June 1980

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BLACK LUNG BENEFIT TRUSTS AS A FEDERAL SELF-INSURANCE ALTERNATIVE

PETER M. KELLY*

Since the enactment of the Federal Coal Mine Health and Safety Act¹ (FCMHSAct) in late 1969, occupational pneumoconiosis, "black lung disease," has been compensable under federal law.² These federal black lung benefits are coordinated with state workmen's compensation or occupational disease laws to provide death or disability benefits for coal miners suffering from the disease.³

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Black lung disease, or pneumoconiosis, is a chronic disease associated with the inhalation of coal dust and is marked by respiratory or pulmonary impairment. FCMHSA § 402(b), 30 U.S.C. § 902(b) (1976). Black lung disease may be established as a cause of compensable death or disability through medical evidence sufficient to satisfy certain statutory burdens of proof. FCMHSAct §§ 402(f), 411, 413(b), 30 U.S.C. §§ 902(f), 921, 923(b) (Supp. II 1978); 20 C.F.R. §§ 718.1-.404 (1979). Coal miners or their dependents may rely upon a number of statutory presumptions which have significantly simplified this burden of proof. FCMHSAct § 411, 30 U.S.C. § 921(c) (Supp. II 1978); 20 C.F.R. §§ 718.101-.107, 718.123 (1979).

³ Most states with significant coal production provide workmen's compensation or occupational disease compensation for coal miners suffering from black lung disease. For a list of the states providing compensation for pneumoconiosis,
Black lung benefits are provided at federal cost under Part B

see A. Larson, Workmen’s Compensation Law § 41.71 n.1 (as supplemented through 1980) [hereinafter cited as Larson]. In adopting the FCMHSA Congress anticipated that full responsibility for black lung compensation would eventually be assumed by state workmen’s compensation programs. Under Part B of Title IV of the FCMHSA the federal government assumed responsibility for benefits payable on claims filed during the early years. This avoided imposing a backlog of claims on mine operators. S. REP. No. 92-743, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 2324. However, the provisions of Part C of Title IV of the FCMHSA, which provided for eventual coal mine operator liability, were designed to apply only to the extent that state laws fail to provide adequate coverage for black lung disease. Congress anticipated that state laws would be updated to comply with the new federal standards. FCMHSA § 421, 30 U.S.C. § 931 (1976 & Supp. II 1978); CONF. COMM. REP. No. 91-761, 91st Cong., 1st Sess., reprinted in [1969] U.S. Code Cong. & Ad. News 2578, 2606. However, this displacement of the federal program never materialized. The Department of Labor received few applications and approved no “adequate” state programs. De Carlo & Viewag, Federal Black Lung Law and Insurance in a Nutshell, 11 Forum 661, 671 (1976). By early 1977 Congress expressed a realization that “adequate” state programs would never materialize to displace the federal program.

Realities have acted to frustrate the objective of transferring claims liability from the federal Treasury to states and coal operators: (1) no state workmen’s compensation law has yet been deemed adequate under part C, and (2) the Department of Labor has been successful in identifying responsible operators only with respect to about 25 to 30% of the Part C claims. . . .

The confluence of these unanticipated occurrences has meant continued federal liability for black lung claims filed after the period when such liability was expected to end. . . .

Section 9 of the Bill conclusively ends this lingering federal liability by the creation of a coal industry trust fund, into which all coal operators will contribute, and from which all Part C benefits will flow. In accomplishing this objective, the Committee establishes that the costs of occupational disease should be now borne by the industry from which it arises. It continues to recognize that an “adequate” state workmen’s compensation plan may cushion this industry liability; and that to the extent individual coal operators can be assessed with liability in individual cases, that liability should attach. But it substitutes the industry-wide trust fund mechanism for the federal Treasury in those cases where residual liability may now fall to the Secretary of Labor.


Although eligibility for federal benefits under the original black lung benefit program (Part B) is conditioned upon assertion of a state compensation claim, no such limitation is applicable with respect to recovery under Part C. FCMHSA § 413(c), 30 U.S.C. § 923(c) (1976); 20 C.F.R. § 725.403 (1979). However, benefits under both Part B and Part C are reduced by any benefits which may be received.

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of Title IV of the FCMHSA with respect to claims which arose before July 1, 1973 (Part B benefits). Benefits are payable directly or indirectly by coal mine operators under Part C of Title IV of the FCMHSA with respect to claims arising after June 30, 1973 (Part C benefits). Part C liability is imposed directly on the coal mine operator found to be the last responsible operator with respect to a Part C claim. To the extent that no last responsible operator can be found or such operator fails to satisfy its obligations to pay Part C benefits, benefits will be paid by a Black Lung Disability Trust Fund, the “National Disability Trust,” established in 1978 for this purpose. The National Disability Trust is funded by a tonnage excise tax on coal mined and sold in the

under state workmen’s compensation or occupation disability programs. FCMHSA §§ 412(b), 422(g), 30 U.S.C. §§ 922(b), 932(g) (1976).

* FCMHSA §§ 411-415, 30 U.S.C. §§ 921-925 (1976). Although the cutoff for Part B benefits was theoretically June 30, 1973, special rules are applicable to benefit claims filed between July 1, 1973 and December 31, 1973. FCMHSA §§ 414(b), 415, 30 U.S.C. §§ 924(b), 925 (1976 & Supp. II 1978). Part B benefits are payable only with respect to the following claims: (i) disability claims filed before July 1, 1973; (ii) survivorship claims filed prior to January 1, 1974; (iii) survivorship claims filed within six months of the death of a miner who died before January 1, 1974; and (iv) survivorship claims filed within six months of a death of a miner who was receiving Part B benefits at the time of death. FCMHSA § 414, 30 U.S.C. § 924 (1976 & Supp. II 1978).

* FCMHSA §§ 421-426, 30 U.S.C. §§ 931-936 (1976 & Supp. II 1978). Part C benefits relate to claims filed after June 30, 1973, except to the extent that Part B benefits would be available. A claimant must establish the existence of black lung disease, that death or total disability was due to such disease, and that the disease arose out of coal mine employment. 20 C.F.R. §§ 718.1-.404 (1979). To the extent that Part C is applicable and the burden of proof is satisfied, benefits are to be provided directly or indirectly by coal mine operators.

* The “last responsible operator” is the coal mine operator, including certain coal mine construction companies. FCMHSA § 3(d), 30 U.S.C. § 802(d) (Supp. I 1977); 20 C.F.R. § 725.491 (1979). If the disability or death of the coal miner arose at least in part out of employment with the operator, the operator conducted business as an operator after June 30, 1973, and the miner worked at least one day for the operator, then that operator may be held liable under Part C. 20 C.F.R. § 725.492 (1979). In addition, the operator must be an operator with which the miner had the most recent period of cumulative employment of one or more years. 20 C.F.R. § 725.493 (1979). The last operator is deemed to be a “responsible” operator. Id.

The Trust is also responsible for the payment of Part C benefits with respect to miners who had no coal mine employment after the end of 1969. The coordination of federal and state black lung programs has been adequately discussed elsewhere; similarly, a detailed description of federal and state benefits and the source of payment of those benefits may be found elsewhere. However, a brief discussion of the obligation of coal mine operators to satisfy certain insurance or self-insurance requirements with respect to Part C liabilities will provide necessary background for the principal focus of this article: the use of individually established and maintained qualified black lung benefit trust funds to provide Part C benefits and satisfy self-insurance requirements. Black lung benefit trusts provide significant tax and funding advantages to the operator. However, current regulations place restrictions upon establishment and maintenance of these trusts, thereby discouraging their use. As will be seen, these restrictions may easily be corrected by Congress and the Internal Revenue Service, thus encouraging the use of black lung benefit trusts to effectively provide benefits and satisfy self-insurance needs, yet provide tax and funding savings to the operator.

I. SECURITY REQUIREMENTS WITH RESPECT TO BLACK LUNG CLAIMS

Coal mine operators are required by section 423 of the FCMHSA to secure payment of Part C benefits either by obtaining insurance or by qualifying as self-insurers. Failure to comply with this security requirement of section 423 exposes an operator, as well as its president, secretary, and treasurer, to joint and several personal liability for a civil penalty of up to $1,000

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10 See, e.g., Larson, supra note 3, at § 41.90-.98; Kelly, Black Lung Benefits Revenue Act of 1977, in REPORT OF SEMINAR OF MINERAL LAW OF OFFICE OF CONTINUING LEGAL EDUCATION OF THE UNIVERSITY OF KENTUCKY COLLEGE OF LAW 87 (1978) [hereinafter cited as Kelly].
11 See, e.g., Larson, supra note 3, at § 41.90-.98; Kelly, note 10 supra.
per day and for any benefits which may accrue while the operator fails to secure the payment of benefits. In light of this rather severe penalty, it is remarkable that there are indications of widespread failure to comply with section 423 requirements. Increased adherence may be expected when the Department of Labor begins to enforce this penalty, and the accounting profession and commercial lenders become aware of the requirement in performing financial audits of incorporated operators or in negotiating loans to operators.

To the extent that a coal mine operator does not elect self-insurance, compliance with section 423 requires that the operator maintain satisfactory insurance coverage. Such insurance policy, or policies, must fully cover the operator's black lung liabilities to qualify as insurance under section 423. Because of extremely high premiums for underground operations, conventional workmen's compensation insurance covering black lung disease is not available to most underground operators at competitive prices. Some alternatives to conventional workmen's compensation insurance are available; however, self-insurance is of particular interest to underground operators in light of the extreme cost of

1. **FCMHSA § 423(d), 30 U.S.C. § 933(d) (Supp. II 1978); 20 C.F.R. § 725.495 (1979).**
2. **FCMHSA § 423(a), 30 U.S.C. § 933(a) (1976); 20 C.F.R. §§ 725.494, 726.201-203 (1979).**
3. **20 C.F.R. § 726.207 (1979).**
4. **Any insurance company authorized to write workmen's compensation policies may write black lung coverage. FCMHSA § 423(a), 30 U.S.C. § 933(a) (1976).**

Black lung coverage is offered as a rider under a standard policy which covers workmen's compensation without regard to liability limitations (Part I) and which covers common law liability up to a liability limitation (Part II). Because of the difficulties of arranging insurance coverage, the National Council for Compensation Insurance formed an assigned risk plan. For a good description of this plan, including certain shortcomings, see Clayton Coal Co. v. Liberty Mut. Ins. Co., 594 F.2d 1378 (10th Cir. 1979). However, other policy approaches may be developed. 20 C.F.R. §§ 726.203, 726.205 (1979). Although high premium rates preclude standard coverage of many underground risks in a manner satisfactory for purposes of FCMHSA § 423, underground coal mine operators nevertheless often obtain excess coverage. Variations have developed using retrospective or cost-plus features together with excess coverage; however, some open questions remain concerning the timing of deduction of the premiums paid under such arrangements. See Steere Tank Lines, Inc. v. United States, 76-2 T.C. 19526 (N.D. Tex. 1976), aff'd, 577 F.2d 279 (5th Cir. 1978), cert. denied, 440 U.S. 946 (1979). Many of these alternatives actually amount to self-insurance.
conventional insurance.

To qualify as a self-insurer an operator must obtain prior approval from the Department of Labor. To qualify as a self-insurer an operator must obtain prior approval from the Department of Labor. Self-insurance authorization will be granted only for a maximum of eighteen months, after which time reauthorization by the Department of Labor is required. The Department of Labor has discretion to approve or disapprove a self-insurance application, and may revoke authority for good cause. Self-insurers must complete reports required from time to time by the Department of Labor and must submit to Department of Labor audits. Failure to cooperate in this manner is grounds for revocation of self-insurance authority. Self-insurance approval is evidenced by a formal notice of authority issued by the Department of Labor.

Self-insurance satisfactory to the Department of Labor may consist of surety bonding, escrow deposits, black lung benefit trusts, or a combination of two or more of these methods. A

21 Id.
25 Senator Long, conferee and Senate floor manager for the Black Lung Revenue Act of 1977, explains the conference agreement regarding black lung trusts:

In light of the investment limitations plus the self-dealing and other restrictions which are imposed under the amendment to assure that funds held by self-insurance trusts are used exclusively for the required purposes, it is contemplated that the Secretary of Labor will give appropriate credit for amounts so held in trust in determining whether an operator satisfies the requirements of section 423 of the Federal Coal Mine Health and Safety Act of 1969, that the operator either qualify as a self-insurer or obtain insurance to cover its contingent black lung benefit liabilities.


The provisions of this bill are not intended to derogate from the authority and responsibility of the Secretary of Labor to prescribe regulations under section 423 of the Federal Coal Mine Health and Safety Act of 1969 as to qualification of an operator as a self-insurer for purposes of that statute.

Id. at S19496 n.6. In reviewing black lung trusts submitted by the undersigned the
combination of one or more self-insurance methods with partial insurance coverage also satisfies section 423 requirements.

Although self-insurance is attractive to underground operators, dissatisfaction may also result from an election to self-insure. The requirement that self-insurance authority be obtained prior to implementation results in significant delay. Self-insurance escrow arrangements, which involve a depository arrangement whereby assets are deposited for investment in specified government securities,\textsuperscript{26} may be viewed as unsatisfactory because amounts set aside in escrow are not immediately deductible. Escrow amounts may only be deducted for federal income tax purposes at the time they are withdrawn and applied for the payment of benefits.\textsuperscript{27}

Furthermore, while premium costs for self-insurance surety bonds are deductible when the premiums are paid or properly accrued,\textsuperscript{28} premium payments do not reduce a coal mine operator's future black lung costs. Surety bond self-insurance also fails to provide a vehicle for prefunding black lung liability.\textsuperscript{29} Prefunding of liabilities is desirable since it permits allocation of the economic burden of black lung claims over several years, thereby avoiding distortion of a corporation's statements of financial condition in years of extraordinarily high, or low, claims experience.

The book reserve method of self-insurance is permissible under workmen's compensation or occupational disease programs

\begin{itemize}
  \item Department of Labor has expressed a willingness to accept such trusts for section 423 security purposes.
  \item The type of escrow contemplated by the Department of Labor's regulations would not involve actual black lung benefit payments or fixed black lung liabilities at the time escrow deposits are made. Application of general principles of taxation dictate that such payments cannot be immediately deducted. Rather, a deduction would be available only when the black lung liabilities become fixed (accrual basis operators) or when black lung benefits are actually paid (cash basis operators). I.R.C. § 461. See also 28 Am. Jur. 2d Escrow (1966).
  \item Treas. Reg. § 1.162-1 (1960).
  \item A surety bond merely provides the Department of Labor with assurance that the surety will perform a duty of the assured if the assured fails to do so. Once the surety has performed its obligations to satisfy the black lung payment obligations of the recalcitrant coal operator, the surety is subrogated to the rights of the disabled or deceased coal miners and may assert their black lung claims against the operator on their own behalf.
\end{itemize}
in several states. Unfortunately, the book reserve method will not satisfy federal black lung self-insurance requirements.\(^3\)

Coal mine operators who are unable or unwilling to rely totally on any of the methods of self-insurance just discussed may satisfy the security requirements of section 423 by the establishment of a qualified black lung benefit trust or trusts, standing alone or in combination with one of the other methods of self-insurance.\(^3\) The remainder of this article explores the rules applicable to such trusts, and presents a tentative evaluation of their usefulness to coal mine operators under present conditions.

II. Basic Qualification Requirements and Tax Treatment of Qualified Black Lung Benefit Trusts

Pursuant to section 501(c)(21) of the Internal Revenue Code of 1954 (I.R.C.), a coal mine operator may establish a black lung benefit trust for purposes of satisfying black lung claims and other related expenses.\(^3\) The black lung benefit trust is advantageous to the operator in several ways. To the extent that all of the requirements of section 501(c)(21) are satisfied, such a trust will be exempt from income taxation on trust earnings,\(^3\) and contributions to the trust by the coal mine operator will be deductible within certain limitations.\(^3\) In addition, because black lung bene-

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\(^3\) 20 C.F.R. §§ 725.494-.495, 726.1-.213 (1979). Although financial statement book reserves for state workmen's compensation purposes are expressly permitted by the accounting profession as an exception to Financial Accounting Standards Board Standard No. 5, this method for planning future black lung expenses will not permit a current deduction of reasonable book reserves for such a contingent corporate liability, nor will this method satisfy FCMHSA § 423 self-insurance requirements.

\(^3\) I.R.C. § 501(c)(21). See note 25 supra and accompanying text. Qualified black lung benefit trusts may also prove to be acceptable self-insurance for state workmen's compensation or occupational disease purposes. Id.

\(^3\) I.R.C. § 501(c)(21).

\(^3\) I.R.C. §§ 501(a), 501(c)(21).

\(^3\) I.R.C. § 192. A qualified black lung benefit trust may be used to prefund black lung liabilities on a deductible basis. However, if the actuarial funding limitations of I.R.C. § 192 are exceeded, the coal mine operator making the excess contribution will be subject to an excise tax. I.R.C. § 4953. This excise tax is assessed at the rate of five percent of the excess contribution. Id. at § 4953(a). An excess contribution may be returned to the coal mine operator without further penalty. Id. Failure to return such excess could result in further excise taxes, however, because the excise tax is assessed on an annual basis against the cumulative
fits are in the nature of workmen’s compensation benefits, amounts paid from such trusts in satisfaction of black lung claims, including amounts attributable to trust earnings which have never been subject to federal income tax, will be excluded from the taxable income of the recipient. 35

However, certain formalities must be observed in establishing and maintaining a trust. A qualified black lung benefit trust must be a written and validly existing trust under applicable state law, 36 a prerequisite for any valid trust. A black lung benefit trust may only be established for certain enumerated purposes and may not permit any direct or indirect reversion of trust assets to the coal mine operator sponsoring the trust. 37 Further, excise tax liability will be imposed upon the trust, the trustee, the operator, or certain other related parties, if any portion is diverted for an impermissible purpose, if an excess contribution is made, or if certain prohibited self-dealing transactions take place. 38

A qualified black lung benefit trust must be established for the exclusive purposes of providing black lung benefits under state or federal law, paying premiums for insurance coverage of state or federal black lung liabilities, paying administrative expenses of the trust, 39 or for investment and reinvestment prior to distribution of funds for one of the other permitted trust purposes. 40 Following termination of such a trust and distribution of assets for all exempt purposes, any excess assets remaining in the trust must be paid to the National Disability Trust or directly to

amount of any overfunding. I.R.C. § 4953(b).

39 The administrative expenses which may be provided by such a trust would include investment costs, claims handling costs, accounting fees, legal fees, actuarial fees, trustees’ fees, or other similar expenses. I.R.C. § 501(c)(21)(A)(iii); Treas. Reg. § 1.501(c)(21)-1(e) (1979).
the Federal Treasury.\footnote{I.R.C. § 501(c)(21)(B)(iii).}

III. INVESTMENT RESTRICTIONS AND PROHIBITED TRANSACTIONS

The trustees of a black lung benefit trust may only invest in specified trust investments.\footnote{I.R.C. § 501(c)(21)(B)(ii); Treas. Reg. §§ 1.501(c)(21)-1(e) to -1(h) (1979); Treas. Reg. § 53.4952-1 (1979).} Such investments include United States, state or local debt obligations, and time or demand deposits in banks or credit unions.\footnote{[N]o part of the assets of the trust may be used for, or diverted to, any purpose other than— . . .(ii) investment (but only to the extent that the trustee determines that a portion of the assets is not currently needed for the purposes described in subparagraph (A)) in—(I) public debt securities of the United States, (II) obligations of a State or local government which are not in default as to principal or interest, or (III) time or demand deposits in a bank (as defined in section 581) or an insured credit union (within the meaning of section 101(6) of the Federal Credit Union Act, 12 U.S.C. 1752(6)) located in the United States, . . .} To the extent that a trustee permits the use of trust assets for investments not specifically permitted under section 501(c)(21), or permits the application of trust assets for any other purpose not permitted under section 501(c)(21), the trustee, as well as the fund itself, will be subjected to an excise tax.\footnote{I.R.C. § 4952; Treas. Reg. § 53.4952-1 (1979).} An initial excise tax is imposed upon the fund in an amount equal to 10\% of the taxable expenditure\footnote{I.R.C. § 4952(a)(1).} and on the trustee in an amount equal to 2\% of the taxable expenditure.\footnote{Id. § 4952(a)(2).} If the taxable expenditure is not corrected in a manner which places the trust in a position no worse than that in which it would have been in if the taxable expenditure had not been made, or if such correction is not made within ninety days of the mailing of a deficiency notice with respect to the excise taxes, then an additional excise tax is imposed.\footnote{Id. §§ 4952(b), 4952(e).} This additional excise tax will be imposed in the amount of 100\% of the taxable expenditure upon the trust fund itself,\footnote{Id. § 4952(b)(1).} and 50\% of the expenditure in the

\footnote{I.R.C. § 501(c)(21)(B)(ii).}{\footnotesize 

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Excise taxes are also imposed with respect to certain prohibited self-dealing transactions. Although some transactions which would otherwise be prohibited are specifically exempt from this excise tax, the following transactions are ordinarily prohibited:

(a) any direct or indirect sale, exchange, or leasing of real or personal property between a qualified black lung benefit trust and a disqualified person;

(b) any direct or indirect lending of money or extension of credit between a qualified black lung benefit trust and a disqualified person;

Under the self-dealing restrictions applicable to these trusts, if a bank or an insured credit union is a trustee of the trust or otherwise is a “disqualified person” with respect to the trust (for example, if it owns or is owned by the coal mine operator maintaining the trust) no funds of the trust may be held or invested in checking accounts, savings accounts, certificates of deposit, or other time or demand deposits in that bank or credit union.
(c) any direct or indirect furnishing of goods, services, or facilities between a qualified black lung benefit trust and a disqualified person;\(^5\)

(d) any direct or indirect payment of compensation (or payment or reimbursement of expenses) by a qualified black lung benefit trust to a disqualified person;\(^5\) and

(e) any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a qualified black lung benefit trust.\(^6\)

For purposes of these prohibitions, a disqualified person will include the coal mine operator and trustee of the qualified black lung benefit trust, officers, directors, or employees of the coal mine operator, and other persons or entities having certain share ownership, profit interest, beneficial interest, or other similar direct or indirect relationships to any of the above.\(^7\)

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\(^{5}\) I.R.C. § 4951(d)(1)(C). Despite the broad scope of this prohibition, disqualified persons may furnish services, goods, or facilities for exempt purposes without charge. Further, reasonable and necessary administrative services may be provided by disqualified persons and compensation, payment, or reimbursement for such services may be paid by the trust as long as such compensation, payment, or reimbursement is not excessive. I.R.C. §§ 4951(d)(2)(B), -(2)(C).

\(^{6}\) I.R.C. § 4951(d)(1)(D). But see note 54 supra.

\(^{7}\) (5) DISQUALIFIED PERSON.—The term "disqualified person" means, with respect to a trust described in section 501(c)(21), a person who is—

(A) a contributor to the trust,

(B) a trustee of the trust,

(C) an owner of more than 10 percent of—

(i) the total combined voting power of a corporation,

(ii) the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is a contributor to the trust,
These prohibited transaction rules, as in prohibited investments and expenditures rules, are enforced by imposition of excise taxes on the trustees and on the other disqualified persons participating in a prohibited transaction. An initial excise tax equal to 10% of the amount involved is imposed upon the disqualified person or persons. Trustees are subject to an initial excise tax of 2 1/2% of the amount involved. A failure to correct a prohibited transaction could result in imposition of an additional excise tax of 100% of the amount involved in the case of a disqualified person, and 50% of the amount involved in the case of a trustee.

The excise taxes for prohibited investments and prohibited transactions impose significant disincentives to engaging in such

(D) an officer, director, or employee of a person who is a contributor to the trust,

(E) the spouse, ancestor, lineal descendant of an individual described in subparagraphs (A), (B), (C), or (D),

(F) a corporation of which persons described in subparagraphs (A), (B), (C), (D), or (E), owns more than 35 percent of the total combined voting power,

(G) a partnership in which persons described in subparagraphs (A), (B), (C), (D), or (E), owns more than 35 percent of the profits interest, or

(H) a trust or estate in which persons described in subparagraphs (A), (B), (C), (D), or (E), hold more than 35 percent of the beneficial interest.

For purposes of subparagraphs (C)(i) and (F), there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are only those individuals described in subparagraph (E) of this paragraph. For purposes of subparagraphs (C)(ii) and (iii), (G), and (H), the ownership of profits or beneficial interest shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are only those individuals described in subparagraph (E) of this paragraph.

I.R.C. § 4951(e)(5).

I.R.C. §§ 4951(a), 4951(b).

Id. § 4951(a)(1).

Id. § 4951(a)(2).

Id. § 4951(b)(1).

Id. § 4951(b)(2).
activities. However, these rules are fairly straightforward and, by and large, are easily complied with. Subject to one notable exception discussed below, these provisions should not present any serious disincentive to the establishment of qualified black lung benefit trusts for FCMHSA section 423 self-insurance purposes.

IV. LEGISLATIVE AND ADMINISTRATIVE BARRIERS TO ESTABLISHMENT OF QUALIFIED BLACK LUNG BENEFIT TRUSTS

Qualified black lung benefit trusts offer significant tax and funding advantages. Contributions to prefund black lung liabilities are currently deductible, funds accumulate in the trust on a tax-free basis, and trust assets are distributed in the form of black lung benefits which are not taxed to the recipient. Qualified black lung benefit trusts also offer coal miners significant protection because trust assets are no longer assets of the coal mine operator and thus are not available to an operator's creditors. Further, the excise tax provisions provide additional assurance that trust assets will only be used for the exempt purposes set forth in I.R.C. section 501(c)(21).

With these advantages it would seem that many such trusts would be established. However, all the evidence points to a slow acceptance of such trusts by coal mine operators. This wait-and-see attitude may be explained by certain provisions of the legislation itself and certain administrative interpretations which have created needless barriers to establishment and implementation of such trusts. These provisions and interpretations work at cross purposes with the basic federal policies embodied in the Black Lung Revenue Act of 1977 and have resulted in less than comprehensive protection of coal miners.

A. The Non-Reversion Problems.

Late in 1978 Congress relaxed the deduction limitations ap-

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63 See notes 32-35 supra and accompanying text.
64 See note 34 supra and accompanying text.
65 See note 33 supra.
68 Id.
Black Lung Benefit Trusts were applicable to qualified black lung benefit trusts. This legislation was enacted in response to concerns that the previous limitations were unworkable and permitted only minimal prefunding.

Compliance with the revised deduction limitations in prefunding benefits may assure that sound and reasonable actuarial prefunding occurs and that an excise tax is avoided. However, the deduction limitations will not insure that overfunding will never occur. For example, overfunding will result from more favorable claims experience or trust earnings experience. The mine safety rules applicable to coal dust which were adopted as part of the FCMHSA were premised, in part, on a belief that such safety rules could significantly reduce the incidence of black lung disease. Certainly, mine operators who follow those rules to the letter or who take the fullest advantage of future technological improvements in coal dust control may experience a dramatic, heretofore unexpected reduction in their black lung claims at some point in the future. If this occurs, there is great likelihood that a qualified black lung benefit trust maintained by an operator will become overfunded.

Under the current rules, the excess funds which may result from overfunding are not recoverable by the contributing coal mine operator. Should overfunding become significant, certain

72 I.R.C. § 501(c)(21); H.R. Rep. No. 95-1656, 95th Cong., 2d Sess. 4, reprinted in [1978] U.S. Code Cong. & Ad. News 3621. The Treasury Department is opposed to any changes in these non-reversion rules. The non-reversion rule apparently resulted from a legislative agreement between representatives of the coal industry and the Treasury Department, and was a condition of the Treasury Department's support for the adoption of I.R.C. §§ 192 and 501(c)(21).
coal mine operators may lose some of the incentive either to prefund black lung benefits through qualified black lung benefit trusts or to vigorously implement coal dust safety procedures beyond the minimum requirements of the law. This potential disincentive to increased security of black lung benefit payments and to vigorous implementation of coal dust safety standards should be avoided at all costs. The Internal Revenue Code should be amended to permit reversions in the case of overfunding which results from actuarial experience, as long as the actuarial method used in prefunding the qualified black lung benefit trust was implemented in good faith compliance with Internal Revenue Service guidelines. As an alternative to such reversions, mine operators could be authorized to apply excess qualified black lung benefit trust assets toward their coal tonnage excise tax. It should be noted, however, that the coal mine operator has already taken a deduction for amounts contributed to the qualified black lung benefit trust; therefore, all amounts received in such a reversion would be taxable income to the coal mine operator.

The proposal to permit reversions in the case of actuarial overfunding is by no means extreme or unprecedented. To the contrary, qualified pension plans which become overfunded and terminate may result in a reversion to the plan sponsor notwithstanding general provisions prohibiting reversions. The Internal Revenue Service has never had difficulty administering the requirements of this reversion rule because it has implemented actuarial guidelines sufficient to provide employers with reasonable guidance and detailed enough to provide the Service with an enforcement obligation which is not unduly burdensome.

Regrettably, the Internal Revenue Service has yet to set forth the detailed actuarial guidelines necessary to assure that wide-

74 As early as 1945 the Internal Revenue Service (then known as the Bureau of Internal Revenue) provided detailed guidelines for determination of actuarial costs methods for qualified retirement plans. BUREAU OF INTERNAL REVENUE, BUREAU BULLETIN ON SECTION 23(p)(1)(A) AND (B) OF THE 1939 INTERNAL REVENUE CODE (1945), reprinted in [3d ed. 1975] 3 PENS. PLAN GUIDE (CCH) ¶ 17,001. Since 1945 the actuarial cost guidelines applicable to retirement plans have been expanded and further clarified in numerous Revenue Rulings, private letter rulings, and Technical Advice Memoranda, as well as in subsequent legislative and regulatory clarifications.
spread overfunding of qualified black lung benefit trusts is minimized. Pending release of these guidelines, actuaries expressing opinions regarding contribution deduction levels have been forced to use actuarial methods and factors approved by the Internal Revenue Service for qualified pension plan deduction purposes. There is every reason to believe that these methods and factors are sufficiently analogous to avoid unnecessary overfunding. However, mine operators and actuaries alike will have more confidence that the deduction limits are not exceeded when such guidelines are available.

Permitting reversions under narrow circumstances involving good faith use of reasonable actuarial methods or permitting application of excess trust assets toward the coal tonnage excise tax would avoid some of the concerns that operators have with the use of qualified black lung benefit trusts. Further, such changes would significantly increase the protection which coal miners would have with respect to the prompt payment by coal mine operators of their black lung liabilities.

B. Uncertainties Regarding Self-Insurance Security Amounts and Deduction Limitations.

Coal mine operators who have established qualified black lung benefit trusts have considerable difficulty determining the proper amount to contribute to such trusts. This problem derives from the twofold concern that exceeding deduction limitations will trigger an excise tax, while any shortfall in Department of Labor security requirements will necessitate other forms of self-insurance.

The Internal Revenue Service has thus far neglected to provide comprehensive and usable guidelines for applying the deduction limitations of I.R.C. section 192. The absence of such com-

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75 The Treasury Department's failure to issue detailed actuarial guidelines is particularly disturbing in light of the legislative history of the late 1978 technical amendments to I.R.C. § 192:

. . . [T]he bill grants sufficiently broad authority to the Secretary of the Treasury to develop further administrable standards including the promulgation of regulations on specific actuarial methods and assumptions which must be used in computing deduction limitations.

The committee expects the Secretary of the Treasury to issue regu-
prehensive guidelines has forced coal mine operators to rely by inference on comprehensive guidelines issued by the Internal Revenue Service with respect to other types of trusts. Specifically, actuaries have used pension funding guidelines even though there is still some degree of uncertainty regarding the proper application of those guidelines to qualified black lung benefit trusts.

To avoid excise taxes applicable to contributions in excess of the deductible limitations, coal mine operators have tended to provide some measure of leeway by contributing less than the maximum amount recommended by their actuaries. At the same time, there is some uncertainty with respect to the Department of Labor's required level of funding for FCMHSA section 423 self-insurance purposes. However, at some point it is likely that the operators' desires for a margin of error to avoid potential excess contribution excise taxes will begin to conflict with Department of Labor self-insurance security requirements.78

This problem could be resolved in two ways. First, the Internal Revenue Service should issue detailed and comprehensive guidelines which operators may rely upon in complying with the deduction limitations so as to avoid excess contributions liabilities. Second, legislative proposals should be initiated which will clarify the coordination between the deduction limitations and the security requirements. At a minimum, operators should be permitted to deduct any amounts required to be contributed to meet security requirements.

C. Bank Deposit Problem.

As has already been discussed, I.R.C. section 4951 prohibits any lending or extension of credit between a trust and a disqualified person. A banking institution serving as a trustee would obvi-
ously fall within the definition of a disqualified person to whom no loans or extensions of credit may be made.\textsuperscript{77} Interpretations of similar prohibited transaction language, enacted prior to the adoption of the Black Lung Revenue Act of 1977, viewed savings deposits, certificates of deposits, checking accounts, and other deposits as either not involving loans or extensions of credit or as exempt transactions.\textsuperscript{78} However, in adopting the prohibited transaction rules applicable to qualified black lung benefit trusts, Congress expressed a legislative intent to prohibit any such deposits with a bank trustee.\textsuperscript{79} Internal Revenue Service interpretations have clearly adopted this view and extended it generally to any type of deposit, including checking accounts.\textsuperscript{80} This restriction presents significant difficulties in clearing benefit payments and other investment expenses. Few, if any, banking institutions will accept trusteeships under circumstances where the trust cannot maintain at least a checking account with the banking department of the same institution.\textsuperscript{81} The practical difficulties which have resulted from this restriction will apparently lead most banking institutions to refuse trusteeship of such trusts.

Legislation should be introduced and passed which exempts such deposits from the prohibited transaction rules. A similar exemption exists under the Employee Retirement Income Security Act of 1974 and has been followed without difficulty.\textsuperscript{82} Certainly, any perceived abuses may be controlled. This attempt to protect coal miners by assuring that trust assets would not be subject to self-dealing has apparently backfired; trusts are now established with individual trustees where corporate trustees would be more appropriate. Certainly, as a general rule, it can be said that opportunities for self-dealing may be less where a banking institution, which is subject to extensive and detailed federal and state

\textsuperscript{77} I.R.C. § 4951(e)(5)(B).
\textsuperscript{78} See note 53 supra and accompanying text.
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Id}.
\textsuperscript{81} Several large banking institutions and an association of banking institutions objected to the proposed I.R.C. § 4951 regulations because of this problem. However, at least one major bank appears to have discovered a technique for circumventing this problem. This institution is responsible for investments but operates through a wire transfer relationship with an individual who serves as custodian or trustee.
regulation and supervision, is involved.

V. Conclusion

Many coal mine operators may find that qualified black lung benefit trusts have significant advantages, tax and otherwise, in the prefunding of black lung liabilities. However, a number of practical difficulties have arisen, primarily as a result of legislative defects. While these difficulties have apparently deterred some coal mine operators from establishing qualified black lung benefit trusts, the increased level of black lung liability which is currently being experienced by coal mine operators, and the expressed intention of the Department of Labor to begin comprehensive enforcement of security requirements, will force many operators to reassess their initial decisions not to implement qualified black lung benefit trusts. These trusts will markedly increase the level of security for payment of black lung liabilities, and will relieve some of the burden currently placed on the Federal Treasury and the National Disability Trust. For this reason, it would be in the public interest if the legislative and administrative changes suggested in this article are implemented.