender neutrality in prospective payments) can be dealt with relatively easily, by the parties involved. This conclusion is also the opinion of eight prominent actuaries in their amicus brief concerning the Norris case.) Certain disruptions to pension plans will be experienced nonetheless. These disruptions will not be incurred without cost, but by incurring these costs, plans/plan sponsors can avoid even higher costs in the long run that will result if they do not change their plans. In addition, some options which are now available in most plans may be closed to certain (particularly male) participants. In exchange for these disruptions, no significant increases in pension amounts will be received by females. Thus, a cost will be incurred without any corresponding benefits. Finally, no substantial "supply-side effects" of the proposed changes on occupational choices are anticipated, unless the legislation (court action, regulation, etc.) also requires employers to pay higher total pension benefits to women.

INSURANCE AND THE PRICE OF SEX

■ One of the strangest issues you will have to make up your mind about this year is an entry that's usually labeled sex discrimination in insurance. At the moment, the moral high ground seems to be controlled by those who believe there's a big, big problem out there and that government must provide a solution. However, a case can be made for viewing the issue as a big, big nonproblem.

This is definitely not the view of Republican Senator Bob Packwood of Oregon, who is pushing a bill to end what he proclaims to be unconscionable discrimination by the insurance industry against women. His bill would also prevent the industry from discriminating on the basis of race, color, religion, or national origin, but since hardly anybody contends there is discrimination in these areas, virtually all the testimony in the Senate Commerce Committee has concerned sex. Packwood's bill was reported out of committee last fall but Congress never got to it in the hectic lame duck session, and so the Senator is starting over again this year. A similar bill has been introduced in the House by John Dingell of Michigan.

Also upset about sex discrimination in insurance is Solicitor General Rex E. Lee, who recently filed a brief attacking "sex-based actuarial tables," thereby lining up the Reagan Administration with the women's movement and numerous members of the judiciary who also don't like the tables. The tables, though, are innocent. They just reflect the reality that in certain matters highly relevant to insurance, men and women are, statistically speaking, very different. The tables show, for example, that on average women live longer than men; at age 60 a woman's life expectancy in the U.S. is 22.1 years, a man's only 17.1 years. Accordingly, insurers price insurance differently for men and women.

These differences in prices have been at issue in several major court cases in recent years. In 1978 the U.S. Supreme Court held that the Department of Water and Power in

Los Angeles violated the 1964 Civil Rights Act by requiring women to make larger contributions to a pension plan to get the same monthly benefits men got. A related case out of Arizona will be coming before the Supreme Court this year. The issue in that one is whether women must settle for smaller monthly benefit checks from a deferred-compensation plan though women and men had made equal contributions to it over the years.

IT IS PERHAPS not surprising that the American Association of University Women, the National Women's Political Caucus, the Coalition of Labor Union Women, and other "movement" organizations are backing such lawsuits, but there are some anomalies in the movement's support of the Packwood bill. One anomaly is discernible in that chart on the facing page, which makes it clear that the insurance industry's present systems of sex classification favor women much of the time.

Indeed they may favor women on balance. Testifying before Packwood last summer, Mavis A. Walters, a member of the Committee on Risk Classification of the American Academy of Actuaries, stated that the Senator's bill would have these effects: "Women would pay more for life insurance; men would pay less. Women would pay less for annuities; men would pay more. Women would pay more for auto insurance; men would pay less. Women would pay less for disability insurance and men would pay more." Taking one thing with another, she added, "our study has found that women

as a group will pay more for insurance if this bill is passed." George K. Bernstein, a witness representing the American Insurance Association at the hearings, put women's additional cost for automobile insurance alone at \$700 million a year. Asking himself why the movement was nevertheless supporting the bill, Bernstein said the only explanation he could think of was "ideology."

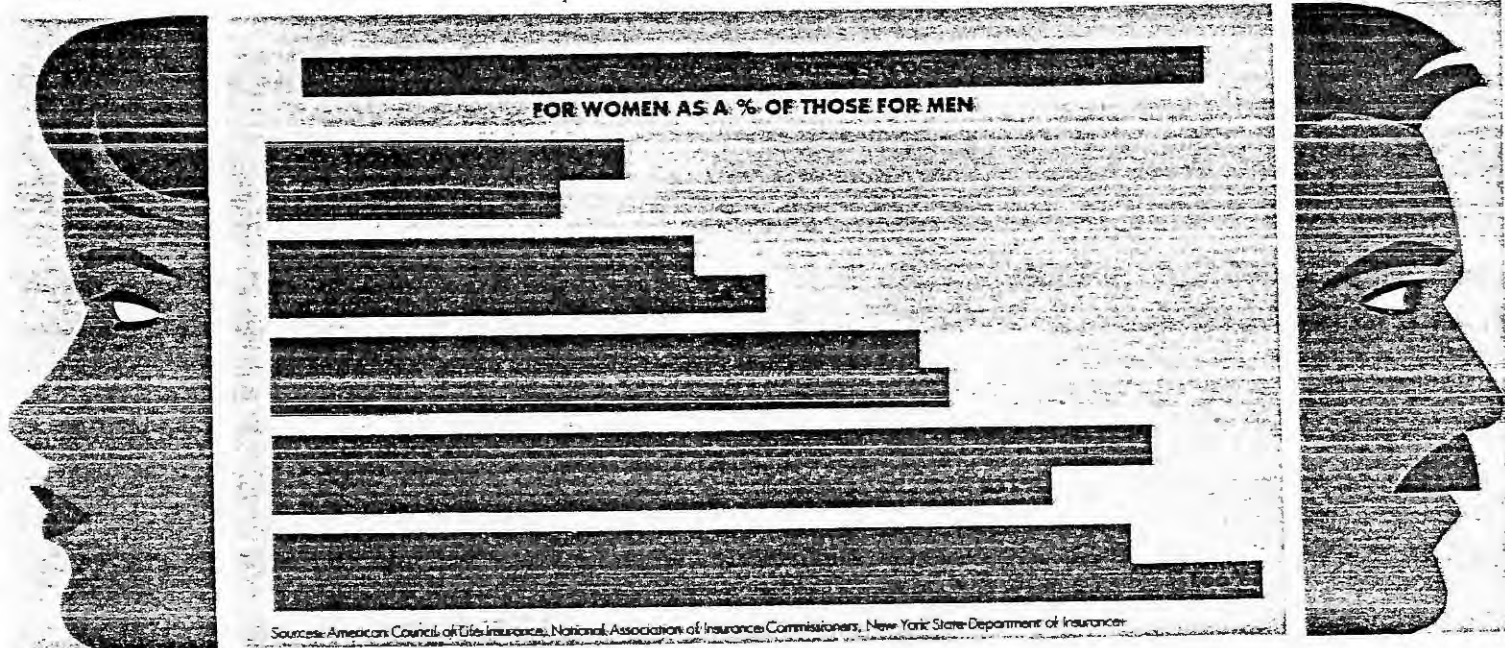
It's hard to see why anybody without an ideological slant should view the insurance industry's sex-based distinctions as discriminatory. If young women have fewer automobile accidents than young men—which they do—why shouldn't the women get a better rate? If the industry's experience shows—as it does—that women spend more time in the hospital than men, why shouldn't women pay more for health policies? If female mortality rates are lower than those for males—which they are, at every age from day one to year 100—why shouldn't females pay less for life insurance? And more for pensions and annuities? There is broad agreement that the industry's pricing reflects not bigotry but actual experience. So why should anybody view it as discriminatory?

Those inclined to the big, big problem view of the case have approached these questions in several ways. Some of them, including Packwood, see antidiscrimination laws in insurance as a natural follow-on to the laws that have successively banned sex discrimination in employment, housing, credit, and other areas. Having long since forgotten that the point of those other laws was to combat inaccurate and prejudicial stereotyping, they have now arrived at a mental way

tation where discrimination is defined as any difference at all in the treatment of the sexes. In an effort to sustain this view, witnesses before the Packwood committee kept saying that it's unfair to discriminate on the basis of sex because sex is an immutable human characteristic; like race and color, they said, sex is something nobody can change (a slightly debatable point these days). But none of the witnesses ever explained why immutability should be a factor in actuarial decisions. People also can't control their ge-

action front. [In the course of arguing against quotas and other kinds of race-conscious preference, the Administration keeps saying that we have to get away from group rights and concentrate on individual rights. This is certainly a logical and commendable rule to apply to employment cases, but extending the rule to insurance just seems mindless. Insurance *requires* group classifications. It needs the law of large numbers to work with. Though nobody knows when a particular person will die, the law of large numbers en-

The insurance industry is naturally quite upset about the trend in the courts and the possibility of having to cope with the Packwood standards. The worst case for the industry would be a law, or a court decision, that required existing as well as future policies to conform to unisex standards in pricing. (Packwood apparently wants to cover existing policies, but he sounds as though the issue is negotiable.) By some industry estimates, the worst-case scenario would cost several billion for pensions alone to



netic heritage. If you're born with some life-threatening genetic defect, should you get insurance at the same price as someone who's in normal health?

HOWEVER, THE ULTIMATE confusion about sex-based discrimination resides in an argument that seems to be sweeping the country these days. It's the argument that prevailed in those California and Arizona cases and that has now been embraced by Solicitor General Lee. The argument proceeds as follows. We agree that women as a class live longer than men. However, we do not agree that an individual woman should be treated as a member of the class when it comes to writing insurance; she may, after all, die tomorrow, while a man her age may live for decades. Indeed, treating people as members of a class, rather than as individuals, is precisely what we mean by discrimination—and is precisely what was forbidden by the Civil Rights Act, at least with respect to classes involving race, color, religion, national origin, or sex.

In buying this line of argument, the Reagan Administration has plainly been influenced by its encounters on the affirmative-

Equal They're Not

Sex is here to stay—at least in the facts-of-life statistics that underlie differences in insurance prices for men and women. Ranged against the efforts to require unisex pricing are some stubborn realities. One is that men and women have different life expectancies at all ages, which implies different costs for carriers offering life and annuity policies. Another is that men and women behave differently, which affects the costs of auto, major medical, and disability insurance. (The chart data for auto insurance pertain to drivers under 25. The data for annuities pertain to age 65. For the other categories, the age is 45.)

ables us to predict with considerable accuracy when an average member of a group will die. In agreeing that women as a group live longer, but insisting that it's unfair to apply this fact to individual cases, the courts and the Administration have stepped into a huge intellectual bog. Presumably we are all agreed that the insurance industry is entitled to classify people by age. But the argument that we must view people as individuals, and not as members of a class, could also be applied to age classifications. After all, some young people die early and some old people just get a lot older.]

bring benefits for women up to male levels.

Packwood himself thinks the true cost for additional pension benefits would be much lower, probably more like \$500 million, "a relatively minor amount," he says, when measured against the industry's assets. He also likes to speculate that the industry might go unisex without his bill. "If one or two of the major companies were to crack," he said hopefully the other day, "the rest would go like a dam with a hole in it."

■ Insurance executives are divided on the effect unisex pricing would have on the terms and availability of policies offered in the future. Coy Eklund, the chairman of Equitable Life Assurance and a consistent out-front supporter of the women's movement, says he "could accept" a public policy decision to go unisex. Other students of the subject believe that, overall, insurance premiums would rise, and that pension plans for companies with predominantly female employees might be hard to get. Meanwhile, the possibility that most insurance people find most attractive is a different one—the possibility that at some point the courts and Congress might discover there's no problem. **E**

THE WHITE HOUSE
WASHINGTON

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FFF calendar

JAN 25 1983

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CCLP

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 1-24-83 NUMBER: 077746CA DUE BY: _____
SUBJECT: Cabinet Council on Legal Policy - January 26, 1983
10:00 a.m. in the Roosevelt Room

	ACTION	FYI		ACTION	FYI
ALL CABINET MEMBERS	<input type="checkbox"/>	<input type="checkbox"/>	Baker	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Vice President	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Deaver	<input type="checkbox"/>	<input type="checkbox"/>
State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Clark	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Treasury	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Darman (For WH Staffing)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Defense	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Harper	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Attorney General	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Jenkins	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Interior	<input checked="" type="checkbox"/>	<input type="checkbox"/>	F. Fielding	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Agriculture	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Commerce	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Labor	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
HHS	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
HUD	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Transportation	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Energy	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Education	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
Counsellor	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
OMB	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
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UN	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
USTR	<input type="checkbox"/>	<input checked="" type="checkbox"/>			
CEA	<input type="checkbox"/>	<input checked="" type="checkbox"/>	CCCT/Gunn	<input type="checkbox"/>	<input type="checkbox"/>
CEQ	<input type="checkbox"/>	<input type="checkbox"/>	CCEA/Porter	<input type="checkbox"/>	<input type="checkbox"/>
OSTP	<input type="checkbox"/>	<input type="checkbox"/>	CCFA/Boggs	<input type="checkbox"/>	<input type="checkbox"/>
ACUS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CCHR/Carleson	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>	CCLP/Uhlmann	<input checked="" type="checkbox"/>	<input type="checkbox"/>
			CCMA/Bledsoe	<input type="checkbox"/>	<input type="checkbox"/>
			CCNRE/Boggs	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: The Cabinet Council on Legal Policy will meet Wednesday, January 26, 1983 at 10:00 a.m. in the Roosevelt Room. The agenda will be Pension Equity for Women, CM# 178. Papers were previously distributed on January 17, 1983.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☒ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

JAN 18 1983

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 1-17-83 NUMBER: 077734CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - January 19, 1983

8:45 a.m. in the Roosevelt Room

	ACTION	FYI		ACTION	FYI
ALL CABINET MEMBERS	<input type="checkbox"/>	<input type="checkbox"/>	Baker	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Vice President	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Deaver	<input type="checkbox"/>	<input type="checkbox"/>
State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Clark	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Defense	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Harper	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Attorney General	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Jenkins	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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OMB	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
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CEQ	<input type="checkbox"/>	<input type="checkbox"/>	CCEA/Porter	<input type="checkbox"/>	<input type="checkbox"/>
OSTP	<input type="checkbox"/>	<input type="checkbox"/>	CCFA/Boggs	<input type="checkbox"/>	<input type="checkbox"/>
ACUS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CCHR/Carleson	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	CCLP/Uhlmann	<input checked="" type="checkbox"/>	<input type="checkbox"/>
_____			CCMA/Bledsoe	<input type="checkbox"/>	<input type="checkbox"/>
			CCNRE/Boggs	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: The Cabinet Council on Legal Policy will meet Wednesday, January 17, 1983 at 8:45 a.m. in the Roosevelt Room. The agenda and background papers are attached.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☒ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

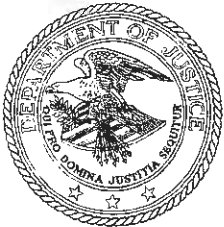
January 19, 1983

8:45 a.m.

Roosevelt Room

AGENDA

1. Pension Equity for Women (CM#297)



Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM

January 17, 1983

TO: The Cabinet Council On Legal Policy

FROM: William French Smith *WFS*
Attorney General

SUBJECT: January 19, 1983 Meeting on Equal Pension
Benefits and the Economic Equity Act

The Cabinet Council on Legal Policy (CCLP) will meet on Wednesday, January 19, 1983, to receive a briefing from T. Timothy Ryan, Jr., the Solicitor of Labor and chairman of the CCLP Working Group on Equal Pension Benefits (also known as the Manhart Working Group). As you all know, the question of equal pension benefits for men and women has received considerable attention within the Administration. It is now believed that an informational briefing of the Cabinet Council is desirable; no decisions will be reached at this meeting.

The briefing will review two subjects that the working group has been asked to examine: (1) whether and how to require employers to provide equal pension benefits to similarly-situated men and women; and (2) the Economic Equity Act (S. 888), a bill to amend the federal laws governing private pension plans and civil service and military retirement plans to help women receive greater retirement income. These subjects are discussed in detail in the attached reports from the working group, and are outlined in the following executive summary.

Equal Pension Benefits (Tab 1)

Since June 1982 the working group has been attempting to develop a unified government position on the questions of whether, and to what extent, an employer must ensure that the pension benefits its similarly-situated male and female employees receive are equal. This very complicated question -- involving Title VII of the Civil Rights Act of 1964, the Equal Pay Act, Executive Order 11246 (which imposes affirmative action and anti-discrimination obligations on federal contractors), the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA) -- was highlighted, but not resolved, by the Supreme Court's decision in City of Los Angeles v. Manhart, 435 U.S. 702 (1978). The Court held that Title VII prohibits employers from requiring women to make larger contributions into a pension fund than men must make, even though the differential is based on the fact that women as a group have a longer life expectancy than men and thus tend to receive larger total pension benefits over

their lifetimes. The holding of Manhart was expressly limited to its facts. However, the Court used a broad rationale based on fairness to the individual rather than fairness to classes, and rejected actuarial distinctions as a justification for unequal treatment of men and women with regard to pensions.

The questions being studied by the working group thus derive from the established fact that women as a class live longer than men, a fact that pension plans frequently take into account. For example, monthly payments from annuities sometimes differ for similarly-situated men and women: an annuity that takes this actuarial difference into account will pay less per month to a woman than a man because she is expected to live longer (based on statistics for her sex as a class, not based on her own individual life expectancy). */ The nub of the discrimination problem is that individual members of a class do not have the same characteristics as that class in general has: i.e., an individual woman may not have the same life expectancy as the average woman -- and Manhart interpreted Title VII to require fairness to individuals, not to classes.

The working group first had to decide whether this difference in monthly payments constitutes sex discrimination in violation of Title VII. After much consideration the group concluded that it does. The government took that position in its January 10, 1983 filing in the Supreme Court in TIAA-CREF v. Spirt, 691 F.2d 1054 (2d Cir. 1982), petitions for cert. pending (Nos. 82-791, 82-913).

The large remaining question is how this equal pension benefits position should be implemented. The basic issues are (1) the degree of "retroactivity" of the equalization requirement, i.e., whether it applies to workers who have already retired, or to the benefits of future retirees which have accrued on the basis of past service; and (2) the manner of equalizing benefits, namely, whether the benefits of the currently disfavored sex must be raised to the level of the favored sex (called "topping up"), or whether a sex-neutral approach (which permits plans to set a benefit level in-between those previously provided the favored and disfavored sexes) can be used. Although there are numerous ways of combining these criteria, the working group has focused on four principal approaches:

*/ Significantly, however, most pension plans offer equal monthly benefits under the normal benefit form (a life annuity); unequal treatment arises primarily where plans offer optional forms which are converted from the normal form on the basis of sex-segregated mortality tables. Ironically, men receive smaller payments under these optional forms, and 55% to 95% of the money spent to equalize benefits would go to male retirees (or their beneficiaries). The reasons for this counter-intuitive outcome are discussed in Section IV(B) of the report.

1. Requiring that total benefits of future retirees be calculated using sex-neutral actuarial tables.
2. Requiring topping up of benefit payments of the disfavored class.
3. Requiring the use of sex-neutral tables to calculate benefits attributable to future service, and topping up for benefits attributable to past service (a hybrid approach).
4. Requiring the use of sex-neutral tables for benefits accruing in the future.

The costs of these various approaches are highly relevant and are discussed in Section IV(B) of the report. Briefly summarized, the Labor Department estimates that the annual cost to private pension plans of approach (1) could be as much as \$181 million; approach (2), up to \$1.3 billion; (3), \$676 million; and (4), \$93 million.

Finally, the report outlines in Section V the means by which a government implementation policy might be effected: (1) Labor Department and EEOC regulations; (2) Title VII litigation; and (3) legislation prohibiting the use of sex-based actuarial tables (and other distinctions based on sex) in calculating pension benefits.

The Economic Equity Act (Tab 2)

The working group has only very recently begun to evaluate the Economic Equity Act, which was introduced as S. 888 early in the 97th Congress by Senator Durenberger, and has not reached any conclusions. The Act would amend the laws governing private pension plans (ERISA and the Internal Revenue Code) and those governing civil and military retirement plans. While the provisions are on their face sex-neutral, the real impact and purpose of the changes are to help women receive greater retirement income. The changes in ERISA and the Code aim to help two different groups of women: sections 102 (survivor annuities) and 103 (assignment of benefits) are designed to help older women whose income in retirement is dependent upon their husband's pension credits; sections 104 (lowering of participation age) and 105 (maternity benefits) are designed to help younger women earn their own pension credits. The changes affecting the military and civil service would provide a former spouse an entitlement to the other spouse's pension.

The working group report discusses each provision of the bill by setting forth the relevant current law, the changes proposed by the bill, and the advantages and disadvantages of those changes. The following is a brief summary of the key features of the bill:

Section 102 would require pension plans offering annuities as a form of benefit to provide for survivor annuities for participants with ten years vesting credit.

Section 103 would provide an exemption from ERISA's general prohibition against assignment or alienation of pension benefits for attachments for child support, alimony payments and marital property rights.

Section 104 would lower the minimum age requirement for participation in pension plans from 25 to 21.

Section 105 would require that pension plan participants who are out on maternity or paternity leave be given service credit of 20 hours per week toward participation, vesting and benefit accrual for up to 52 weeks.

Section 107 would accord a former spouse an entitlement to the other spouse's military pension based on marriage to the participant during the years the pension was earned. The entitlement would be similar to the entitlement currently provided to divorced spouses of foreign service officers.

Section 108 would provide spouses of federal civil service employees a pension entitlement similar to that granted military spouses under section 107.

Title V of the Economic Equity Act is identical to S. 2204, a bill which would prohibit the use of sex-based actuarial tables in calculating pension benefits. S. 2204 is discussed in Section V(B) of the working group's equal pension benefits report (Tab 1).

Attachments