Regular Meeting

AMERICAN PENSION CONFERENCE

December 1, 1966

SUBJECT

The Possible Application of the Securities Act of 1933 and the Investment Company Act of 1940 to Certain Pension and Profit Sharing Plans

Speaker

Philip A. Loomis, Jr., Esq.

The regular meeting of the American Pension Conference opened in the Terrace Room of the Hotel New Yorker at 7:45 o'clock, Mr. Robert S. Lane, as Chairman for the evening.

MR. LANE: Good evening, ladies and gentlemen. I am Bob Lane. I am making my final appearance here as a Steering Committee member. I want to tell you that it's been a very enjoyable experience, and I want to thank you all for the privilege of serving in this capacity.

I have been asked this evening to tell you that a special committe on I.R.S. Announcement 66-58, appointed by the Steering Committee and chaired by Sam Ain has an appointment with Stanley Surrey, Assistant Secretary of the Treasury, on December 21, to report on our November 7 special meeting and to exchange views with respect to the Social Security integration problems. This committee will report to you subsequently on their meeting.

As your moderator this evening, I think I owe you at least one story:

In my church, we have a minister. And we have an associate, who is his junior. This younger fellow recently came to the minister, and he was quite upset over something that happened in the local hospital that afternoon. It seems that he had been visiting patients, and he happened upon one who was in an oxygen tent. As he stepped over to the bed and bent over the man, the patient began to shudder and cough, made a grab for a pad and pencil, scribbled a note and handed it to the minister. As he did so, the poor fellow expired.

Then of course the minister was quite upset. So he went over to the older minister and told him all about it.

The older minister asked, "What about that note, what did it say?"

"Good gosh," he said, "I didn't read it." So he took the note and read it and showed it to the minister.

The note said, "Please get off my oxygen line, you're killing me." (Laugher)

Sometimes I wonder a little bit about whether this isn't going to happen to the patient in the pension field, with much future legislation just offstage.

Those of us who are in the legal profession and who have spent considerable time wrestling with the problem of pension and profit-sharing plans, pay rather close attention to the federal financial disclosure laws known as the SEC Statutes.

Most of you I am sure are aware of their existence, but perhaps have not paid very close attention to their effect on employee plans.

The purpose of the Securities Act of '33, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 are essentially to provide fair and just

disclosure of the character of the securities which are sold to the public, to prevent fraud or misrepresentation in the sale of securities; to prevent and to provide remedies for fraud in securities trading and manipulation of the markets, and to regulate the securities market.

Probably the best known application of the 1933 Act is in the area of employee profit-sharing savings or thrift plans, under which frequently employee contributions along with employer contributions are used to buy company stock.

The Commission has considered that the solicitation by the employer of participation by employees in such plan is considered a "public sale" of "securities". In fact, the Commission has issued a simplified form for registering such plans, a Form S8.

Another application of the '34 Act is the so-called regulation S-X, applying to corporations whose securities are traded on a stock exchange, and to those making periodic reports to the Commission, which requires the disclosure in the balance sheet, or a note thereto, of the highlights of any pension plan, the estimated annual cost, and of course if the plan is not funded or otherwise provided for, an estimated amount necessary to fund past service cost.

There are of course many other applications. Perhaps one of the most interesting questions which has arisen in recent years is the application of the Investment Company Act of 1940 to plans which provide variable benefits depending upon the investment results of a merged fund invested in equity.

Our guest speaker this evening, Mr. Philip A. Loomis, Jr., is a graduate of Princeton University and of Yale Law School. He was in private practice a good many years. At one time he was Counsel for Northrup Corporation out on the West Coast. He's a member of the California Bar and of the American Bar Association.

He has spent twelve years with the Securities and Exchange Commission, and prior to becoming its General Counsel was director of the Division of Trading and Exchanges. I am going to introduce him to you in just a moment to speak for himself.

But before I do, I do want to just mention one additional thing to you:

Recently the Subcommittee on Fiscal Policy of the Joint Economic Committee of the Congress of the United States has released a pamphlet entitled "Old Age Income Assurance: An Outline of Issues and Alternatives." I commend its reading to you as must reading to those who are interested in the future of private pensions. It is available from the government printing office. If anybody wants a reference to it after the meeting we have a copy up here. But I do think you ought to read it.

In the meantime, may I present to you Phil Loomis, General Counsel of the Securities & Exchange Commission.

MR. LOOMIS: Thank you, Bob. I am very glad to be here. The topic which

is assigned to me, which generally involves the possible application of the Federal Securities Laws to pension and profit-sharing plans, is a very broad one.

Bob has indicated some of its possible dimensions and all I can say is that I am not going to get into all of them. There are several reasons for this. One of them is the fact that on one side of this equation, the Federal Securities Law, I am supposed to be reasonably informed. Of the other side, the operation of pension and profit-sharing plans, I know very little. As a result I have to proceed with caution.

I believe that I might well define some of the limits of what I propose to talk about. As to one side of it, the pension and profit-sharing plans, I think I will primarily discuss pension or retirement plans. That is, those plans which are designed to provide retirement income to employees.

I will further devote myself at least primarily to those plans which are funded in some way. A plan which simply provides that the employer agrees to pay retirement income to his employees out of his current revenues without any funding arrangements, is unlikely to involve many problems under the Securities laws.

One reason for confining myself to some extent to retirement plans is that profit-sharing and thrift and savings and option plans assume such infinite variety, that to attempt to generalize about the possible application of the securities laws to those plans isn't going to get anybody very far. It will all come back to the usual answer that you get when you speak to a bureaucrat, it depends on the facts of the case. (Laughter.) And that isn't going to help you very much.

As far as the Federal Securities Laws, I am going to confine myself primarily to the possible applications of the Securities Act of 1933 and the Investment Company Act of 1940. This, because the more interesting problems I think are in these areas.

The Securities Exchange Act of 1934 as applied to pension plans requires disclosure in reports and other documents concerning the existence and terms of a company's pension plan. While that is significant, it's an area in which there is nothing very new going on, except insofar as accountants have been recently taking some interest, and making some suggestions as to how these disclosures should be made.

As I say, I told you earlier, I am not too familiar with pension plans. I proceeded on the assumption that perhaps I had one advantage over you, that maybe you weren't too familiar with the details of the Securities Laws. I think from some of the faces that I see in the audience that isn't so. But I will nevertheless try to outline the Securities Act and the Investment Company Act in case some of you have not too much acquaintance with them, and to give you a thumbnail sketch.

The Securities Act of 1933 prohibits fraud and that type of thing. But its primary purpose is to provide disclosures, through registration and the requirement that a prospectus be delivered, in the case of offerings of securities by an issuer to the public.

Prima facie, this wouldn't seem to have much effect on pension plans, but it can, because of the fact that the definition of security in the Act is extremely broad. It includes such things as an investment contract, or a certificate of interest in a profit-sharing plan.

The term investment contract, in turn, has been defined by the Supreme Court rather broadly to include any contract or arrangement by which a person entrusts funds to others with the expectation that he will derive profit from the management of those funds or the investment of those funds in some venture by others.

Consequently, a great many, particularly contributory, pension plans could well be regarded as creating either an investment contract or a certificate of interest in a profit-sharing plan.

There are various exemptions in the securities act. The ones which are perhaps most pertinent here are exemptions for securities issued or guaranteed by a bank, and an exemption for insurance policies or annuity contracts.

Further, the act applies only if a security is sold. And that term is defined as meaning that a security is disposed of for value.

The Investment Company Act of 1940 provides for the registration and the rather detailed and elaborate regulation of investment companies. Again, its possible application depends upon the statutory definitions. The definition of an investment company is a thing which you have to work your way through about four sections of the act before you finally come down to it. But in essence it means a company, and a company is defined as a corporation, a partnership, a fund or any organized group of persons, which company is engaged in the business of investing or reinvesting in securities or which does invest or reinvest in securities and has forty percent of its assets invested in securities other than government bonds.

Again, you can see that that definition could well encompass a funded pension plan. There are various exceptions in the Investment Company Act as well.

The ones that are particularly pertinent in this area, I think are exemptions for banks and insurance companies. Neither of these is an investment company. There is also an exemption for common trust funds administered by a bank. And finally, there is the exemption provided in Section 3 (c) (13) of the Act, for any employees pension or profit-sharing trust, which is qualified for tax exemption under Section 165 of the Internal Revenue Code.

Section 165 was long ago repealed, but its provisions as I understand it are transferred to Section 401 of the Internal Revenue Code. So the key to the 3 (c) (13) exemption is whether or not the pension arrangment is a trust and whether it qualifies for tax exemption under Section 401 of the Internal Revenue Code.

This is a brief thumbnail sketch of the statutory pattern. Historically, the Securities Act and the Investment Company Act have had very little application to pension and retirement plans. This is somewhat surprising, in view of the fact that such plans do involve the creation of a security within the meaning of both acts, an investment

contract, or a certificate of interest in a profit-sharing agreement, and these are made available to a considerable number of people.

The historical position of the Commission as explained by Professor Loss in his text book, and I have no reason to doubt that this is not correct, is that the average interest in a pension plan does involve a security, particularly a contributory plan, where employees put money into the plan with the expectation of receiving a return, there is a security.

Furthermore, it is not impossible to bring into this concept non-contributory plans, because after all, these are not gifts, what the employer contributes is not philanthropy, it is something that is paid in consideration of the employee's services, and as a result, it can well be said that this also in effect is an investment fund which has been set aside for the employees.

Historically, however, the Commission's position has been, as far as the Securities Act is concerned, that if a plan is non-contributory, or if employees' contributions are mandatory, they are required as a condition of their employment, to put in whatever they do put in, the transaction has not been regarded as involving a sale of security.

It has been the position that it is merely an incident of the employer-employee relationship, in which the employee makes no investment decisions, so to speak, and he is accordingly regarded as not having purchased a security.

Thus, generally speaking, the Securities Act applied only to a non-mandatory contributory plan. Further, the Commission has taken the view that it will really require registration for the traditional type of plan, only where there is an investment in the employer's stock.

Form S-8 that Bob referred to, and which was promulgated in 1953, covers the registration of numerous types of employee plans, but is applicable only when there is an investment in the employer stock, and an opinion of one of the Commission's assistant general counsels, I believe, that came out at the same time, said that there would be no registration question raised unless the investment in the company stock exceeded the amount of the employer's contributions.

Consequently, there have been historically, relatively few pension plans registered under the Securities Act. There have been various thrift plans and profit sharing plans which involve investment in the company stock, but among pension plans there have been relatively few. The Sears Roebuck pension plan, for example, has been registered consistently over a good many years under the Securities Act, because that is largely invested in Sears stock.

As to the application of the Investment Company Act, most funded plans probably do involve the creation of an investment company. But there are several exemptions which have usually sufficed to cover the field. The exemption for insurance, the exemption for securities issued by banks, the exemption for common trust funds, and particularly the employees pension trust and profit-sharing exemption in 3 (c) (13) have kept most pension plans out from under the Investment Company Act. So much

for history.

There have, however, been developments in recent years. I think these spring from two principal sources. First, changes in the operation and structure of employees pension and retirement plans, and secondly, certain developments in the interpretation and application of the Securities Laws.

First, as to the pension plan, traditionally, as I understand it, and I admit to some ignorance, a pension plan involves a system under which employees were promised, upon retirement at a specified age, that they would receive a pension in a fixed dollar amount, which was determined by reference to their prior compensation on the job, and perhaps by their length of service.

This would either not be completely funded, or would be funded by amounts actuarially calculated to yield the required amount, and the money would be usually invested in bonds, and the actuarial computations would assume a rate of interest for the bonds. There really didn't seem any great reason to apply the Securities Act to that type of arrangement.

The disclosure requirements of the Securities Act, the investment type of disclosure requirement, wouldn't add a great deal to what was already known about the plan, and the regulation under the Investment Company Act also would be of limited usefulness.

Accordingly, the Commission didn't worry too much about this type of plan. Then a change developed. There came a feeling, as I understand it, on the part of employers, that they could reduce their expenses for pension plans by investing in equity securities in the hope, which has been realized to a considerable degree in recent years, that the equity security might go up, and that this would reduce the required employer contributions.

Consequently, both banks and insurance companies got into the business of creating plans which provided for an investment in equity securities with the employer taking the risk and reaping the benefit of that type of investment.

Later, employees wanted to get in on this, and consequently, plans were developed in which the benefits which the employee would receive were not fixed in advance, under the terms of the plan, but, rather, depended upon the investment experience of a portfolio of securities. If they went up, the pension was larger. If they went down, the pension was less.

There further developed in conjunction with this, plans which gave the employee a good many options. He could place part of his money in fixed income and part of his money in variable benefits. He could change his election from time to time. All of this rather changes the picture from the viewpoint of the Federal Securities Law.

You have employers, in effect, assuming investment risks, and making investment decisions. You have employees -- and this is where we really begin to worry a bit - assuming investment risks and making investment decisions. One of the purposes of the Securities Law, one of the primary purposes was to provide for protection where this

type of thing is being done, where investment risks and investment decisions are being made by members of the public who may need disclosures.

There was also the adoption of the so-called Smathers-Keogh Act, the self-employed person's retirement act provisions, with the consequent development of an interest among banks and insurance companies in providing media for the funding of these plans, again often using equity investment.

So much initially for developments in the pension plan area which have changed the look of things from the Commission's viewpoint. There were also developments in securities regulation. One of the most signficant involved the creation by the insurance industry of so-called variable annuities. These are arrangements under which an insurance company sells a program in which people put in money over a period of time, usually periodic payments over a period of some years. These are invested in equities, and the so-called annuitant receives not a fixed sum as annuities have always provided, but rather an amount which varies depending upon the investment experience of the so-called separate account, which, under state insurance laws, is a medium in which the funds are invested. Most State insurance laws require that amounts allocated to variable annuities be separated from the general assets of the insurance companies, and set aside in a special fund or separate account for the participants.

The Commission took the position that this was not an annuity, rather it was a security, and litigated the question with the Variable Annuity Life Insurance Company of Washington. We lost in two courts, but we won in the one that counts, the Supreme Court of the United States. (Laughter.)

Accordingly, it was established that a variable annuity is a security, not insurance. Then we got involved in the controversy under the Investment Company Act with the Prudential Insurance Company. They took the position that even though the Supreme Court had determined that a variable annuity is a security and not insurance, nevertheless since Prudential is obviously upon its face an insurance company, they were exempt from the Investment Company Act, even when they sold variable annuities, because an insurance company is exempted from the definition of an investment company, and no one could say that Prudential was not primarily an insurance company.

They applied to the Commission for a determination to this effect. The Commission declined to give them that determination, and instead concluded that their separate account for variable annuities was an investment company, which for purposes of the Investment Company Act was separate from Prudential.

The Court of Appeals for the Third Circuit in Philadelphia affirmed the Commission's decision in 1964, holding that not only was a variable annuity a security, not insurance, but that a separate account for variable annuities maintained by an undoubted insurance company was an investment company.

The rationale both of the Commission and the court was that although Prudential was not an investment company, it had created and was managing one. We then got involved in various difficult problems. One of them was the fact that when a bank chose to operate a plan for equity investment and variable benefits for employees, it appeared that it still was entitled to the 3 (c)(13) exemption from the Investment

Company Act, as an employee's pension trust, since the bank held the assets in trust, which were qualified for exemption under the Internal Revenue Code. On the other hand, the decisions in the Prudential case held that, if an insurance company attempted to do the same thing, it had no exemption.

The insurance companies, for obvious reasons, were most unhappy about the situation. And accordingly, the Commission in 1963, adopted a rule, Rule 3 (c) (3), which exempted group variable annuities used to fund employee retirement plan from the Investment Company Act, if various conditions were met, including qualification for the tax exemption, and a provision that the employee's contributions, if any, were not invested in variable annuities, but in pure fixed annuities.

The object of this was to more or less equalize the position of banks and insurance companies. At the same time a rule was adopted, Rule 156, which in effect said that a transaction by the insurance company, which qualified for the Rule 3 (c) (3) exemption was not deemed to be subject to registration under the Securities Act of 1933.

In 1964, the Commission determined to amend this Rule 3 (c) (3) to provide an exemption even if the employers' contributions were used to provide variable benefits for employees.

Also, in 1963, the Commission had to deal with the Smathers-Keogh Plans. Traditionally, as far as the Securities Act of 1933 was concerned, we have taken the position that an offering to an employer, as distinct from employees, of a pension plan arrangement by a bank or insurance company, was regarded as not involving a public offering under the Securities Act, because each of these were privately negotiated arrangements, which were worked out between the employer, assisted by his actuary and advisers, and the banks or insurance company, assisted by its actuaries and advisers.

This concept didn't seem to apply very well to Smathers-Keogh Plan, because these can efficiently be operated only if you offer a fairly standardized package, to all the numerous small self-employed persons and their employees who may be interested.

Accordingly, and in accordance with a public statement by the then chairman, the treatment of the Smathers-Keogh Plans has been that where a bank or insurance company is offering them they are not exempt from registration under the Securities Act, and Prudential has registered under the Securities Act its collective investment funds for Smathers-Keogh Plans, and so has a bank in Detroit.

The Rule 3 (c) (3) exemption for employees pension funds under the Investment Company Act has been regarded as available for bank administered funds for the operation of Smathers-Keogh Plans. There is no comparable exemption for insurance companies. But the Commission has so far stood still for allowing those insurance companies which are interested, and few are, to also operate collective investment funds for Smathers-Keogh Plans, without registration under the Investment Company Act.

We have, rather surprisingly, had very little contact with pension plans other than those which are administered by banks and insurance companies. We know there are a great many of them. We went over to the Labor Department to see if we could look at their files under the Pension and Welfare Plans Disclosure Act, but we were not very successful in finding anything that was very useful to us.

We assumed that most of these plans not involving a bank or insurance company probably qualify for exemption under the Investment Company Act, on the ground that they are trusts meeting the tax exemption requirements of the Internal Revenue Code. I suppose everyone would wish to qualify for a tax exemption if possible. These plans probably do not usually involve a public offering of securities. But this is a rather obscure area in our relation to pension and welfare -- pension and profit-sharing plans. It seems to be primarily banks and insurance companies, companies with pension, profit-sharings, thrift, investment and that type of plan who come to us.

So much for history.

The next question is, where do we go from here? What I have told you heretofore is pretty much a matter of record. But now, if I go off into the future, I have to emphasize the caveat that the Commission always expects of its employees, that they are speaking only for themselves and they don't bind the Commission. But I have to emphasize it a little more than usual, because the fact is that the Commission has not reached any firm decisions, or even less than firm decisions, as to where we go from here.

There are a few things which I think are fairly clear. Those pension plans which provide for fixed benefits and are invested in fixed income securities will be treated as they have been heretofore. There will be no real problem under the securities law as to them. Therefore, if there is a problem or a change, it will revolve around those pension and retirement plans where either the employer or the employee or both, assumes an investment risk and makes an investment decision, primarily in situations involving investment in equity securities. It might also include situations where the employee is given assorted options as to what type benefit he will receive, whether it will be fixed or variable, or whether it will be invested in this or in that.

The focus of the two acts, the Securities Act and Investment Company's Act is a little different. The basic purpose of the Securities Act is to provide information to investors in order that they may make informed investments decisions.

Consequently, it would seem logical that the Securities Act would apply, if at all, only where the public was being called upon to make investment decisions in connection with a pension plan, and this would include particularly the employees, where they are being asked to make investment decisions, it would seem that they should be informed.

As far as the employers are concerned, the situation is a little different. The Securities Act exempts private offerings. And thus if you have a privately negotiated arrangement between a sophisticated substantial employer and an insurance company, bank or other pension administrator, it would be reasonable to say that this, for purposes

of the Securities Act, would be viewed as a private offering.

Consequently, on this hypothesis, the Securities Act would apply when a number of employees were called upon to make investment decisions.

As far as the Investment Company Act of 1940 is concerned, the emphasis is a little different. Where funds of the public are collectively invested and managed by some investment manager, and the public's funds are at the risk of the market, where they may gain if the investment fund gains, and they may lose if the investment fund declines, that situation is of the essence for the Investment Company Act.

The regulation there provided, which is in effect designed to minimize conflicts of interest, to provide disclosures, to provide independent checks on management, to give the investor a voice in what is done with his money -- seems relevant where the public's money is at risk.

Here again, we may distinguish between the employers and employees. Employers are presumably able to take care of themselves, except in the Smathers-Keogh area, and you can assume, therefore, that their relationships with the pension managers is to be regarded as a private transaction. But where employees bear the investment risk, then it would seem at least as a hypothesis that maybe some of the protections of the Investment Company Act should apply.

How do you square this theoretical analysis, with the existence of Section 3 (c) (13) of the Investment Company Act which, you will recall, exempts employees pension and profi sharing trusts which meet the requirements of Section 401 of the Internal Revenue Code. You couldn't quite achieve the type of hypothetical solutions that I have mentioned without creating a discrimination between insurance companies and banks.

Insurance company plans might require registration under the Investment Company Act, where identical bank plans do not. Further, since 3 (c)(13) is keyed to Section 401 of the Internal Revenue Code, there isn't any exemption there for anybody, covering the average plan for public employees, school teachers, college professors, government employees, state or local government employees, generally, since whatever tax exemption they have, doesn't come from Section 401 of the Internal Revenue Code.

Further, these public employee plans are even more variable in a way than private plans because of the fact that the public employer doesn't have to worry about getting a tax deduction. We will be confronted with the necessity of attempting to harmonize some of our theoretical ideas with the realities of what the Securities laws provide and what the Internal Revenue Code provides, which latter is even worse, from my limited experience.

If we should determine that the Investment Company Act should have an application in any material way to pension plans, it would be my opinion, that the full panoply of the Investment Company Act should not apply, and that the Commission hopefully would develop rules which would provide exemptions from those provisions of the Investment Company Act which just don't seem very well adopted to the realities of pension plan administration being designed for something quite different.

There is another possible avenue which might be explored. It is not really within the Commission's function to explore, but it may be worth considering.

There is I gather, a feeling that the Welfare and Pension Plan Disclosure Act is less than a perfect statute, and there are bills pending in Congress to amend it, and consideration is being given to the problem, as I understand it, in various parts of the government and outside the government by advisory groups from organizations such as this.

If as a result of all this, there emerged amendments to the Welfare and Pension Plan Disclosure Act, which would provide for more effective disclosure, more effective enforcement, particularly of fiduciary duties, and a broader coverage, then it would seem to me possible, and at this point, I assure you, I am not speaking for the Commission, -- there could be legislation exempting from various provisions of the Securities Laws, plans which were brought under it. There is some history behind this. When the Welfare and Pension Plan Act was originally introduced, it was suggested by Senator Douglas and others that the Commission should administer it. The Commission was a very reluctant dragon, and ultimately bowed out willingly in favor of the Labor Department.

On the other hand, I understand that some of the people in other agencies of the government who are considering this problem, think that if that act is fixed up, one part of the fixing it up could be to transfer it to the Commission. I am not campaigning for that. Heaven knows, we've got enough to do. (Laughter)

These then are some of my ideas, and only my ideas, as to where we may be going with respect to the relationship and application of the Securities Laws to these new and novel developments in the pension and welfare fund area.

I understand from Bob Lane that you might be willing to take a few minutes for questions, and I'd be glad to try to deal with them if we can. (Applause.)

MR. LANE: Thank you very much. I think probably the easiest thing for us to do is to make you stand up here and deal with the questions as they come. However, as your moderator, I would just like to ask one question, to see whether I understood some of the things you were saying.

Are you saying that, if an employer plan provides a benefit which comes from invested funds, which, let's say, are invested in equities under a Sec. 401 Plan and Sec. 501 trust, you may one of these days insists upon registration, because the employee is assuming the investment risk?

MR. LOOMIS: Not quite. That depends on registration under which act. If it's a trust which qualifies under 401, it's exempted from the Investment Company Act by Section 3 (c) (3) and that ends that. If, however, the employee assumes the investment risk, whatever he gets depends upon how the investment performs, or if he has assorted options as to whether he wants a fixed, a variable or combination of the two, it is possible that we might say that registration and the disclosure, under the 1933 Securities Act is called for, although we recognize, and have said, that before

we cross that bridge, we would have to provide a modified registration form.

QUESTION: Will this take into account a qualified money purchase plan where the contribution is stated, and would this vary the ultimate benefit? If the benefit is not stated, with individual trustees, to what extent would that have to be registered with the SEC?

MR. LOOMIS: I am sorry to confess my ignorance. What is a money purchase plan --

QUESTION: In a stated benefit plan, the employer promises X dollars fixed. In a money purchase plan, there is no such promise. But the contribution is promised, so that ultimately the employee gets no fixed benefits. It would depend on the experience of the fund.

I would like to know whether that kind of a deal would have to be registered.

MR. LOOMIS: I see. This is a different phraseology from that I know of.

As I understand it, this is an arrangement where the employer simply agrees to put a certain amount of money into a fund, and this is invested by somebody, for instance, a bank --

QUESTION: No, we have individual trustees.

MR. LOOMIS: For a trustee, yes. A bank or a trustee --

QUESTION:. No; individual trustees.

MR. LOOMIS: Individual trustees, all right. This presumably would still be exempt from the Investment Company Act by virtue of 3 (c) (13). But if it was publicly offered, if the number of employees was large enough, and if it was interstate, since there is an intrastate exemption under the Securities Act if the issuer, which in this case would be the trust, and all the employees were located in one state, it would be exempted from the Securities Act.

But if those exemptions were not available, it is possible that registration under the Securities Act may be called for.

QUESTION: I want to add one more point.

There are several companies in different states which takes it over state boundaries. Would that make any difference?

MR. LOOMIS: Yes. It would indicate that registration under the Securities Act might be much more likely to be called for.

QUESTION: Let us suppose we have a 401 qualified plan. And let us suppose that this plan is a multi-employer; in other words, a trade association group. And they use a bank as trustees. The bank may invest in equities or whatever they see fit. They are