

NOT VOTING—13

Coburn Kennedy Velázquez  
Cook Lucas (OK) Wise  
Cooksey McIntosh Young (AK)  
Cox Myrick  
Gutierrez Souder

□ 1243

So (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

PERSONAL EXPLANATION

Mr. KENNEDY of Rhode Island. Mr. Speaker, on May 3, 2000, I was unavoidably detained and consequently missed four votes. Had I been here I would have voted: "Yes" on the passage of H. Con. Res. 295; "yes" on the passage of H. Con. Res. 304; "yes" on the passage of S. 1744; "yes" on the passage of H.R. 1509.

SUPPORTING A NATIONAL CHARTERS SCHOOLS WEEK

The SPEAKER pro tempore. The unfinished business is the question of suspending the rules and agreeing to the concurrent resolution, H. Con. Res. 310.

The Clerk read the title of the concurrent resolution.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. PETRI) that the House suspend the rules and agree to the concurrent resolution, H. Con. Res. 310, on which the yeas and nays are ordered.

This will be a 5-minute vote.

The vote was taken by electronic device, and there were—yeas 397, nays 20, not voting 17, as follows:

[Roll No. 137]

YEAS—397

Abercrombie Bliley Clyburn  
Ackerman Blumenauer Coble  
Aderholt Blunt Collins  
Allen Boehlert Combest  
Andrews Boehner Condit  
Archer Bonilla Cooksey  
Army Bono Costello  
Baca Borski Cox  
Bachus Boswell Coyne  
Baird Boucher Cramer  
Baker Boyd Crane  
Baldacci Brady (PA) Crowley  
Baldwin Brady (TX) Cubin  
Ballenger Brown (FL) Cunningham  
Barcia Brown (OH) Danner  
Barr Bryant Davis (FL)  
Barrett (NE) Burr Davis (IL)  
Barrett (WI) Burton Davis (VA)  
Bartlett Buyer Deal  
Barton Callahan DeFazio  
Bass Calvert DeGette  
Bateman Camp Delahunt  
Becerra Campbell DeLauro  
Bentsen Canady DeMint  
Bereuter Cannon Deutsch  
Berkley Capps Diaz-Balart  
Berman Cardin Dickey  
Berry Castle Dicks  
Biggert Chabot Dingell  
Bilbray Chambless Dixon  
Billirakis Chenoweth-Hage Doggett  
Bishop Clayton Dooley  
Blagojevich Clement Doyle

Dreier Kleczka  
Duncan Klink  
Dunn Knollenberg  
Edwards Kolbe  
Ehlers Kuykendall  
Ehrlich LaFalce  
Emerson LaHood  
Engel Lampson  
English Lantos  
Eshoo Larson  
Etheridge Latham  
Everett LaTourrette  
Ewing Lazio  
Farr Leach  
Fattah Levin  
Fletcher Lewis (CA)  
Foley Lewis (GA)  
Forbes Lewis (KY)  
Ford Linder  
Fossella Lipinski  
Fowler LoBiondo  
Frank (MA) Lofgren  
Franks (NJ) Lowey  
Frelinghuysen Lucas (KY)  
Frost Luther  
Gallegly Maloney (CT)  
Ganske Maloney (NY)  
Gejdenson Manzullo  
Gekas Markey  
Gephardt Martinez  
Gibbons Mascara  
Gilchrest Matsui  
Gillmor McCarthy (MO)  
Gilman McCarthy (NY)  
Gonzalez McCollum  
Goode McCrery  
Goodlatte McGovern  
Goodling McHugh  
Gordon McInnis  
Goss McIntyre  
Graham McKeon  
Granger McKinney  
Green (TX) McNulty  
Green (WI) Meehan  
Greenwood Meek (FL)  
Gutknecht Meeks (NY)  
Hall (OH) Menendez  
Hall (TX) Metcalf  
Hansen Mica  
Hastings (FL) Millender-  
Hastings (WA) McDonald  
Hayes Miller (FL)  
Hayworth Miller, Gary  
Hefley Miller, George  
Herger Minge  
Hill (IN) Moakley  
Hill (MT) Mollohan  
Hilleary Moore  
Hinojosa Moran (KS)  
Hobson Moran (VA)  
Hoefel Morella  
Hoekstra Murtha  
Holden Nadler  
Holt Napolitano  
Hoooley Neal  
Horn Nethercutt  
Hostettler Ney  
Houghton Northup  
Hoyer Norwood  
Hulshof Nussle  
Hunter Oberstar  
Hutchinson Obey  
Hyde Ortiz  
Insole Ose  
Isakson Owens  
Istook Oxley  
Jackson (IL) Packard  
Jackson-Lee Pallone  
(TX) Pascarell  
Jefferson Pastor  
Jenkins Paul  
John Buyer Pease  
Johnson (CT) Pelosi  
Johnson, E. B. Peterson (MN)  
Johnson, Sam Peterson (PA)  
Jones (NC) Petri  
Jones (OH) Phelps  
Kanjorski Pickering  
Kaptur Pickett  
Kelly Pitts  
Kennedy Pombo  
Kildee Pomeroy  
Kilpatrick Porter  
Kind (WI) Portman  
King (NY) Price (NC)  
Kingston Pryce (OH)

Quinn Weldon (PA)  
Radanovich Weller  
Rahall Wexler  
Ramstad Weygand  
Rangel  
Regula  
Reyes  
Reynolds  
Riley  
Rodriguez  
Roemer  
Rogan  
Rogers  
Rohrabacher  
Ros-Lehtinen  
Rothman  
Roukema  
Roybal-Allard  
Royce  
Rush  
Ryan (WI)  
Ryun (KS)  
Sabo  
Salmon  
Sanchez  
Sanders  
Sandlin  
Sanford  
Sawyer  
Saxton  
Scarborough  
Schaffer  
Schakowsky  
Sensenbrenner  
Sessions  
Shadegg  
Shaw  
Shays  
Sherman  
Sherwood  
Shimkus  
Shows  
Shuster  
Simpson  
Sisisky  
Skeen  
Skelton  
Smith (MI)  
Smith (NJ)  
Smith (TX)  
Smith (WA)  
Snyder  
Spence  
Spratt  
Stabenow  
Stark  
Stearns  
Stenholm  
Strickland  
Stump  
Stupak  
Sununu  
Sweeney  
Talent  
Tancredo  
Tanner  
Tauscher  
Tauzin  
Taylor (MS)  
Taylor (NC)  
Terry  
Thomas  
Thompson (CA)  
Thompson (MS)  
Thornberry  
Thune  
Thurman  
Tiahrt  
Toomey  
Traficant  
Turner  
Udall (CO)  
Udall (NM)  
Upton  
Vento  
Vitter  
Walden  
Walsh  
Wamp  
Waters  
Watkins  
Watt (NC)  
Watts (OK)  
Waxman  
Weiner  
Weldon (FL)

Whitfield  
Wicker  
Wilson  
Wolf

NAYS—20

Bonior Kucinich Scott  
Capuano Lee Serrano  
Carson McDermott Slaughter  
Clay Mink Tierney  
Conyers Olver Towns  
Hilliard Payne Visclosky  
Hinchey Rivers

NOT VOTING—17

Coburn Filner Myrick  
Cook Gutierrez Souder  
Cummings Kasich Velázquez  
DeLay Largent Wise  
Doolittle Lucas (OK) Young (AK)  
Evans McIntosh

□ 1252

Ms. CARSON changed her vote from "yea" to "nay."

So (two-thirds having voted in favor thereof) the rules were suspended and the concurrent resolution was agreed to.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

Stated for:

Mr. DOOLITTLE. Mr. Speaker, on rollcall No. 137, I was inadvertently detained. Had I been present, I would have voted "yea."

WORKER ECONOMIC OPPORTUNITY ACT

Mr. GOODLING. Mr. Speaker, I move to suspend the rules and pass the Senate bill (S. 2323) to amend the Fair Labor Standards Act of 1938 to clarify the treatment of stock options under the Act.

The Clerk read as follows:

S. 2323

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Worker Economic Opportunity Act".

SEC. 2. AMENDMENTS TO THE FAIR LABOR STANDARDS ACT OF 1938.

(a) EXCLUSION FROM REGULAR RATE.—Section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(e)) is amended—

(1) in paragraph (6), by striking "or" at the end;

(2) in paragraph (7), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

"(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

"(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that

grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

“(C) exercise of any grant or right is voluntary; and

“(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

“(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

“(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.”.

(b) EXTRA COMPENSATION.—Section 7(h) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(h)) is amended—

(1) by striking “Extra” and inserting the following:

“(2) Extra”; and

(2) by inserting after the subsection designation the following:

“(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date that is 90 days after the date of enactment of this Act.

(d) LIABILITY OF EMPLOYERS.—No employer shall be liable under the Fair Labor Standards Act of 1938 for any failure to include in an employee's regular rate (as defined for purposes of such Act) any income or value derived from employer-provided grants or rights obtained pursuant to any stock option, stock appreciation right, or employee stock purchase program if—

(1) the grants or rights were obtained before the effective date described in subsection (c);

(2) the grants or rights were obtained within the 12-month period beginning on the effective date described in subsection (c), so long as such program was in existence on the date of enactment of this Act and will require shareholder approval to modify such program to comply with section 7(e)(8) of the Fair Labor Standards Act of 1938 (as added by the amendments made by subsection (a)); or

(3) such program is provided under a collective bargaining agreement that is in effect on the effective date described in subsection (c).

(e) REGULATIONS.—The Secretary of Labor may promulgate such regulations as may be necessary to carry out the amendments made by this Act.

The SPEAKER pro tempore (Mr. QUINN). Pursuant to the rule, the gentleman from Pennsylvania (Mr. GOODLING) and the gentleman from New York (Mr. OWENS) each will control 20 minutes.

The Chair recognizes the gentleman from Pennsylvania (Mr. GOODLING).

Mr. GOODLING. Mr. Speaker, I yield myself 2 minutes.

Mr. Speaker, I rise in strong support of S. 2323, the Worker Economic Opportunity Act. The Department of Labor, in a recent opinion letter, has jeopardized a successful and popular new trend in employment, and they did it not because of any fault of theirs but because they interpreted the Labor Standards Act of 1938, which is what I have said over and over again, year after year, we are trying to run businesses, labor and management, based on rules and regulations that were written back in the 1930s, when it was a manufacturing economy only and men only. We cannot do that in the 21st century.

Well, of course, if they had followed through, we would have eliminated the very popular stock option for hourly employees.

I want to thank the gentleman from New York (Mr. OWENS) and the gentleman from Indiana (Mr. ROEMER) and the gentleman from Wisconsin (Mr. KIND), among others, for helping us develop the bipartisan resolution. I want to certainly thank the gentleman from California (Mr. CUNNINGHAM), who has worked tirelessly to help bring about this resolution, as well as our subcommittee chair, the gentleman from North Carolina (Mr. BALLENGER).

The Worker Economic Opportunity Act reflects a consensus reached among the bill's chief sponsors in the House and the Senate committees of jurisdiction and the Department of Labor. The other body passed it 95 to nothing; and to further explain the consensus we have reached, I am going to include into the RECORD a statement of legislative intent which is substantially identical to what was the legislative intent presented in the other body by Senators MCCONNELL, DODD, JEFFORDS, and ENZI.

I urge my colleagues to vote for the Worker Economic Opportunity Act.

STATEMENT OF LEGISLATIVE INTENT REGARDING S. 2323, THE WORKER ECONOMIC OPPORTUNITY ACT

#### I. INTRODUCTION AND PURPOSE

The purpose of S. 2323, the Worker Economic Opportunity Act, is to allow employees who are eligible for overtime pay to continue to share in workplace benefits that involve their employer's stock or similar equity-based benefits. More working Americans are receiving stock options or opportunities to purchase stock than ever before. The Worker Economic Opportunity Act updates the Fair Labor Standards Act to ensure that rank-and-file employees and management can share in their employer's economic well being in the same manner.

Employers have provided stock and equity-based benefits to upper level management for decades. However, it is only recently that employers have begun to offer these programs in a broad-based manner to non-exempt employees. Historically, most employees had little contact with employer-provided equity devices outside of a 401(k) plan. But today, many employers, from a broad cross-section of industry, have begun offer-

ing their employees opportunities to purchase employer stock at a modest discount, or have provided stock options to rank and file employees; and they have even provided outright grants of stock under certain circumstances.

The Federal Reserve Board of Governors recently estimated that 17 percent of large firms have introduced a stock options program and 37 percent have broadened eligibility for their stock option programs in the last two years.<sup>1</sup> The Employment Policy Foundation estimates between 9.4 million and 25.8 million workers receive benefits through some type of equity participation program.<sup>2</sup> The trend is growing, and given the current state of the economy, it is likely to continue.

The tremendous success of our economy over the last several years has been largely attributed to the high technology sector. One of the things that our technology companies have succeeded at is creating an atmosphere in which all employees share the same goal: the success of the company. By vesting all employees in the success of the business, stock options and other equity devices have become an important tool to create businesses with unparalleled productivity. The Worker Economic Opportunity Act will encourage more employers to provide opportunities for equity participation to their employees, further expanding the benefits that inure from equity participation.

#### II. BACKGROUND AND NEED FOR LEGISLATION

##### A. Background on Stock Options and Related Devices

Employers use a variety of equity devices to share the benefits of equity ownership with their employees. As the employer's stock appreciates, these devices provide a tool to attract and retain employees, an increasingly difficult task during a time of record economic growth and low unemployment in the United States. These programs also foster a broader sense of commitment to a common goal—the maintenance and improvement of the company's performance—among all employees nationally and even internationally, and thus provide an alignment between the interests of employees with the interests of the company and its shareholders. They can also reinforce the evolving employer-employee relationship, with employees viewed as stakeholders.

Employer stock option and stock programs come in all different types and formats. The Worker Economic Opportunity Act focuses on the most common types: stock option, stock appreciation right, and employee stock purchase programs.

**Stock Option Programs.** Stock options provide the right to purchase the employer's securities for a fixed period of time. Stock option programs vary greatly by employer. However, two main types exist: nonqualified and qualified option programs.<sup>3</sup> Most programs are nonqualified stock option programs, meaning that the structure of the program does not protect the employee from being taxed at the time of exercise. However, the mechanics of stock option programs are very similar regardless of whether they are nonqualified or qualified. Some of these characteristics are described below.

**Grants.** An employer grants to employees a certain number of options to purchase shares of the employer's stock. The exercise price may be around the fair market value of the stock at the time of the grant, or it may be discounted below fair market value to provide the employee an incentive to participate in the option program.

<sup>1</sup>Footnotes at end of article.

Vesting. Most stock option programs have some sort of requirement to wait some period after the grant to benefit from the options, often called a vesting period. After the period, employees typically may exercise their options by exchanging the options for stock at the exercise price at any time before the option expires, which is typically up to ten years. In some cases, options may vest on a schedule, for example, with a third of the options vesting each year over a three-year period. In addition to vesting on a date certain, some options may vest if the company hits a certain goal, such as reaching a certain stock price for a certain number of days. Some programs also provide for accelerated or automatic vesting in certain circumstances such as when an employee retires or dies before the vesting period has run, where there is change in corporate control or when an employee's employment is terminated.

Exercise. Under both qualified and nonqualified stock option programs, an employee can exchange the options, along with sufficient cash to pay the exercise price of the options, for shares of stock. Because many rank-and-file employees cannot afford to pay the cost of buying the stock at the option price in cash, many employers have given their employees the opportunity for "cashless" exercise, either for cash or for stock, under nonqualified option plans. In a cashless exercise for cash, an employee gives options to a broker or program administrator, this party momentarily "lends" the employee the money to purchase the requisite number of shares at the exercise price, and then immediately sells the shares. The employee receives the difference between the market price and the exercise price of the stock (the profit), less transaction fees. In a cashless exercise for stock, enough shares are sold to cover the cost of buying the shares the employee will retain. In either case, the employee is spared from having to provide the initial cash to purchase the stock at the option price.

An employee's options usually expire at the end of the option period. An employee may forfeit the right to exercise the options, in whole or in part, under certain circumstances, including upon separation from the employer. However, some programs allow the employee to exercise the options (sometimes for a limited period of time) after they leave employment with the employer.

Stock Appreciation Rights. Stock appreciation rights (SARs) operate similarly to stock options. They are the rights to receive the cash value of the appreciation on an underlying stock or equity based security. The stock may be publicly traded, privately held, or may be based on valued, but unregistered, stock or stock equivalent. The rights are issued at a fixed price for a fixed period of time and can be issued at a discount, carry a vesting period, and are exercisable over a period of time. SARs are often used when an employer cannot issue stock because the stock is listed on a foreign exchange, or regulatory or financial barriers make stock grants impracticable.

Employee Stock Purchase Plans. Employee stock purchase plans (ESPPs) give employees the opportunity to purchase employer stock, usually at up to a 15 percent discount, by either regularly or periodically paying the employer directly or by having after-tax money withdrawn as a payroll deduction. Like option programs, ESPPs can be qualified or nonqualified.

Section 423 of the Internal Revenue Code<sup>4</sup> sets forth the factors for a qualified ESPP.

The ability to participate must be offered to all employees, and employees must voluntarily choose whether to participate in the program. The employer can offer its stock to employees at up to a 15 percent discount off of the fair market value of the stock, determined at the time the option to purchase stock is granted or at the time the stock is actually purchased. The employee is required to hold the stock for one or two years after the option is granted to receive capital gains treatment. If the employee sells the stock before the requisite period, any gain made on the sale is treated as ordinary income.

Nonqualified ESPPs are usually similar to qualified ESPPs, but they lack one or more qualifying features. For example, the plan may apply only to one segment of employees, or may provide for a greater discount.

#### B. The Fair Labor Standards Act and Stock Options

The Fair Labor Standards Act of 1938<sup>5</sup> (FLSA) establishes workplace protections including a minimum hourly wage and overtime compensation for covered employees, record keeping requirements and protections against child labor, among other provisions. A cornerstone of the FLSA is the requirement that an employer pay its nonexempt employees overtime for all hours worked over 40 in a week at one and one-half times the employee's regular rate of pay.<sup>6</sup> The term "regular rate" is broadly defined in the statute to mean "all remuneration for employment paid to, or on behalf of, the employee."<sup>7</sup>

Section 207(e) of the statute excludes certain payments from an employee's regular rate of pay to encourage employers to provide them, without undermining employees' fundamental right to overtime pay. Excluded payments include holiday bonuses or gifts,<sup>8</sup> discretionary bonuses,<sup>9</sup> bona fide profit sharing plans,<sup>10</sup> bona fide thrift or saving plans,<sup>11</sup> and bona fide old-age, retirement, life, accident or health or similar benefits plans.<sup>12</sup> By excluding these payments from the definition of "regular rate,"<sup>13</sup> Congress recognized that certain kinds of benefits provided to employees are not within the generally accepted meaning of compensation for work performed.

Thus, by excluding these payments from the regular rate in section 207(e) of the FLSA, Congress encouraged employers to provide these payments and benefits to employees. The encouragement has worked well—employees now expect to receive from their employer at least some of these benefits (i.e. healthcare), which today, on average, comprise almost 30 percent of employees' gross compensation.<sup>14</sup> For similar reasons, Congress decided that the value and income from stock option, SAR and ESPP programs should also be excluded from the regular rate, because they allow employees to share in the future success of their companies.

#### C. The Department of Labor's Opinion Letter on Stock Options

The impetus behind the Worker Economic Opportunity Act is the broad dissemination of a February 1999 advisory opinion letter<sup>15</sup> regarding stock options issued by the Department of Labor's Wage and Hour Division, the agency charged with the administration of the FLSA. The letter involved an employer's stock option program wherein its employees would be notified of the program three months before the options were granted, and some rank-and-file employees employed by the company on the grant date

would receive options. The options would have a two-year vesting period, with accelerated vesting if certain events occurred. The employer would also automatically exercise any unexercised options on behalf of the employees the day before the program ended.<sup>16</sup>

The opinion letter indicated that the stock option program did not meet any of the existing exemptions to the regular rate under the FLSA, although it did not explain the reasons in any detail. Later, the Administration's testimony before the House Workforce Protections Subcommittee explained that the stock option program did not meet the gift, discretionary bonus, or profit sharing exceptions to the regular rate because, among other reasons, it required employees to do something as a condition of receiving the options—to remain employed with the company for a period of time.<sup>17</sup> Such a condition is not allowed under the current regular rate exclusions. The testimony also noted that the program was not excludable under the thrift or savings plan exception because the employees were only allowed to exercise their options using a cashless method of exercise, and thus the employees could not keep the stock as savings or an investment.<sup>18</sup>

The opinion letter stated that the employer would be required to include any profits made from the exercise of the options in the regular rate of pay of its nonexempt employees. In particular, the profits would have to be included in the employee's regular rate for the shorter of the time between the grant date and the exercise date, or the two years prior to exercise.<sup>19</sup>

Section 207(e)'s exclusions to the regular rate did not clearly exempt the profits of stock options or similar equity devices from the regular rate, and thus from the overtime calculation. Thus, the Department of Labor's opinion letter provided a permissible reading of the statute. A practical effect of the Department of Labor's interpretation was stated by J. Randall MacDonald, Executive Vice President of Human Resources and Administration at GTE during a March 2, 2000 House Workforce Protections Subcommittee hearing on the issue: "[i]f the Fair Labor Standards Act is not corrected to reverse this policy, we will no longer be able to offer stock options to our nonexempt employees."<sup>20</sup>

As the contents of the letter became generally known in the business community and on Capitol Hill, it became clear that the letter raised an issue under the FLSA that previously had not been contemplated. It further became clear that an amendment to the FLSA would be needed to change the law specifically to address stock options.

A legislative solution was not only supported by employers at the House hearing, it was also supported by employees and unions. Patricia Nazemetz, Vice President of Human Resources for Xerox Corporation, read a letter from the Union of Needlework, Industrial and Textile Employees (UNITE), the union that represents many Xerox manufacturing and distribution employees, in which the International Vice President stated:

Xerox's UNITE chapter would strongly urge Congress to pass legislation exempting stock options and other forms of stock grants from the definition of the regular rate for the purposes of calculating overtime. . . . It is only recently that Xerox has made bargaining unit employees eligible to receive both stock options and stock grants. Without a clarification to the FLSA, we are afraid Xerox may not offer stock options or other forms of stock grants to bargaining unit employees in the future.<sup>21</sup>

At the House hearing, the Administration also acknowledged that the problem needed

to be fixed legislatively in a flexible manner. "Based on the information we have been able to obtain, there appears to be wide variations in the scope, nature and design of stock option programs. There is no one common model for a program, suggesting the need for a flexible approach. Given the wide variety and complexity of programs, we believe that the best solution would be to address this matter legislatively."<sup>22</sup>

The general agreement on the need to fix the problem among these diverse interests led to the development of the Worker Economic Opportunity Act.

### III. EXPLANATION OF THE BILL AND SPONSORS' VIEWS

Congress worked closely with the Department of Labor to develop this important legislation. The sections below reflect the discussions between the sponsors and the Department of Labor during the development of the legislation, and the sponsors' intent and their understanding of the legislation.

#### A. Definition of Bona Fide ESPP

For the purposes of the Worker Economic Opportunity Act, a bona fide employee stock purchase plan includes an ESPP that is (1) a qualified ESPP under section 423 of the Internal Revenue Code,<sup>23</sup> or (2) a plan that meets the criteria identified below.

##### 1. Qualified Employee Stock Purchase Plans

Qualified ESPPs, known as section 423 plans, comprise the overwhelming majority of stock purchase plans. Thus, the intent of the legislation is to deem "bona fide" all plans that meet the criteria of section 423.

##### 2. Nonqualified Employee Stock Purchase Plans

As described above, section 423 plans are considered bona fide ESPPs. Further, those ESPPs that do not meet the criteria of section 423, but that meet the following criteria also qualify as bona fide ESPPs:

(a) the plan allows employees, on a regular or periodic basis, to voluntarily provide funds, or to elect to authorize periodic payroll deductions, for the purchase at a future time of shares of the employer's stock;

(b) the plan sets the purchase price of the stock as at least 85% of the fair market value of the stock at the time the option is granted or at the time the stock is purchased; and,

(c) the plan does not permit a nonexempt employee to accrue options to purchase stock at a rate which exceeds \$25,000 of fair market value of such stock (determined either at the time the option is granted or the time the option is exercised) for each calendar year.

The sponsors note that many new types of ESPPs are being developed, particularly by companies outside the United States, and that many of these companies may also intend to apply them to their U.S.-based employees. These purchase plans have several attributes which make them appear to be more like savings plans than traditional U.S. stock purchase plans, such as a period of payroll deductions of between three and five years, or an employer provided "match" in the form of stock or options to the employee.

Further many companies are developing plans that are similar to section 423 plans. The sponsors believe that it is in the best interests of employees for the Secretary of Labor to review these and other new types of plans carefully in the light of the purpose of the Worker Economic Opportunity Act—to encourage employers to provide opportunities for equity participation to employees—and to allow section 7(e), as amended, to accommodate a wide variety of programs,

where it does not undermine employees' fundamental right to overtime pay. It is the sponsors' vision that this entire law be flexible and forward-looking and that the Department of labor apply and interpret it consistently with this vision.

#### B. "Value or Income" Is Defined Broadly

The hallmark of the Worker Economic Opportunity Act is that section 7(e)(8) provides that any value or income derived from stock option, SAR or bona fide ESPP programs is excluded from the regular rate of pay. For this reason, the phrase "value or income" is construed broadly to mean any value, profit, gain, or other payment obtained, recognized or realized as a result of, or in connection with, the provision, award, grant, issuance, exercise or payment of stock options, SARs, or stock issued or purchased pursuant to a bona fide ESPP program established by the employer.

This broad definition means, for example, that any nominal value that a stock option or stock appreciation right may carry before it is exercised is excluded from the regular rate. Similarly, the value of the stock or the income in the form of cash is excluded after options are exercised, as is the income earned from the stock in the form of dividends or ultimately the gains earned, if any, on the sale of the stock. The discount on stock option, SAR or stock purchase under a ESPP program is likewise excludable.

#### C. The Act Preserves Programs Which Are Otherwise Excludable Under Existing Regular Rate Exemptions

The Worker Economic Opportunity Act recognizes two ways that employer equity programs may be excluded from the regular rate. Such equity programs may be excluded if they meet the existing exemptions to the regular rate pursuant to Section 7(e)(1)-(7), which apply to contributions and sums paid by employers regardless of whether such payments are made in cash or in grants of stock or other equity based vehicles, and provided such payment or grant is consistent with the existing regulations promulgated under Section 7(e). Employer equity plans also may be excluded under new section 7(e)(8) added by the Worker Economic Opportunity Act.

This is reaffirmed in new section 207(e)(8), which makes clear that the enactment of section 7(e)(8) carries no negative implication about the scope of the preceding paragraphs of section (e). Rather, the sponsors understand that some grants and rights that do not meet all the requirements of section 7(e)(8) may continue to qualify for exemption under an earlier exclusion. For example, programs that grant options or SARs that do not have a vesting period may be otherwise excludable from the regular rate if they meet another section (7)(e) exclusion. This would be true even if the option was granted at less than 85% of fair market value. This language was not intended to prevent grants or rights that meet some but not all of the requirements of an earlier exemption in 7(e) from being exempt under the newly created exemption.

#### D. Basic Communication to Employees Required Because it Helps Ensure a Successful Program

For grants made under a stock option, SAR or bona fide ESPP program to qualify for the exemption under new section 7(e)(8), their basic terms and conditions must be communicated to participating employees either at the beginning of the employee's participation in the program or at the time of grant. This requirement was put into the

legislation to recognize that when employees understand the mechanics and the implications of the equity devices they are given, they can more fully participate in exercising meaningful choices with respect to those devices. As discussed below, this is a simple concept, it is not intended to be a complicated or burdensome requirement.

#### 1. Terms and Conditions To Be Communicated to Employees

Employers must communicate the material terms and conditions of the stock option, stock appreciation right or employee stock purchase program to employees to ensure that they have sufficient information to decide whether to participate in the program. With respect to options, these terms include basic information on the number of options granted, the number of shares granted per option, the exercise price, the grant date or dates, the length of any applicable vesting period(s) and the dates when the employees will first be able to exercise options or rights, under what conditions the options must be forfeited or surrendered, the exercise methods an employee may use (such as cash for stock, cashless for cash or stock, etc.), any restrictions on stock purchased through options, and the duration of the option, and what happens to unexercised options at the end of the exercise period. Pending issuance of any regulations, an employer who communicated the information in the prior sentence is to be deemed to have communicated the terms and conditions of the grant. Similar information should be provided regarding SARs or ESPPs.

#### 2. The Mode of Communications

The legislation does not specify any particular mode of communication of relevant information, and no particular method of communication is required, as long as the method chosen reasonably communicates the information to employees in a understandable fashion. For example, employers may notify their employees of an option grant by letter, and later provide a formal employee handbook, or other method such as a link to a location on the company Intranet. Any combination of communications is acceptable. The intent of the legislation is to ensure that employees are provided the basic information in a timely manner, not to mandate the particular form of communication, nor to bar the use of new forms of communication. Therefore, an employer should be able to use current electronic communication methods, as well as other forms of communication that develop later.

#### 3. The Timing of Communications

The legislation specifies that the employer is to communicate the terms and conditions of the stock option, SAR and ESPP programs to employees at or before the beginning of the employee's participation in the program or at the time the employee receives a grant. It is acceptable, and perhaps even likely, that the relevant information on a program will be disseminated in a combination of communications over time. This approach allows flexibility and acknowledges that types of participation vary greatly between stock option and SAR programs, on the one hand, and ESPPs on the other.

For example, under an ESPP, an employee may choose to begin payroll deductions in January, but not actually have the option to purchase stock until June. By contrast, with an option or SAR program, employees are given the options or rights at the outset, but those rights may not vest until some year in the future.

The timing of the communication is flexible, because often it is difficult to have materials ready for employees at the beginning

of a stock option or stock appreciation right program, immediately following approval by the Board of Directors, because of confidentiality requirements. Thus, within a reasonable time following approval of a stock option grant by the Board of Directors, the employer is required to communicate basic information about the grant employees have received. For example, an initial letter may notify the employees that they have received a certain number of stock options and provide the basic information about the program. More detailed information about the program may precede or follow the grant in formats such as an employee handbook, options pamphlet, or an Intranet site that provides options information.

#### E. Exercisability Criteria Applicable only to Stock Options and SARs

As discussed above, a common feature in grants of stock options and SARs is a vesting or holding period, which under current practice may be as short as a few months or as long as a number of years. For a stock option of SAR to be excluded from the regular rate pursuant to the Worker Economic Opportunity Act, new section 7(e)(8) requires that the grant or right generally cannot be exercisable for at least six months after the date of grant.

For stock option grants that include a vesting requirement, typically an option will become exercisable after the vesting period ends. Some option grants vest gradually in accordance with a schedule. For example, a portion of the employee's options may vest after six months, with the remaining portion vesting three months thereafter. Options may also vest in connection with an event, such as the stock reaching a certain price or the company attaining a performance target.

In addition, the sponsors recognize that a grant that is vested may not be currently exercisable by the employee because of an employer's requirement that the employee hold the option for a minimum period prior to exercise. In other words, there may be an additional period of time after the vesting period during which the option remains unexercisable. An option or SAR may meet the exercisability requirements of the bill without regard to the reason why the right to exercise is delayed.

Further, if a single grant of options or SARs includes some options exercisable after six months while others are exercisable earlier, then those exercisable after the six month period will meet the exercisability requirement even if the others do not. The determination is made option by option, SAR by SAR. In addition, if exercisability is tied to an event, the determination of whether the six-month requirement is met is based on when the event actually occurs. Thus, for example, if an option is exercisable only after an initial public offering (IPO) and the IPO occurs seven months after grant, the option shall be deemed to have met the provision's exercisability requirement.

However, section 7(e)(8)(B) specifically recognizes that there are a number of special circumstances when it is permissible for an employer to allow for earlier exercise to occur (in less than 6 months) without loss of the exemption. For example, an employer or plan may provide that a grant may vest or otherwise become exercisable earlier than six months because of an employee's disability, death, or retirement. The sponsors encourage the Secretary to consider and evaluate other changes in employees' status or circumstances.

Earlier exercise is also permitted in connection with a change in corporate owner-

ship. The term change in ownership is intended to include events commonly considered changes in ownership under general practice for options and SARs. For example, the term would include the acquisition by a party of a percentage of the stock of the corporation granting the option or SAR, a significant change in the corporation's board of directors within 24 months, the approval by the shareholders of a plan or merger, and the disposition of substantially all of the corporation's assets.

The sponsors believe it important to allow employers the flexibility to construct plans that allow for these earlier exercise situations. However, this section is not intended to in any way require employers to include these or any other early exercise circumstances in their plans.

#### F. Stock Option and SAR Programs may Be Awarded at Fair Market Value or Discounted up to and Including 15%

Stock options and SARs generally are granted to employees at around fair market value or at a discount. New section 7(e)(8)(B) recognizes that grants may be at a discount, but that the discount cannot be more than a 15% discount off of the fair market value of the stock (or in the case of stock appreciation rights, the underlying stock, security or other similar interest).

A reasonable valuation method must be used to determine fair market value at the time of grant. For example, in the case of a publicly traded stock, it would be reasonable to determine fair market value based on averaging the high and low trading price of the stock on the date of the grant. Similarly, it would be reasonable to determine fair market value as being equal to the average closing price over a period of days ending with or ending shortly before the grant date (or the average of the highs and lows on each day). In the case of a non-publicly traded stock, any reasonable valuation that is made in good faith and based on reasonable valuation principles must be used.

The sponsors understand that the exercise price of stock options and SARs is sometime adjusted in connection with recapitalizations and other corporate events. Accounting and other tax guidelines have been developed for making these adjustments in a way that does not modify a participant's profit opportunity. Any adjustment conforming with these guidelines does not create an issue under the 15% limit on discounts.

#### G. Employee Participation in Equity Programs Must Be Voluntary

New section (8)(C) of the Worker Economic Opportunity Act states that the exercise of any grant or right must be voluntary. Voluntary means that the employee may or may not choose not to exercise his or her grants or rights at any point during the stock option, stock appreciation right, or employee stock purchase program, as long as that is in accordance with the terms of the program. This is a simple concept and it is not to be interpreted as placing any other restrictions on such programs.

It is the intent of the sponsors that this provision does not restrict the ability of an employer to automatically exercise stock options or SARs for the employee at the expiration of the grant or right. However, an employer may not automatically exercise stock options or SARs for an employee who has notified the employer that he or she does not want the employer to exercise the options or rights on his or her behalf.

Stock option, SARs and ESPP programs may qualify under new section 7(e)(8) even

though the employer chooses to require employees to forfeit options, grants or rights in certain employee separation situations.

#### H. Performance Based Programs

The purpose of new section 7(e)(8)(D) is to set out the guidelines employers must follow in order to exclude from the 'regular rate' grants of stock options, SARs, or shares of stock pursuant to an ESPP program based on performance. If neither the decision of whether to grant nor the decision as to the size of the grant is based on performance, the provisions of in new section 7(e)(8)(D) do not apply. For example, grants made to employees at the time of their hire, and any value or income derived from these grants, may be excluded provided they meet the requirements in new sections 7(e)(8)(A)-(C).

New section 8(D) is divided into two clauses. The first, clause (i), deals with awards of options awarded based on pre-established goals for future performance, and the second, clause (ii), deal with grants that are awarded based on past performance.

##### 1. Goals for Future Performance

New section 7(e)(8)(D)(i) provides that employers may tie grants to future performance so long as the determinations as to whether to grant and the amount of grant are based on the performance of either (i) any business unit consisting of at least ten employees or (ii) a facility.

A business unit refers to all employees in a group established for an identifiable business purpose. The sponsors intend that employers should have considerable flexibility in defining their business units. However, the unit may not merely be a pretext for measuring the performance of a single employee or small group of fewer than ten employees. By way of example, a unit may include any of the following: (i) a department, such as the accounting or tax departments of a company, (ii) a function, such as the accounts receivable function within a company's accounting department, (iii) a position classification, such as those call-center personnel who handle initial contacts, (iv) a geographical segment of a company's operations, such as delivery personnel in a specified geographical area, (v) a subsidiary or operating division of a company, (vi) a project team, such as the group assigned to test software on various computer configurations or to support a contract or a new business venture.

With respect to the requirement to have ten or more employees in a unit, this determination is based on all of the employees in the unit, not just those employees who are, for example, non-exempt employees.

A facility includes any separate location where the employer conducts its business. Two or more locations that would each qualify as a facility may be treated as a single facility. Performance measurement based on a particular facility is permitted without regard to the number of employees who are working at the facility. For example, a facility would include any of the following: a separate office location, each separate retail store operated by a company, each separate restaurant operated by a company, a plant, a warehouse, or a distribution center.

The definition of both a business unit and a facility are intended to be flexible enough to adapt to future changes in business operations. Therefore, the examples of business units set forth above should be viewed with this in mind.

Options may be excluded from the regular rate in accordance with new section 7(e)(8)(D)(i) under the following circumstances:

*Example 1*—Employer announces that certain employees at the Wichita, Kansas plant will receive 50 stock options if the plant's production reaches a certain level by the end of the year (note that in order to fit within this subsection, the grant does not have to be made on a facility wide basis);

*Example 2*—Employer announces that it will grant employees working on the AnyCo. account 50 stock options each if the account brings in a certain amount of revenue by the end of the year, provided that there are at least 10 employees on the AnyCo. account.

*Example 3*—Employer announces that certain employees will receive stock options if the company reaches specified goal.

New section 7(e)(8)(D)(i) also makes clear that otherwise qualifying grants remain excludable from the regular rate if they are based on an employees' length of service or minimum schedule of hours or days of work. For example, an employer may make grants only to employees: (i) who have a minimum number of years of service, (ii) who have been employed for at least<sup>24</sup> a specified number of hours of service during the previous twelve month period (or other period), (iii) who are employed on the grant date (or a period ending on the grant date), (iv) who are regular full-time employees (i.e., not part-time or seasonal), (v) who are permanent employees, or (vi) who continue in service for a stated period after the grant date (including any minimum required hours during this period). Any or all of these conditions, and similar conditions, are permissible.

#### 2. Past Performance

New section 7(e)(8)(d)(ii) clarifies that employers may make determinations as to existence and amount of grants or rights based on past performance, so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract. Thus, employers have broad discretion to make grants as rewards for the past performance of a group of employees, even if it is not a facility or business unit, or even for an individual employee. The determination may be based on any performance criteria, including hours of work, efficiency or productivity.

Under new section 7(e)(8)(D)(ii), employers may develop a framework under which they will provide options in the future, provided that to the extent the ultimate determination as to the fact of and the amount of grants or rights each employee will receive is based on past performance, the employer does not contractually obligate itself to provide the grant or rights to an employee. Thus, new section 7(e)(8)(D)(ii) would allow an employer to determine in advance that it will provide 100 stock options to all employees who receive "favorable" ratings on their performance evaluations at the end of the year, and it would allow the employer to advise employees, in employee handbooks or otherwise, of the possibility that favorable evaluations may be rewarded by option grants, so long as the employer does not contractually obligate itself to provide the grants or in any other way relinquish its discretion as to the existence or amount of grants.

Similarly, the fact that an employer makes grants for several years in a row based on favorable performance evaluation ratings, even to the point where employees come to expect them, does not mean in itself that the employer may be deemed to have "contractually obligated" itself to provide the rights.

Some examples of performance based grants that fit within new 7(e)(8)(D)(ii) are as follows:

*Example A:* Company A awards stock options to encourage employees to identify with the company and to be creative and innovative in performing their jobs. Company A's employee handbook includes the following: "Company A's stock option program is a long-term incentive used to recognize the potential for, and provide an incentive for, anticipated future performance. Stock option grants may be awarded to employees at hire, on an annual basis, or both. All full-time employees who have been employed for the appropriate service time are eligible to be considered for annual stock option grants."

Company A provides stock options to most nonexempt employees following their performance review. Each employee's manager rates the employee during a review process, resulting in a rating of from 1 to 5. The rating is based upon the manager's objective and subjective analysis of the employee's performance. The rating is then put into a formula to determine the number of options an employee is eligible to receive, based on the employee's level within the company, the product line that the employee works on, and the value of the product to the company's business. Employees are aware a formula is used. The Company then informs the employee of the number of options awarded to him or her.

Managers make it clear to employees that the options are granted in recognition of prior performance with the expectation of the employee's future performance, but no contractual obligation is made to employees. This process is repeated annually, with employees eligible for stock options each year based on their annual performance review. Most employees receive options annually based upon their performance review rating and their level in the company.

*Example B:* Company B manages its program similarly to company A, with some notable exceptions. Company B has a very detailed performance management system, under which all employees successfully meeting the expectations of their job receive options. The employee's job expectations are more clearly spelled out on an annual basis than under Company A's plan. Once a year, the employee under goes a formal, written, performance review with his or her manager. If work is satisfactory, the employee receives a predetermined but unannounced number of options. Unlike Company A, which provides different amounts of options to employees based upon a numeric performance rating, Company B provides the same number of options to all employees who receive satisfactory employment evaluations. Over 90 percent of Company B's employees receive options annually, and in many years, this percentage exceeds 95 percent.

In both Example A and Example B, the employers set up in advance the formula under which option decisions are made; however, the decisions as to whether an individual employee would receive options and how many options he or she would receive was made based on past performance at the end of the performance period, but not pursuant to a prior contractual obligation made to the employees. The fact that the employer determines a formula or program in advance does not disqualify these examples from new section 7(e)(8).

#### I. Extra Compensation

The Worker Economic Opportunity Act also amends section 7(h) of the FLSA (29 U.S.C. §207(h)) to ensure that the income or value that results from a stock option, SAR or ESPP program, and that is excluded from

the regular rate by new section 7(e)(8), cannot be credited by an employer toward meeting its minimum wage obligations under section 6 of the Act or overtime obligations under section 7 of the Act. The language divides section 7(h) into two parts, 7(h)(1) and 7(h)(2). Section 7(h)(1) states that an employer may not credit an amount, sum, or payment excluded from the regular rate under existing sections 7(e)(1-7) or new section 7(e)(8) towards an employers' minimum wage obligation under section 6 of the Act. When section 7(h)(1) is read together with section 7(h)(2), it states that an employer may not credit an amount excluded under existing sections 7(e)(1-4) or new section 7(e)(8) toward overtime payments. However, consistent with existing 7(h), extra compensation paid by an employer under sections 7(e)(5-7) may be creditable towards an employer's overtime obligations. This change shall take effect on the effective date but will not affect any payments that are not excluded by section 7(e) and thus are included in the regular rate.

#### J. The Legislation Includes a Broad Pre-Effective Date Safe Harbor & Transition Time

In drafting the Worker Economic Opportunity Act, the sponsors hoped to create an exemption that would be broad enough to capture the diverse range of broad-based stock ownership programs that are currently being offered to non-exempt employees across this nation. However, in order to reach a consensus, the new exemption had to be tailored to comport with the existing framework of the FLSA. The result is a series of requirements that stock option, SAR and ESPP programs must meet in order for the proceeds of those plans to fit within the newly created exemption.

Because of the circumstances that give rise to this legislation, the pre-effective date safe harbor is intentionally broader than the new exemption. The sponsors did not want to penalize those employers who have been offering broad-based stock option, SAR and ESPP programs simply because these programs would not meet all the new requirements in section 7(e)(8). Thus, the safe harbor in section 2(d) of the Act comprehensively protects employers from any liability or other obligations under the FLSA for failing to include any value or income derived from stock option, SAR and ESPP programs in a non-exempt employee's regular rate of pay. The safe harbor applies to all grants or rights that were obtained under such programs prior to the effective date, whether or not such programs fit within the new requirements of section 7(e)(8). If a grant or right was initially obtained prior to the effective date, it is covered by the safe harbor even though it vested later or was contingent on performance that would occur later. In addition, normal adjustments to a pre-effective date grant or right, such as those that are triggered by a recapitalization, change of control or other corporate event, will not take the grant or right outside the safe harbor.

On a prospective basis, the sponsors realized that many employers would need time to evaluate their programs in light of the new law and to make the changes necessary to ensure that the programs will fit within the new section 7(e)(8) exemption. Consequently, the sponsors adopted a broad transition provision to apply to stock option, SAR and ESPP programs without regard to whether or not they meet the requirements for these plans set forth in the legislation. Specifically, section 2(c) of the

legislation contains a 90 day post enactment delayed effective date. The sponsors believe that the vast majority of employers who offer stock option, SAR and ESPP programs to non-exempt employees will be able to use the transition period in section 2(d)(1) to modify their programs to conform with the requirements of the legislation.

In addition, the sponsors felt that there were two circumstances where a further extension of this broad transition relief was appropriate. First, the legislation recognizes that some employers would need the consent of their shareholders to change their plans. Section 2(d)(2) provides an additional year of transition relief to any employer with a program in place on the date this legislation goes into effect that will require shareholder approval to make the changes necessary to comply with the new requirements of section 7(e)(8). Second, the legislation extends the transition relief to cover situations wherein an employers' obligations under a collective bargaining agreement conflict with the requirements of this Act. Section 2(d)(3) eliminates any potential conflict by allowing employers to fulfill their pre-existing contractual obligations without fear of liability.

#### V. REGULATORY IMPACT STATEMENT

The sponsors have determined that the bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the sponsors do not believe that it will be significant.

#### VI. SECTION-BY-SECTION ANALYSIS

Sec. 2. (a) Amendments to the Fair Labor Standards Act—The legislation amends Section 7(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. §207(e)) by creating a new subsection, 7(e)(8), which will exclude from the definition of the regular rate of pay any income or value nonexempt employees derive from an employer stock option, stock appreciation right, or bona fide employee stock purchase program under certain circumstances. Specifically, the legislation adds the following provisions to the end of Section 7(e) of the Fair Labor Standards Act:

(8) The new exclusion provides that when an employer gives its employees an opportunity to participate in a stock option, stock appreciation right or a bona fide employee stock purchase program (as explained in the Explanation of the Bill and Sponsor's Views), any value or income received by the employee as a result of the grants or rights provided pursuant to the program that is not already excludable from the regular rate of pay under sections 7(e)(1-7) of the Act (29 U.S.C. §207(e)), will be excluded from the regular rate of pay, provided the program meets the following criteria—

(8)(A) The employer must provide employees who are participating in the stock option, stock appreciation right or bona fide employee stock purchase program with information that explains the terms and conditions of the program. The information must be provided at the time when the employee begins participating in the program or at the time when the employer grants the employees stock options or stock appreciation rights.

(8)(B) As a general rule, the stock option or stock appreciation right program must include at least a 6 month vesting (or holding) period. That means that employees will have to wait at least 6 months after they receive stock options or a stock appreciation right before they are able to exercise the right for

stock or cash. However, in the event that the employee dies, becomes disabled, or retires, or if there is a change in corporate ownership that impacts the employer's stock or in other circumstances set forth at a later date by the Secretary in regulations, the employer has the ability to allow its employees to exercise their stock options or stock appreciation rights sooner. The employer may offer stock options or stock appreciation rights to employees at no more than a 15 percent discount off the fair market value of the stock or the stock equivalent determined at the time of the grant.

(8)(C) An employee's exercise of any grant or right must be voluntary. This means that the employees must be able to exercise their stock options, stock appreciation rights or options to purchase stock under a bona fide employee stock purchase program at any time permitted by the program or to decline to exercise their rights. This requirement does not preclude an employer from automatically exercising outstanding stock options or stock appreciation rights at the expiration date of the program.

(8)(D) If an employer's grants or rights under a stock option or stock appreciation right program are based on performance, the following criteria apply.

(1) If the grants or rights are given based on the achievement of previously established criteria, the criteria must be limited to the performance of any business unit consisting of 10 or more employees or of any sized facility and may be based upon that unit's or facility's hours of work, efficiency or productivity. An employer may impose certain eligibility criteria on all employees before they may participate in a grant or right based on these performance criteria, including length of service or minimum schedules of hours or days of work.

(2) The employer may give grants to individual employees based on the employee's past performance, so long as the determination remains in the sole discretion of the employer and not according to any prior contract requiring the employer to do so.

(b) Extra Compensation—The bill amends section 7(h) of the Fair Labor Standards Act (29 U.S.C. 207(h)) to make clear that the amounts excluded under section 7(e) of the bill are not counted toward an employer's minimum wage requirement under section 6 of the Fair Labor Standards Act and that the amounts excluded under sections 7(e)(1-4) and new section 7(e)(8) are not counted toward overtime pay under section 7 of the Act.

(c) Effective Date—The amendments made by the bill take effect 90 days after the date of enactment.

(d) Liability of Employers—

(1) No employer shall be liable under the FLSA for failing to include any value or income derived from any stock option, stock appreciation right and employee stock purchase program in an non-exempt employee's regular rate of pay, so long as the employee received the grant or right at any time prior to the date this amendment takes effect.

(2) Where an employer's pre-existing stock option, stock appreciation right, or employee stock purchase program will require shareholder approval to make the changes necessary to comply with this amendment, the employer shall have an additional year from the date this amendment takes effect to change its plan without fear of liability.

(3) Where an employer is providing stock options, stock appreciation rights, or an employee stock purchase program pursuant to a collective bargaining agreement that is in

effect on the effective date of this amendment, the employer may continue to fulfill its obligations under that collective bargaining agreement without fear of liability.

(e) Regulations—the bill gives the Secretary of Labor authority to promulgate necessary regulations.

#### FOOTNOTES

<sup>1</sup>David Lebow et al., Recent Trends in Compensation Practices, Board of Governors of the Federal Reserve System, Fin. and Econ. Discussion Series, No. 1999-32, July 1999.

<sup>2</sup>Anita U. Hattinagadi, Taking Stock: \$470,000 at Risk for Hourly Workers, Employment Policy Foundation, Mar. 2, 2000, at 4, and Fig. 2.

<sup>3</sup>Any stock option program that meets the criteria under section 422 of the Internal Revenue Code (called an Incentive Stock Option) is considered a qualified option. 26 U.S.C. §422.

<sup>4</sup>26 U.S.C. §423.

<sup>5</sup>29 U.S.C. §201, et seq.

<sup>6</sup>29 U.S.C. §207(a)(1).

<sup>7</sup>29 U.S.C. §207(e).

<sup>8</sup>29 U.S.C. §207(e)(1).

<sup>9</sup>29 U.S.C. §207(e)(3).

<sup>10</sup>Id.

<sup>11</sup>Id.

<sup>12</sup>29 U.S.C. §207(e)(4).

<sup>13</sup>See e.g., Conference Report on H.R. 5856, H. Rept. No. 1453.

<sup>14</sup>U.S. Dept. of Lab. Bureau of Lab. Statistics, Employer Costs for Employee Compensation—March 1999, available at <ftp://146.142.4.23/pub/news.release/ecec.txt>.

<sup>15</sup>A wage-hour opinion letter responds to a request for the Department of Labor's view of how the law applies to a given set of facts. The letters are available to the public upon request or through commercial reporting services. Opinion letters have significant practical effects: "[T]he Administrator's interpretation . . . has the characteristic not only of securing 'expected compliance' . . . but of possibly stimulating double damage suits by employees who need not fear that they would be at odds with the Government Officials involved." National Automatic Laundry & Cleaning v. Schultz, 143 U.S. App. D.C. 274 (D.C. Cir. 1971).

<sup>16</sup>Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, Wage & Hour Division, Feb. 12, 1999.

<sup>17</sup>Hearing on the Treatment of Stock Options and Employee Investment Opportunities Under the Fair Labor Standards Act before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 106th Cong. 2d Sess. Mar. 2, 2000 (Statement of T. Michael Kerr, at 4-5).

<sup>18</sup>Id. at 5. The testimony also noted that the program's automatic exercise feature prevented the employees' participation from being voluntary, as required under the Division's rules for thrift savings programs.

<sup>19</sup>Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, Wage & Hour Division, Feb. 12, 1999.

<sup>20</sup>Hearing on the Treatment of Stock Options and Employee Investment Opportunities Under the Fair Labor Standards Act before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 106th Cong. 2d Sess. Mar. 2, 2000 (Statement of J. Randall MacDonald, at 2).

<sup>21</sup>Id. (addendum to statement of Patricia Nazemetz, Letter from Gary J. Bonadonna, Director & International Vice President, UNITE, February 22, 2000).

<sup>22</sup>Id. (statement of T. Michael Kerr, at 7).

<sup>23</sup>26 U.S.C. §423.

Mr. Speaker, I reserve the balance of my time.

Mr. OWENS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of the Worker Economic Opportunity Act. It is kind of complicated so I think it is important that the record reflect that we understand those complications.

Stock option programs have existed for decades, but traditionally they have only been provided to top executives. Laudably, in recent years a number of companies have expanded these

programs to cover rank and file workers. However, when this practice was brought to the attention of the Department of Labor, it correctly found that in many cases income earned by workers participating in these kinds of programs do not qualify within any of the existing statutory exemptions for exclusion from overtime.

As a general matter, ignorance of or disregard for the law should not serve to justify its violation. In this instance, however, I fully concur that speculative stock options should not be subject to overtime and that invoking the requirements of the law at this late date *ex post facto* would be unfair and unwise.

This legislation provides that if certain conditions are met, income earned by workers as a result of participation in certain recognized option programs, stock appreciation programs, or bona fide employee stock purchase programs, shall not be counted for the purpose of calculating overtime.

The legislation is not intended to alter or to undermine in any way any other existing protection afforded to workers under the overtime provisions of the Fair Labor Standards Act. By the same token, income from stock option-type programs that is already exempt from the overtime calculation is not intended to be affected by this legislation. That income remains exempt.

Stock programs vary widely in their structure. This legislation is not intended to impose a single structure on such programs but has been broadly crafted to try to accommodate their variety. Consequently, the bill is solid with regard to certain definitions and implementation issues, and broad regulatory authority has been given to the Department of Labor to implement the legislation.

The legislation requires that employees must be informed of the terms and conditions of any grants made to employees and that the employees must be able to voluntarily exercise any grant or right offered by the employer. The intent of these provisions is to ensure that employees are able to knowledgeably and freely determine whether they wish to participate in the program before they are required to do so and that they are able to knowledgeably and freely exercise such rights and options as they are afforded within the program. Employees must have a basis for assessing the value and the risk inherent in the choices they face.

This legislation provides that employers may sell stock options or stock appreciation rights to employees at a discounted rate but that the discount may not be greater than 15 percent of the market value of the stock. This provision applies equally to closely held companies as well as publicly traded companies. Necessarily then stock appraisals by closely held companies may become subject to review.

□ 1300

The legislation provides that there must be at least a 6-month period between the grant of stock option or stock appreciation right and the date on which that right is exercisable. This requirement is waived in cases involving an employee's death, disability, retirement, or a change in corporate ownership or in other circumstances permitted by regulation.

The limitation on stock discounts and the 6-month holding period, taken together, reflect the intention that some level of risk be assumed by employees in order that this legislation does not serve as an incentive for employers to convert wages to stock options as a means of evading overtime.

Where an employee separates from employment with an employer, whether voluntarily or involuntarily, overtime is no longer an issue. In my view, it is, therefore, wholly appropriate for the 6-month holding period requirement to be waived in such instances.

Finally, while many refer to the 6-month period as a vesting period, the use of the term vesting is not accurate. The only requirement imposed by this legislation is that an employee may not exercise a grant for at least 6 months.

This legislation provides that an employer may not condition the offer of a stock program based on an employee's future performance unless such an offer is made to all employees in a facility or in a business unit consisting of at least 10 employees.

An exception to this rule is provided to permit employers to condition offers upon length of service or minimum schedule of hours or days of work. The purpose of the exception is to permit employers to distinguish between part-time and full-time employees or between employees on temporary or probationary status and those on permanent status.

The purpose is not to permit employers to target offers predicted on future performance to a single employee or to require employees to work overtime as a condition of participation.

Likewise, the term business unit is intended to be meaningful. Assuming an offer is made on less than a facilitywide basis, an employer may not make an offer that is conditioned on future performance if that offer excludes some employees within a business unit who are otherwise eligible under the grant's terms, nor may an employer make such an offer arbitrarily to some employees without regard to their duties.

As is generally the case under current law with regard to performance bonuses, an employer may offer program participation to individual employees based upon the employee's past performance. The intent is to enable the employers to reward employees for past service. This provision is not in-

tended to undermine or supersede limitations applicable to grants that are conditioned upon future performance.

Stock-option programs are new avenues for the front-line worker; however, the right to overtime remains protected by the Fair Labor Standards Act for the same group of employees.

The overtime law plays a more important role in the daily lives of Americans than any other provision of labor law. It guarantees that workers will be fairly compensated when they are required to work excessive hours. It creates more job opportunities for workers. It ensures that workers will have enough time away from work to meet family and personal responsibilities. As women enter the workforce in increasing numbers, the overtime law has become even more vital to the health of American families.

This legislation is necessary to accommodate the increasing participation of rank and file workers in stock programs. This legislation is not intended to otherwise weaken or to diminish the vital protection afforded workers under the FLSA and should be interpreted in the manner that is consistent with the intent and remedial purposes of the Fair Labor Standards Act.

Mr. Speaker, I reserve the balance of my time.

Mr. GOODLING. Mr. Speaker, I yield 4 minutes to the gentleman from California (Mr. CUNNINGHAM) who has worked tirelessly to bring this legislation to the floor.

Mr. CUNNINGHAM. Mr. Speaker, as a lead House sponsor of H.R. 4182, I rise in strong support today of this identical Senate counterpart, S. 2323. Originally, we came up with an idea based on the 1938 language, and thanks to the gentleman from Pennsylvania (Mr. GOODLING) and the gentleman from North Carolina (Mr. BALENGER), the subcommittee chairman, and the ranking minority member, they had hearings with an attempt to match this not only with the Senate, but with the Department of Labor and with the White House in a very bipartisan way.

Mr. Speaker, I think the outcome in the Senate of 95 to 0 vote shows the work that went forward on this bill, not only from Republicans but Democrats, the White House and the Labor Department as well.

Why would we do this? Well, when the 1938 legislation first came about, they did not know that every day you pick up a newspaper that there is jobs wanted in there that offer stock options; whether it is medical benefits; whether it is stock options or safety programs within the workplace, workers look at these things when they select those jobs to help their families. This bill provides for that.

This will affect over 65 million Americans, union, nonunion, private individuals, public individuals. They want a

piece of the rock, and I laud those individuals who have helped with this.

Profits from stock options have been taken to account for too long, Mr. Speaker, and I want to thank personally the gentleman from California (Mr. KUYKENDALL); the gentleman from Virginia (Mr. DAVIS); the gentleman from California (Mr. OSE); the gentleman from California (Mr. BALLENGER), chairman of the committee; the gentleman from Virginia (Mr. MORAN); on the Democrat side, the gentleman from California (Mr. DOOLEY); the gentleman from Indiana (Mr. ROEMER); the gentlewoman from California (Ms. ESHOO). And I say to the gentleman from New York (Mr. OWENS) there is not but a handful of issues that we agree on in a year, but this is one where we come together in support of it. I would like to thank the gentleman as well.

Mr. Speaker, I want to also thank Senator MCCONNELL on the Senate side that drove this. In an election year, it is not important who takes credit for this thing, it is the workers and the families that benefit from this bill. I want to thank those individuals. This will help protect the dot-coms of America.

Another issue is where for example, the biotechs, we have had to bring in Ph.D.s for biotech industries from other countries. I think that is a crime to where our education system does not provide for our people to take those jobs, Americans to take those workers, but yet when they brought in other doctors and Ph.D.s, there is a group that wanted to tax that as real income, because they did not have the cash flow to do that, it prohibited those companies from helping with medical research.

This is a good bill, Mr. Speaker, a lot of good people worked on it on both sides of the aisle, the White House, and with the Department of Labor.

Mr. Speaker, I want to specifically thank the gentleman from California (Mr. KUYKENDALL), for his effort in this; the gentleman from North Carolina (Mr. BALLENGER), who worked tirelessly on this, and the gentleman from California (Mr. ROGAN) and the gentleman from California (Mr. BILBRAY), my seatmate down in San Diego.

Washington, DC, April 27, 2000.

Hon. RANDY "DUKE" CUNNINGHAM,  
House of Representatives,  
Rayburn House Office Building, Washington,  
DC.

DEAR REPRESENTATIVE CUNNINGHAM: The National Association of Manufacturers (NAM) is the nation's largest, broad-based industrial trade group. Our membership includes more than 14,000 companies and subsidiaries, including approximately 10,000 small manufacturers and 350 member associations, located in every state. On behalf of our member companies, we ask you to co-sponsor and support H.R. 4182, the Worker Economic Opportunity Act. H.R. 4182 is a bipartisan bill, sponsored by Representatives CUNNINGHAM (R-CA), JIM MORAN (D-VA),

CASS BALLENGER (R-NC), TIM ROEMER (D-IN) and many more of their colleagues, which simply ensures that non-exempt (hourly) workers can continue to receive stock options and other equity-participation programs.

H.R. 4182 is needed because of a February 1999 compliance letter by the Department of Labor's (DOL) Wage and Hour Division that placed stock options and other equity-participation programs for hourly workers in jeopardy. It required employers to recalculate overtime pay based on profits realized when an employee exercises the stock options. In response to the letter, many companies have already put their programs on hold until there is legislative clarification. If hourly employees are to continue to receive these options, the House needs to act swiftly. This bipartisan bill has already passed the Senate by a 95-0 margin and enjoys the strong support of the Department of Labor.

On behalf of our members and their employees, the NAM thanks you in advance for your support of H.R. 4182, The Worker Economic Opportunity Act.

Sincerely,

PATRICK J. CLEARY.

UNION OF NEEDLETRADES,  
INDUSTRIAL AND TEXTILE EMPLOYEES,  
Rochester, NY, February 22, 2000.

TO WHOM IT MAY CONCERN: I am writing on behalf of UNITE and its approximately 5,300 United States bargaining unit employees covered by a contract with Xerox Corporation. It is our understanding that Congress is currently considering legislation to clarify the Fair Labor Standards Act (FLSA) treatment of stock options and other forms of stock grants in computing overtime for non-exempt workers. Xerox' UNITE chapter would strongly urge Congress to pass legislation exempting stock options and other forms of stock grants from the definition of the regular rate for the purpose of calculating overtime.

It is only recently that Xerox has made bargaining unit employees eligible to receive both stock options and stock grants. Without a clarification to the FLSA, we are afraid Xerox may not offer stock options or other forms of stock grants to bargaining unit employees in the future. In addition, without such a change in the law if options are granted there could be tremendous differentials in the amount of overtime each individual employee receives based on what he or she decides, to exercise an option or sell stock. However, our position that stock options should be exempt from the regular rate for purposes of overtime in no way diminishes our position that bargaining unit employees must have the right to receive overtime pay for actual hours worked.

As we begin the 21st century, UNITE hopes more companies will begin to provide all their employees with stock options and other forms of stock, it is a great way to assure that when the company does well the employees share the reward through employee ownership. Thank you for your consideration of this matter.

Sincerely,

GARY J. BONADONNA,  
Director, International Vice President.

ASSOCIATION OF PRIVATE PENSION  
AND WELFARE PLANS,  
Washington, DC, April 19, 2000

Hon. J. C. WATTS,  
Chairman, House Republican Conference,  
Longworth House Office Building, Washington,  
DC.

DEAR REPRESENTATIVE WATTS: I am writing on behalf of the Association of Private

Pension and Welfare Plans (APPWP—The Benefits Association) to ask you to co-sponsor and support H.R. 4182, the Worker Economic Opportunity Act, a bipartisan bill to ensure that rank and file employees continue to benefit from stock ownership programs. A companion bill (S. 2323) has already passed the Senate by a 95 to 0 vote and the legislation enjoys the support of the Clinton Administration.

APPWP is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, APPWP's members either sponsor directly or provide services to employees benefit plans that cover more than 100 million Americans.

Many stock option and stock participation plans, which extend the benefits of equity ownership to working Americans at all income levels, are in jeopardy due to an opinion letter issued by the Department of Labor (DOL) in February 1999. The opinion letter stated that the Fair Labor Standards Act (FLSA) requires any stock option profits earned by a non-exempt employee to be included in that employee's regular rate of pay for purposes of calculating overtime. The practical result of this unexpected ruling is that employers will feel compelled to exclude their non-exempt employees from broad-based stock ownership plans or not offer such plans at all. To its credit, the DOL recognizes that this result is not beneficial to workers but has stated that only legislative action can reverse the ruling. H.R. 4182, introduced by Representatives "Duke" Cunningham (R-CA), Jim Moran (D-VA), and Cass Ballenger (R-NC), is the product of bipartisan discussions and agreement with the DOL and provides the necessary revisions to the FLSA.

APPWP believes that broad-based stock ownership plans provide important benefits to American workers. Such plans make workers corporate owners, can serve as a significant vehicle for wealth accumulation and enhance retirement security. As the attached fact sheet shows, stock ownership and its benefits are spreading to all levels of the workforce and across the entire spectrum of American industry. Despite these positive developments, many employers are now caught in the quandary of how, or even whether, to proceed with extending equity ownership to rank-and-file employees. Therefore, quick passage of H.R. 4182 is necessary. Your commitment to join 37 other House members as a co-sponsor of H.R. 4182 will help achieve this goal and ensure that non-exempt employees will continue to be eligible for stock ownership programs.

Thank you for your consideration of this important matter. If we can provide more information or answer any questions you may have, please contact James Deleplane, APPWP's Vice President, Retirement Policy, at [jdeleplane@appwp.org](mailto:jdeleplane@appwp.org) or (202) 289-6700.

Sincerely,

JAMES A. KLEIN,  
President.

STOCK OPTION BILL UNANIMOUSLY APPROVED  
BY SENATE; LPA-BACKED LEGISLATION  
MOVES TO HOUSE

BIPARTISAN BILL BACKED BY LABOR DEPARTMENT  
CORRECTS LAW DISCOURAGING EMPLOYERS  
FROM PROVIDING STOCK, STOCK OPTION  
PROGRAMS TO HOURLY EMPLOYEES

APRIL 12, 2000—Today, LPA praised the Senate's passage of the Worker Economic Opportunity Act (S. 2323), bipartisan legislation that would amend the Fair Labor Standards Act of 1938 (FLSA) to ensure that

employers can continue to offer stock options to non-exempt employees without fear of violating overtime requirements. Many stock and stock option programs had been placed on hold when companies learned last December about a potential conflict with the FLSA. That conflict would require overtime payments to be calculated retroactively based on profits earned through stock option programs.

According to Jeff McGuinness, President of LPA, "We are very pleased that the Senate has come to the rescue of tens of thousands of working Americans who receive stock and stock options from their employers. We applaud its effort to ensure that companies will be able to continue to offer broad-based stock option programs. Because proxy season is upon us, we hope the House will act quickly on this important bill so that stock programs can be resumed." Labor Secretary Alexis Herman has indicated that she will strongly recommend that the President sign the bill if it reaches his desk.

Senators Mitch McConnell (R-KY) and Chris Dodd (D-CT) introduced S. 2323 in March. Rep. Duke Cunningham (R-CA) has introduced an identical bill (H.R. 4182) in the House.

The need for legislation became apparent after the Department of Labor's Wage and Hour Division advised an employer to include employees' stock option profits as part of base pay for the purposes of calculating overtime. The additional administrative burden imposed by such calculations and the liability arising from making them incorrectly has resulted in a large number of companies suspending future employee equity programs.

LPA is a public policy advocacy organization representing human resource executives of more than 200 leading companies doing business in the United States, many of whom give stock options to hourly employees. Collectively, LPA members, many of whom have substantial numbers of employees represented by labor unions, employ more than 12 percent of the private sector workforce in the United States.

CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA,  
*Washington, DC, May 2, 2000.*

Hon. RANDY "DUKE" CUNNINGHAM,  
*Rayburn House Office Building,  
Washington, DC.*

DEAR REPRESENTATIVE CUNNINGHAM: I am writing to commend you on your leadership role in bringing to the floor of the House S. 2323, the Worker Economic Opportunity Act. As you know, this bill passed the Senate by a vote of 95-0 in April, and is identical to H.R. 4182, which you introduced along with seven other original co-sponsors from both sides of the aisle. The Chamber strongly supports this bipartisan legislation, which will help millions of hourly workers retain or obtain stock options.

Last year, the U.S. Department of Labor issued a letter ruling stating that companies providing stock options to their employees must include the value of those options in the base rate of pay for hourly workers. Employers must then recalculate overtime pay over the period of time between the granting and exercise of the options. This costly and administratively complex process will cause many employers to cease offering stock options and similar employee equity programs to their nonexempt workers.

Clearly, the Fair Labor Standards Act must be modernized to reflect the fact that many of today's hourly workers receive

stock options. For this reason, the Chamber strongly supports S. 2323, legislation that would exempt stock options and similar programs from the regular rate of pay for non-exempt workers. This carefully crafted legislation will provide certainty to employers who want to increase employee ownership and equity building by offering stock options and similar programs to their hourly workers. The bill is broadly supported by members from both sides of the ideological spectrum, as well as the U.S. Department of Labor.

We urge prompt enactment on S. 2323, which will help millions of American workers build equity in the companies for which they work.

Sincerely,

R. BRUCE JOSTEN.

THE ERISA INDUSTRY COMMITTEE,  
*Washington, DC, May 1, 2000.*

DEAR REPRESENTATIVE: The ERISA Industry Committee (ERIC) strongly urges you to support H.R. 4182, the "Worker Economic Opportunity Act." H.R. 4182 is expected to come before the House for a vote during the week of May 1. Timely enactment of this legislation is critical to the continued viability of broad-based stock options and other similar programs that provide employees with equity ownership in the companies for which they work.

Introduced April 5 by Representative Randy "Duke" Cunningham, the "Worker Economic Opportunity Act" enjoys strong bipartisan and bicameral support. The bill is the result of a cooperative effort between congressional leaders, the Department of Labor, and the business community. The Senate unanimously passed its companion to H.R. 4182 on April 12.

Stock options increasingly are available to a broad range of employees, not just executives. A recent survey by William M. Mercer, Inc., reports a better than twofold increase since 1993 in the percentage of major industrial and service corporations that have a broad-based stock option plan.

In spite of the growing enthusiasm for employee equity ownership among employers and employees, an advisory letter interpreting current law issued by the Department of Labor's Wage and Hour division has effectively stopped this movement in its tracks.

According to the Department's interpretation of the Fair Labor Standards Act (FLSA) of 1938, and gains from the exercise of stock options recognized by rank and file workers must be included in their "regular rate of pay" for purposes of computing overtime wages. Thus, in order to comply with the Wage and Hour Division's interpretation of the FLSA, employers would be required to track stock options granted to rank and file employees and recalculate their overtime payments once the options have been exercised.

No rational employer will subject itself to this impracticable burden. As a result, rank and file workers will be denied the valued opportunity to become a stakeholder in their employer's future.

H.R. 4182 is narrowly tailored to directly address the issues raised by the Wage and Hour Division's advisory letter without compromising any long-standing worker protections under FLSA. Most important, this legislation will benefit millions of working Americans by facilitating the continued expansion of equity-based compensation programs. It should be enacted without delay.

Thank you for considering our views. Please feel free to call on us if you have any questions or need additional information.

Very truly yours,

MARK J. UGORETZ,  
*President.*

INFORMATION TECHNOLOGY  
INDUSTRY COUNCIL,  
*Washington, DC, May 2, 2000.*

Hon. RANDY CUNNINGHAM,  
*House of Representatives,  
Washington, DC.*

DEAR CONGRESSMAN CUNNINGHAM: I am writing to thank you for your leadership during House consideration of S. 2323, the Worker Economic Opportunity Act. I would also like to let you know that ITI anticipates making the vote on final passage of S. 2323 a "key vote" for our 106th Congress High-Tech Voting Guide.

ITI is the association of leading U.S. providers of information technology products and services. It advocates growing the economy through innovation and supports free-market policies. ITI members had worldwide revenue of more than \$440 billion in 1998 and employ more than 1.2 million people in the United States. The High-Tech Voting Guide is used by ITI to measure Members of Congress' support for the information technology industry and policies that ensure the success of the digital economy. At the end of the 106th Congress, key votes will be compiled and analyzed to assign a "score" to every Member of Congress.

We believe that passage of this legislation is an important piece in ensuring the future growth of our industry and the nation's economy. As you know, today more and more working Americans worker are receiving stock options. The Worker Economic Opportunity Act updates the Fair Labor Standards Act to guarantee that rank-and-file employees and management can share in their employer's economic well being in the same manner.

We look forward to working with you on other issues important to the information technology industry.

Best regards,

RHETT DAWSON,  
*President.*

Mr. OWENS. Mr. Speaker, I yield 2 minutes to the gentleman from California (Mr. DOOLEY).

Mr. DOOLEY of California. Mr. Speaker, I rise today in support of H.R. 4182, a bipartisan effort to address a problem that could impede advancements in many sectors of our economy.

In many ways this legislation I think is a reflection of the transition our economy is making from an industrial-based economy to an information-based economy. We are seeing some of the most rapid growth in our economy now in this information sector, where a lot of those companies are making great efforts to recruit talent and personnel by offering them a stake in the company. By ensuring that stock options can be available not only to management, but to employees, we are going to ensure that that employee will have the opportunity to benefit from the technology and the product development that is adding so much wealth to our entire economy.

I am real pleased that this legislation will certainly benefit not only the technology sector, but also a lot of

other companies on the more manufacturing side of things, who are seeing some examples of how they too can reach out to make their employees more a part of their efforts to move forward.

Mr. Speaker, I just want to join the chairman and the ranking member in their efforts in bringing this bill to the floor, and thank all of the efforts of the administration and other Members that have joined in support of this legislation.

Mr. GOODLING. Mr. Speaker, I yield 2 minutes to the gentleman from North Carolina (Mr. BALLENGER), the subcommittee chair responsible for this legislation.

Mr. BALLENGER. Mr. Speaker, I am pleased today to rise in support of this act, a bipartisan bill to protect the stock option programs for rank and file employees.

Stock option programs can be configured in a variety of ways and are referred to by different names, but all the programs share similar objectives, to reward employees, to provide ownership in the company, and to attract and maintain a motivated workforce.

In testimony before my Subcommittee on Workforce Protections earlier this month, witnesses discussed how stock ownership programs are now available to more and more employees. In the past, such programs were used to reward executives, top management and other key employees. However, there has been a dramatic increase in the past several years in the number of companies offering broad-based employee ownership plans to rank and file employees.

The Department of Labor's recent interpretation saying that stock options may be part of an employee's "regular rate," threatened to undermine the ability and willingness of employers to make stock options available to their own nonexempt employees. Ms. Abigail Rosa, an employee who testified at the hearing, expressed concern that the Department of Labor's interpretation of the law would force companies to do away with stock option programs for employees who are covered by the overtime law.

Allowing hard-working rank and file employees to share in the growth of their companies is good for morale, good for families, and good for the country. I am pleased that we were able to work together to fashion a bill that updates the 1938 labor law. We have a bill that fosters stock option plans and has the FLSA taking a baby step into the 21st century.

This bill represents the hard work and attention of many Senators and Members of the House on both sides of the aisle, as well as the Department of Labor, and I urge my colleagues to vote for this legislation.

Mr. OWENS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I would like to express my gratitude to the gentlemen on the other aisle for their cooperation in working together on this piece of legislation.

I think the bipartisan cooperation of this legislation shows that both parties are willing to go into the rest of this age of information and to continue on to what I call the cyber-civilization and make the necessary adjustments to various factors in our economy. But I think it is important to note that the gentleman from California (Mr. Cunningham) said that it is a crime that large numbers of foreign workers are being imported and that they will be occupying these high-paying jobs, they will be getting these stock options, and large numbers of our own workforce will be denied the opportunity because they do not have the proper education and training. So at a time when our economy is leaping ahead and there is unprecedented prosperity, and we heard recently that the budget surplus is going up since we were on recess and came back, the budget surplus is going up, I think they expect about \$200 billion surplus this year or more, and over the next 10 years you may have a \$2 trillion surplus, it is a crime that we do not have the kind of education system which will develop and train the workers who can take the jobs that are paying so well that they offer stock options in addition to regular salaries.

This great budget surplus that we anticipate, if we were only to take 10 percent of it for education, just 10 percent, we could deal with these 21st century problems of large numbers of vacancies in industries which require highly educated workers. Just 10 percent. I would say 5 percent for the all-important activity of school construction, school repairs, various things related to school infrastructure, because part of the training process requires that you have the facilities and you have the equipment.

There is a great need for capital investment in our schools in order to get the workforce trained who would be able to take advantage of such lucrative items as stock options, as well as higher paying jobs. Take 5 percent for physical infrastructure and deal with the problem that the National Education Association has cited as requiring \$254 billion. Their survey, their report, shows that we need \$254 billion to bring the infrastructure of the public school systems up to a level where they can take care of the present population. We are not talking about long-term enrollment projections. \$254 billion is needed at this point to do that.

We have it. Money is not the problem. It is there in the surplus. I am not asking for that much, but I think we ought to reserve 10 percent for education. Five percent of \$2 trillion would be like \$20 billion. Five percent of \$2

trillion would be \$10 billion for construction and another \$10 billion for other educational improvements. \$20 billion a year reserved out of the projected surplus would take care of the problem of training workers so those workers could make the salaries and be eligible for the stock options we are talking about today.

Mr. Speaker, I reserve the balance of my time.

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Mr. OWENS. Mr. Speaker, I reserve the balance of my time.

Mr. GOODLING. Mr. Speaker, I yield myself 30 seconds, just to indicate that if we in the Congress of the United States refuse to admit that billions and billions, hundreds of billions of dollars that we have spent on education from the Federal level have not closed the academic achievement gap one little tiny bit, and if we will not admit that those programs have failed, I do not care how much money we spend or how many more programs we introduce, failure is bound to follow as it has over the last 30 years.

Mr. Speaker, I yield 3 minutes to the gentleman from Ohio (Mr. BOEHNER), the other subcommittee chair of the labor side of our committee.

Mr. BOEHNER. Mr. Speaker, team-building is replacing bureaucracy throughout our country. That is really what we define today as the New Economy. New Economy companies are not just high-tech firms. They are companies that understand the value of their workforce as a team and organize themselves around team dynamics. That goes for companies that make sofas in southwestern Virginia, as well as companies that make Internet servers in Silicon Valley.

A critical part of team-building is getting everyone on the same page, making sure everyone is motivated by common interests. By making the employee a shareholder, stock options also make them valued team members who see their interests and those of the rest of their team as one and the same.

Our subcommittee held a hearing in March on another stock options-related measure, one that I introduced last winter. One of the witnesses at our hearing was Timothy Byland, a sales employee with a San Diego-based Internet firm. Tim told our committee, and I quote, "Stock options are a way of sharing the gains of the business with those responsible for those gains. With stock options, I am part of that shared success. I am rewarded for the contributions I make and I am motivated to make them."

Stock options are part of almost any employee compensation package in the high-tech sector today, but increasing numbers of more established companies today are recognizing the value of helping employees become shareholders, giving them an unprecedented

chance to share in their company's performance and profits. These companies range from 3M to Pepsi to Merrill Lynch, Citigroup and CBS.

In short, Mr. Speaker, stock options just are not for the executive anymore. This is a new economy with new opportunities for workers at every step along the pay scale.

The Labor Department's current policy on stock options for overtime employees illustrates how out of step Washington's rules are with the opportunities of the new economy. It is a throwback to the old days when stock options were available to almost no one except top executives.

If fully implemented, this policy would be a dramatic step backward. It would needlessly discourage employers from granting stock options to hourly employees. It would limit opportunities for millions of workers to build greater wealth and, most importantly, retirement security.

Swift passage of this measure today will remove a major Federal obstacle to the vision of a shareholder society shared by many members on both sides of the political aisle. It will also help to ensure continued movement toward a regulatory system that reflects the opportunities of the 21st century, and it will pave the way for us to address some other problems that current law poses for rank and file workers with stock options such as the IRS Tax Code dual taxation of nonqualified stock options.

Mr. Speaker, I commend the gentleman from North Carolina (Mr. BALLENGER), the gentleman from Pennsylvania (Mr. GOODLING), and all of the Members who have worked on this bill, and I urge all of my colleagues to support it today.

Mr. OWENS. Mr. Speaker, I yield 5 minutes to the gentleman from Virginia (Mr. MORAN).

Mr. MORAN of Virginia. Mr. Speaker, I thank the distinguished gentleman from New York for yielding me this time.

Mr. Speaker, as the lead Democratic sponsor of the House version of this bill, the Stock Options Preservation Act, I want to thank all of the people in both Chambers and particularly on both sides of the aisle who put aside partisanship and traditional turf battles to get this important legislation passed into law. Particularly, I want to thank the gentleman from California (Mr. CUNNINGHAM) and the gentleman from Virginia (Mr. DAVIS), who reached out to Members on both sides of the aisle and worked with the administration to craft meaningful, substantive legislation. I wish we could do more of this. Not only is this a substantive piece of legislation, but it also ought to be an example of how we can do things when we can get together in a bipartisan way.

What drove this, of course, was the understanding that in business, there

is only one way to increase total compensation without raising inflation, and that is increasing productivity. Increased productivity means that workers can take home more and that businesses can earn more. It represents a win/win scenario and is directly responsible for the tremendous economic growth we have experienced over the last 8 years. It has been unbelievable to be able to keep inflation down, while wages and benefits are going up; and, of course, it is all because of the increased productivity that we are seeing throughout our workforce.

This is not just because of technological advances; it is achieved by improving the way in which employees work together. When employers and employees share the same goals, which is the success of a business, then productivity increases. Employees and employers both win, and of course the American economy wins too. That is why we have this enormous surplus. We are finally going to be able to stop paying down the debt, investing in education and research, and setting aside money for our retirement. It is all because we have this tremendously more productive economy.

As one example, let me just share an example. One large company that distributed food products was losing millions of dollars each year because of very low recycling rates. So when it imprinted the logo for its stock option program on all of its products, the recycling rates went up to 99 percent; 99 percent got recycled. It was because the employees realized that recycling boxes and other waste products saved the company millions, that improved the bottom line and consequently, the stock price.

No longer are stock options exclusively for the CEO and top management. Two-thirds of large companies give options to portions of their non-executive workforce, and over one-fourth of those companies give options to all of their employees.

Stock options unite employees. Some businesses have stock tickers in their cafeterias. When the price is up, the employees all feel a sense of achievement. When it is down, they know they have more work to do. It overcomes divisions that oftentimes pit employees against employers, and that is better for all of us. It promotes a sense that employees from the CEO to the line worker in all parts of the country are part of the same team.

This has been a long time in coming, but when we can work as a team and we can stop that gap between management and the workforce, we are all better off. This new economy should bring increased opportunities for all American workers. Stock option programs provide that opportunity by making workers into owners, investing them in the success of the business.

The administration has endorsed this bill, the Senate passed it unanimously,

and I strongly support it, and I trust it will pass unanimously. This is what the new economy should be all about and what the American workforce should be all about, being invested more in the product, in the efficiency and the effectiveness of the way in which we develop a product and not just in the process. We are all part of this economy, and workers need to be owners. Stock options are enabling us to achieve that.

Again, I want to congratulate my colleague, the gentleman from Virginia (Mr. DAVIS), for being one of the first people to bring that up, and as I said, the gentleman from California (Mr. CUNNINGHAM) and the gentleman from Pennsylvania (Mr. GOODLING), and all of the other speakers, and the gentleman from New York (Mr. OWENS). It is both sides of the aisle, and this is the way we get things done, and this is very important for our economy.

Mr. GOODLING. Mr. Speaker, I yield 1 minute to the distinguished gentleman from Texas (Mr. SAM JOHNSON), a member of the committee.

Mr. SAM JOHNSON of Texas. Mr. Speaker, it is a rare occasion when we agree with the Department of Labor on legislation, but today we do. This bill will ensure that all employees, including rank and file workers, are allowed to participate in employee-provided stock option programs.

With the advent of new technology and Internet companies that offer stock options to lure the best and the brightest, we must make sure that outdated laws do not stifle our growth and innovation.

It is unfair to allow only top executives to participate in these stock options, excluding those who provide the labor for the same company, but on an hourly basis. I believe rank and file employees deserve the chance to make their fortune, secure their retirement, and increase opportunities for savings. The time is long overdue to help millions of workers and employees achieve the American dream.

Mr. GOODLING. Mr. Speaker, I yield 1 minute to the gentleman from Virginia (Mr. DAVIS), another Member who worked hard on this legislation.

Mr. DAVIS of Virginia. Mr. Speaker, the Department of Labor's opinion letter that was issued in February was really outrageous. The letter stated that the Fair Labor Standards Act did not allow the value of stock options to be excluded from the calculation of a nonexempt worker's overtime pay. Now, this had not been a problem in 20 years. When I was a corporate executive and we were giving stock options to nonexempt employees, we did it with the idea of them being owners of companies.

The effect of this rule and regulation would have been that many workers who are salaried employees would no longer be eligible for stock options,

that they were going to be deprived of their piece of the American dream: homeownership, to be able to build equity, and get the kind of income that exempt workers were routinely getting. That was the effect of that decision.

Unfortunately, it created a lot of uncertainty within the business community. When this was brought to the attention of the higher-ups, Congress started to act and the administration moved into gear. We appreciate everybody working together now to bring this legislation where it is today. I think the unanimous Senate vote, the fact that the administration is now going to sign legislation that will basically solve the problem that was created when they sent this letter out in February, is an indication that when we work together, we can solve these problems. I want to applaud all concerned.

Mr. Speaker, I rise today to express my strong support for S. 2323, the Worker Economic Opportunity Act, a measure that exempts stock options, stock appreciation rights, and employee stock purchase programs from the calculation of overtime pay for certain employees under the Fair Labor Standards Act. As a sponsor of the House companion to this measure, introduced by my colleague, Congressman CUNNINGHAM, I cannot emphasize enough how important this legislation is to the continued growth of our nation's New Economy in the 21st Century.

Over the past decade, our economy has boomed and the shortage of workers has intensified. Within this context, employers have used innovative ways to improve their workplaces and attract and retain workers. Offering new financial opportunities—such as stock options—has allowed many companies to draw in good workers and at the same time, give employees an ownership right in the growth potential of a business. According to *Fortune* magazine, of the 100 best companies to work for, over one-third now offer stock options to all of their employees. And the National Center for Employee Ownership reports that over 80 percent of companies receiving venture capital financing provide options to both non-managerial and key management employees.

The Department of Labor's opinion letter, issued in February, brought a great deal of uncertainty for employers and employees. The letter stated the Fair Labor Standards Act did not allow the value of stock options to be excluded from calculation of non-exempt worker's overtime pay, sparking serious concerns among those of us here in the House of Representatives and the other body as to how this ambiguity would affect economic growth. While the increased use of stock options is on the rise in traditional businesses, the high technology industry in particular owes a great deal of its growth to the issuance of stock options. The high technology industry has been a boon to our economy, creating more than 1 million high-paying jobs since 1993. In my home state of Virginia, some 12,100 technology-based firms call Virginia home, employing more than 370,000 workers and contributing more than \$19.4 billion in wages.

S. 2323 passed the Senate overwhelmingly with a vote of 95–0 last month and received the support of the Secretary of Labor, Alexis Herman. It will assure the protection of worker's stock options and ability to share in the success of a company without harming the computation of fair overtime pay. I want to commend Chairman GOODLING, Chairman BALLENGER, and Congressman CUNNINGHAM, for their leadership on this issue. I urge all of my colleagues to support this bill and save stock options for all workers.

Mr. GOODLING. Mr. Speaker, I yield 2 minutes to the gentleman from California (Mr. KUYKENDALL).

Mr. KUYKENDALL. Mr. Speaker, I rise today in strong support of S. 2323, the Worker Opportunity Act. It is important legislation that encourages companies to grant stock options to all employees without triggering overtime calculations of the Fair Labor Standards Act. It is a much-needed update to reflect current realities in the workforce and our economy.

Passed in 1938, the Fair Labor Standards Act guaranteed that hourly workers would receive fair pay for their work. It set strict requirements with respect to how overtime would be calculated. Over the years, overtime pay provisions have been amended to reflect changing realities of the workplace.

For example, today current law excludes health and pension plans from overtime calculations as a means of encouraging employers to offer these important benefits to hourly employees. The United States economy has changed dramatically since 1938. It is an economy fueled by information technology and high-tech industries.

Many companies today have tight capital constraints when starting out. Companies in this new economy attract potential employees by offering the promise to share future corporate profitability through stock options or other stock purchase plans; and for the first time, employees at all levels have a meaningful stake in the success of their businesses, creating other positive benefits. Imagine, the attitude that every employee is important to the success and welfare of their employer, and they can participate in the benefits of ownership are attitudes that our labor laws and policies should encourage.

Unless changes are made to the Fair Labor Standards Act, most employers have indicated that they would exclude nonexempt employees from participation in stock purchase plans. According to the Employment Policy Foundation, the potential impact of the Department of Labor's interpretation is that 26 million Americans would stand to lose their stock options or other corporate equity. This is not a result intended by the Fair Labor Standards Act, by the Department of Labor, or by labor representatives. With passage of this bill today, we undertake the much

needed revision to provide the Department of Labor with additional flexibility.

I was pleased to be an original co-sponsor of the House companion bill, and I am proud to support S. 2323 today, and I urge all of my colleagues to vote in favor of this important resolution.

Mr. GOODLING. Mr. Speaker, I reserve the balance of my time.

□ 1330

Mr. OWENS. Mr. Speaker, I yield myself the balance of my time.

Mr. Speaker, I think it is important to note that the language on both sides has been the same. The concepts have been the same. We basically agree that the Committee on Education and the Workforce understands the implication of the New Economy. We understand the kind of society we are going into. We understand that we have responsibilities for the workforce.

Here we are exercising an important responsibility in terms of payment; that they should not be barred from enjoying the prosperity and should not in any way be kept from having stock options as other people do within the confines of a corporate enterprise. So we all agree.

Mr. Speaker, I think we all ought to agree that the Committee on Education and the Workforce is primarily for the American workforce. We may have some international obligations sometime in the future; we may choose to assume those, but it is the American workforce that we would like to see take advantage of the opportunities that exist in our economy now.

The sad thing about this bill, as the gentleman from California (Mr. CUNNINGHAM) pointed out, is that so many of our people who ought to be qualified for these jobs are not qualified, and we are going to be reaching out to the rest of the world to bring in workers who will not pay into the Social Security system, who will not contribute to the full economy of our Nation, while we are denying the opportunity to our own people because we have not developed a sufficient education system.

So given the fact that we now have an opportunity with a huge surplus, 10 percent of that surplus ought to be devoted to revamping our education system. Revamping it in ways that do not interfere with local controls, starting with school construction, which is a capital expenditure. Buying computers is a capital expenditure. We can do the things that capital expenditures require, get out, and do not interfere with the operation of the schools.

It is relevant to this discussion. At the end of the war in Vietnam, we did not jettison or throw away our military establishment. We did not say, look, they have lost a war to a Third World country; and, therefore, they

have not succeeded so we will not continue to support our military. Just the opposite happened. We began to pour more and more resources more and more dollars into revamping and building up the world's greatest military system that existed.

So the failure of our school systems up to now, the huge amount of problems that we have in terms of educational reform and improvement, should not prevent us from utilizing this window of opportunity to provide help for working families. Working families should be allowed to join the economy and enjoy the stock options, because they qualify for those good-paying jobs.

Mr. Speaker, I yield back the balance of my time.

Mr. GOODLING. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. QUINN). The question is on the motion offered by the gentleman from Pennsylvania (Mr. GOODLING) that the House suspend the rules and pass the Senate bill, S. 2323.

The question was taken.

Mr. GOODLING. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX and the Chair's prior announcement, further proceedings on this motion will be postponed.

#### GENERAL LEAVE

Mr. GOODLING. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on S. 2323.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

#### IDEA FULL FUNDING ACT OF 2000

Mr. GOODLING. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 4055) to authorize appropriations for part B of the Individuals with Disabilities Education Act to achieve full funding for part B of the act by 2010.

The Clerk read as follows:

H.R. 4055

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

##### SECTION 1. SHORT TITLE.

This Act may be cited as the "IDEA Full Funding Act of 2000".

##### SEC. 2. FINDINGS.

The Congress finds the following:

(1) All children deserve a quality education, including children with disabilities.

(2) The Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) provides that the Federal Government and State and local governments are to share in the expense of educating children with disabilities

and commits the Federal Government to provide funds to assist with the excess expenses of educating children with disabilities.

(3) While Congress committed to contribute up to 40 percent of the average per pupil expenditure of educating children with disabilities, the Federal Government has failed to meet this commitment to assist States and localities.

(4) To date, the Federal Government has never contributed more than 12.6 percent of the national average per pupil expenditure to assist with the excess expenses of educating children with disabilities under the Individuals with Disabilities Education Act.

(5) Failing to meet the Federal Government's commitment to assist with the excess expense of educating a child with a disability contradicts the goal of ensuring that children with disabilities receive a quality education.

##### SEC. 3. PURPOSE.

It is the purpose of this Act to reach the Federal Government's goal under part B of the Individuals with Disabilities Education Act (20 U.S.C. 1411 et seq.) of providing 40 percent of the national average per pupil expenditure to assist States and local educational agencies with the excess costs of educating children with disabilities.

##### SEC. 4. AUTHORIZATION OF APPROPRIATIONS FOR PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

Notwithstanding section 611(j) of the Individuals with Disabilities Education Act (20 U.S.C. 1412(j)), for the purpose of carrying out part B of such Act, other than section 619, there are authorized to be appropriated—

- (1) \$7,000,000,000 for fiscal year 2001;
- (2) \$9,000,000,000 for fiscal year 2002;
- (3) \$11,000,000,000 for fiscal year 2003;
- (4) \$13,000,000,000 for fiscal year 2004;
- (5) \$15,000,000,000 for fiscal year 2005;
- (6) \$17,000,000,000 for fiscal year 2006;
- (7) \$19,000,000,000 for fiscal year 2007;
- (8) \$21,000,000,000 for fiscal year 2008;
- (9) \$23,000,000,000 for fiscal year 2009;
- (10) \$25,000,000,000 for fiscal year 2010; and
- (11) such sums as may be necessary for each subsequent fiscal year.

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Pennsylvania (Mr. GOODLING) and the gentleman from Michigan (Mr. KILDEE) each will control 20 minutes.

The Chair recognizes the gentleman from Pennsylvania (Mr. GOODLING).

Mr. GOODLING. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I have looked forward to this day for 26 years, and I am glad it has arrived and I hope it is just the beginning.

For many years in the minority, I pleaded and pleaded and pleaded to do something about getting somewhere near that 40 percent of excess costs. Finally, I got the gentleman from Michigan (Mr. KILDEE) to join with me on the Committee on the Budget and as powerful as we two are, we did not move the Committee on the Budget nor did we move the appropriators. But we are still fighting.

Today, of course, we have an opportunity to do something about it. As I have said over and over again, if we would meet that obligation, if we had met it over the years of paying 40 per-

cent of the excess costs, today we are talking probably about \$2,500 per student for each child.

I have said over and over again that how much we could have done over those years in maintaining school buildings, improving school buildings, reducing class size. And then people will say that is not very much money. Well, I have got news for my colleagues. New York City would get \$170 million a year. Twenty times \$170 million sounds like a lot of money to me. Los Angeles, \$95 million every year. Twenty times \$95 million every year sounds like a lot of money to me.

The problem is, we have not met our obligations. If we had met our obligations, of course, we can see on the chart the number of children with disabilities, the national average per pupil in the year 2000 was \$6,300. So 40 percent of that gives about \$2,500 per child.

On the other chart, of course, I indicate what Los Angeles, Chicago, New York City, Dallas, Miami, Washington, D.C., St. Louis, just to mention a few, would have gotten year after year after year if they had gotten the 40 percent that they expected us to put forth on the excess costs.

I ought to caution, however, that unless we can control over-identification, we can never get to the 40 percent. There is not anybody that has enough money to get to that 40 percent. So we have to work at both ends.

The legislation was proper because the legislation said every child, whether you have a disability or not, should have an equal opportunity for a good education. Our problem is that we did not put our money where our mouth was. That meant that local school districts have had to raise all of this money locally and take it away from reducing classes and away from school construction and maintenance, and they have had to take it away from better education for every other child because they had to fund this 40 percent.

I am very pleased to indicate, however, in the last 4 years we have convinced the budget people and we have convinced the appropriators, and they have upped us \$2 billion each year. That gives us 115 percent increase in a 4-year period, and I am very thankful for that. If we keep doing the same for the next 10 years, we will be in very good shape.

Mr. Speaker, I reserve the balance of my time.

Mr. KILDEE. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I join the gentleman from Pennsylvania (Chairman GOODLING) in supporting H.R. 4055. I want to commend the gentleman for bringing this legislation before the House today.

Several years ago, when we both served on the Committee on the Budget, the gentleman from Pennsylvania