H.R. REP. 99-241(II)

Legislative History (Approx. 32 pages)

Document

H.R. REP. 99-241(II), H.R. REP. 99-241, H.R. Rep. No. 241(II), 99TH Cong., 1ST Sess. 1985, 1986 U.S.C.C.A.N. 685, 1985 WL 25930 (Leg.Hist.)

P.L. 99–272, **685 COMPREHENSIVE OMNIBUS BUDGET RECONCILIATION ACT OF 1986

DATES OF CONSIDERATION AND PASSAGE

House: October 24, 31, December 5, 19, 20, 1985; March 6, 18, 20, 1986

Senate: November 14, December 19, 20, 1985; March 14, 18, 1986

House Report (Ways and Means Committee) No. 99–241(I),
July 31, 1985 [To accompany H.R. 3128]

House Report (Education and Labor Committee) No. 99–241(II),
Sept. 11, 1985 [To accompany H.R. 3128]

House Report (Judiciary Committee) No. 99–241(III),
Sept. 11, 1985 [To accompany H.R. 3128]

Senate Report (Budget Committee) No. 99–146,
Oct. 2, 1985 [To accompany S. 1730]

House Conference Report No. 99–453, Dec. 19, 1985
[To accompany H.R. 3128] (rejected by the House on Dec. 19, 1985)

Cong. Record Vol. 131 (1985)

Cong. Record Vol. 132 (1986)

Related Reports:

House Report (Budget Committee) No. 99–300,
Oct. 3, 1985 [To accompany H.R. 3500]

HOUSE REPORT NO. 99–241, Part 2

September 11, 1985

*1 The Committee on Education and Labor, to whom was referred the bill (H.R. 3128) to make changes in spending and revenue provisions for purposes of deficit reduction and program improvement, consistent with the budget process, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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*27 I. SYNOPSIS

The purpose of the single-employer pension plan insurance provisions in the Deficit Reduction Amendments of 1985 as favorably reported by the Committee is:

(1) to foster and facilitate interstate commerce,

(2) to encourage the maintainance and growth of single-employer defined benefit plans,

(3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit plans will receive their full benefits.

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship and to keep the premium costs of such system at a reasonable level, and

*28 (5) to assure the prudent financing of current funding deficincies and future obligations of the single-employer pension plan termination system by increasing termination insurance premiums.

II. BACKGROUND AND REASONS FOR THE BILL

A. OVERVIEW

Single-employer defined benefit pension plans provide retirement income to about 30 million American workers and retirees. In 1974, the Congress passed, the President Gerald Ford signed into law, the Employee Retirement Income Security Act of 1974 ('ERISA'), to safeguard the benefits earned by these workers. An important protection under ERISA was the creation of the Pension Benefit Guaranty Corporation ('PBGC'), a wholly owned, self-financing government corporation, charged with guaranteeing the payment of certain benefits in terminated single-employer and multiemployer defined benefit pension plans.

As of the end of its tenth fiscal year, September 30, 1984, the PBGC was responsible for the payment of benefits to about 68,000 retirees and beneficiaries and about 84,500 deferred vested participants in about 1,100 terminated single-employer plans with assets **686 that are insufficient to provide the level of benefits guaranteed by the PBGC.

The number of insufficient terminations and the magnitude of the insufficiencies in the single-employer program have exceeded all projections. The current premium rate of $2.60, which was set by the Congress in 1977 with the expectation that it would be adequate for a five-year period (an increase from the original rate of $1.00 set in 1974), has proven to be far below the level needed to fund the program. As a result, $462 million (30 percent) of the $1,525 million in program liabilities are unfunded, and will have to be financed by future premiums.

Steps must be taken to assure that the single-employer insurance program is put back on a

fiscally sound basis so that it will continue to be able a fulfill its statutory purpose. First, it is necessary to immediately increase the PBGC's single-employer premium to $8.50 per participant per year. This level of premium, while a sizable percentage increase over the current premium of $2.60, is nontheless a modest cost for the protections it would afford. Second, certain changes in the terms and conditions of single-employer plan insurance are needed to protect premium payers aganst avoidable or unwarranted claims.

Most of the claims against the insurance program have been associated with business failures. However, a significant portion of claims has come from ongoing companies or as a result of the transfer of underfunded plans from stronger to weaker companies that subsequently fail. The Committee believes that the law should be revised to prevent claims against the insurance program from ongoing companies that are financially able to fund the guaranteed benefits in their plans. Legislation is also needed to provide an explicit prophylactic rule to protect the insurance program from companies that transfer large amounts of unfunded benefits to a *29 weaker company or that otherwise attempt to evade liability for their pension promises.

In addition, a significant portion of claims experienced by the single-employer insurance program has been attributable to the sponsoring company's failure to make contributions to the plan, generally because of the granting of funding waivers that were never repaid. Failure to make these contributions has also resulted in the loss of nonguaranteed benefits promised to participants under the plan. The Committee believes that legislation is necessary to better protect the insurance program and plan participants from such losses.

Steps must also be taken to close loopholes in existing law that permit profitable companies to avoid responsibility for the payment of certain benefits that are not guaranteed by the PBGC. The Committee believes that the law should be revised to assure, whenever possible, that participants and beneficiaries receive all benefits to which they are entitled under the terms of the plan.

The basic policy of the legislation is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits to cases of severe business hardship. **687 However, the bill assures that a plan sponsor will be able to terminate and close out a plan that is sufficient to pay all benefit entitlements earned by participants. It also clarifies that plan sponsors can limit the cost of an ongoing plan by ceasing further benefit accruals.

B. PREMIUM NEEDS

The PBGC's single-employer program has operated at a loss in all but two years of its ten-year existence. Table 1 shows the revenues, expenses and net income/loss for the program for each year of operation.

TABLE 1.—REVENUE, EXPENSES, AND RESULTS OF OPERATIONS, SINGLE-EMPLOYER PROGRAM, FISCAL YEAR 1975–84

[In millions of dollars]

	Revenue (1)	Expenses (2)	Results of operations income (loss) (1(2)
Fiscal year:			
1975 (10 mo)	19.4	35.1	(15.7)
1976 (15 mo)	36.7	62.0	(25.3)
1977	30.8	85.1	(54.3)
1978	57.0	99.4	(42.4)
1979	87.4	96.0	(8.6)
1980	93.4	41.6	51.8
1981	69.6	163.8	(94.2)
1982	175.8	319.8	(144.4)
1983	269.8	460.3	(190.5)
1984	110.2	48.8	61.3

As the table shows, the magnitude of PBGC's annual losses in the single-employer program generally has escalated dramatically *30 since inception. ERISA originally set the premium rate paid by covered single-employer plans at $1.00 per participant per year. By the end of the second fiscal year following enactment, it was already clear that the $1.00 premium level was not adequate. At that time, the single-employer program had a deficit of $41 million which was projected to grow to almost $170 million by the end of calendar 1981 without a premium increase. In December, 1977, Congress approved a premium increase to $2.60 per participant for plan years beginning on or after January 1, 1978.

Since that time, the PBGC has requested the Congress three times to grant another premium increase. Beginning in May, 1982, PBGC sought an increase to $6.00 per participant, effective January 1, 1983, in order to fund future annual claims on a current basis, pay administrative expenses and retire the fiscal 1982 year-end deficit—then projected to be $236 million—over a 5-year period.

Because of record high claims in 1982 and 1983, the PBGC in 1984 revised its premium request to $7.00, effective for plan years beginning on or after January 1, 1984. One of the factors the PBGC **688 cited as a basis for the increased request was the loss of premium revenue in 1983 because

of Congress' failure to approve a $6 premium rate. Testimony of the United States General Accounting Office (GAO) before the House Ways and Means Committee, Subcommittee on Oversight, on March 20, 1984 criticized the financial condition of the single-employer program as inconsistent with sound insurance principles:

> In the private sector, such deficits are avoided because state insurance departments require insurance companies to maintain assets at least equal to their liabilities.

and

> The funding of the program contrasts with general insurance industry standards which do not permit private insurers to operate at a deficit. In order to comply with state regulatory standards, private insurers must report their financial condition annually to state insurance departments. If a private insurer's financial condition does not meet state statutory requirements, a state may take action to protect policyholders, including possible revocation of the insurer's operating rights.

With respect to the PBGC's request for a $7.00 premium, the GAO testimony concluded:

> We recognize that there are substantial uncertainties in arriving at a premium rate and believe that the $7.00 premium proposed by the Corporation is the lowest that should be provided.

Early in 1985, the Administration submitted a new premium increase request for a $7.50 premium effective for plan years beginning on or after January 1, 1985. The PBGC has informed the Committee that if the effective date of the premium increase were delayed one year to January 1, 1986, the equivalent amount needed would be $8.10. In testimony in June 1985 before the House Committee *31 on Ways and Means' Subcommittee on Oversight, the GAO supported the Administration's request as the lowest premium rate that would be reasonable while expressing concern that the Administration's request might in fact be too conservative in light of past PBGC experience.

The Administration request provides for amortization of the $462 million deficit as of the end of FY 1984 over a 15-year period and funding of future claims and administrative expenses as they are incurred. Expected future claims underlying the premium request are based on the Corporation's experience to date. Combining the extremely high claims for 1982 and 1983 ($264 million and $189 million, respectively) and the extremely low claims of 1984 ($36 million) with the PBGC's prior experience, resulted in future claims expected to average $185 million over the next 15 years. The PBGC estimates that a $4.96 premium will be needed to fund these future claims. An additional premium of $1.62 is needed to amortize the existing deficit of $462 million over 15 years. Finally, **689 ministrative expenses add $1.00. The total of the three components is $7.58, which has been rounded to $7.50.

The Committee believes that the Administration's request is not adequate and that a more realistic figure of $8.50 should be enacted. The occurrence of claims in excess of projected levels, unfavorable investment experience or mortality losses, for example, are not taken into account in the PBGC's projection. Nor does the PBGC's calculation include a reserve for any extraordinarily

large claims. Developments since submission of the Administration's $7.50 request also suggest that a higher premium is needed; Allis-Chalmers has filed termination notices for some of its plans and plans maintained by Wheeling-Pittsburgh are in very serious trouble.

In the Committee's view, it would be imprudent to further delay favorable action on a premium increase for this critically important benefits insurance program. Although the PBGC does not face an immediate cash crisis, the prospects are bleak. According to the PBGC's FY 87 budget submission, during FY 1984 cash flow in the single-employer program turned negative, and this trend is continuing in FY 1985 and will accelerate in future years, unless the premium is increased. The PBGC projects that by 1990, the single-employer revolving fund (the fund provided by premium dollars) will no longer be adequate to pay the insured portion of benefit payments when they are due and that the program's ratio of assets to liabilities will have declined to 54 percent, and the deficit will have climbed to $5.5 billion, unless a premium increase is enacted.

It is clear both from the PBGC's operating statistics and the GAO's testimony that the PBGC's current financial condition is untenable. If the present trend is allowed to continue, the PBGC will find itself in a similar disastrous condition with the same attendant policy predicament as the Congress recently faced with the Social Security system. The Committee believes that a premium increase this year is essential to the long range survival of the single-employer insurance program.

***32** C. NEED FOR STRUCTURAL REFORMS

The single-employer termination insurance system faces the two-fold problem of eliminating the existing deficit and of controlling the level of claims in the future. The $8.50 premium rate is an essential component of the solution. In order to control the level of future claims, there is a need to close loopholes in ERISA which can lead to unwarranted or abusive claims against the insurance system—claims which must eventually be paid by other PBGC premium payers. There is also a need for certain structural reforms to Title IV to prevent profitable employers from avoiding responsibility for payment of certain benefits to participants and beneficiaries that are not guaranteed by the PBGC.

1. The insurable event and the net worth cap

Under current law, the plan sponsor of a single-employer plan can terminate its plan at any time absent other contractual tions. ****690** If the terminated plan does not have sufficient assets to pay guaranteed benefits, PBGC is responsible for paying those benefits. The employer is liable to the PBGC for the shortfall in assets; however, this liability is limited to 30 percent of the employer's net worth. Thus, the plan sponsor controls the incidence of the claim against the insurance program and, to some extent, the amount of that claim.

The Committee believes that the law should limit the occurrence of claims against the PBGC premium fund to situations of extreme need. The bill contains objective criteria for employer distress (‘distress termination’). The bill also contains provisions to increase the amount of liability

to PBGC above the current 30 percent of new worth limit in the case of companies that survive a period of financial distress and later become profitable. Both these provisions will help close the door to abusive claims against the termination insurance program.

In order to provide increased benefit security in plans maintained by companies that do not qualify for a distress termination, the bill provides that a plan may close out and make a final distribution of assets only if it has sufficient assets to provide all benefit entitlements ('standard termination').

In addition, even in situations where companies do qualify for a distress termination, the companies shall be liable to the section 4049 trust for five percent of their pre-tax profits for a period of up to ten years. Further the section 4049 trustee to make annual distributions to participants and beneficiaries to pay for any benefit entitlements not guaranteed by the PBGC.

2. Transfer of unfunded pension liabilities

The intent of ERISA is that solvent employers pay for the benefits promised to their employees and that termination not end this responsibility. III Legislative History of ERISA of 1974 at 4741–42 (remarks of Sen. Williams); *Nachman Corp.* v. *PBGC*, 592 F. 2d 947 (7th Cir. 1979), *aff'd.* 446 U.S. 359 [1] (1980). Under current law, if a company transfers unfunded pension benefits to an entity that does not have a reasonable chance of paying for those benefits, the ***33** transferor is liable under section 4062 in the event of plan termination.

Nonetheless, it has been contended in the past that a transfer of pension benefits, albeit to a very weak entity, insulates the transferor and that the burden of paying for those benefits on termination therefore falls on the PBGC premium payers. In fact, about 11 percent of termination claims against the PBGC's single-employer premium fund have resulted from transfers of pension liabilities to weak transferees. Although the Congress never intended that companies be permitted to dump pension liabilities onto the premium system in this way, challenges to the law and attendant litigation costs are likely to continue.

****691** For example, a company may sell a division or subsidiary to another company or spin off a division or subsidiary as an independent company and transfer unfunded pension liabilities as part of the transaction. The transferee may be much weaker than the transferor as, for example, in a highly leveraged or thinly-capitalized buyout, and there may be little chance that the transferee will be able to successfully continue the business. If its pension plan terminates, and a principal purposed of the transaction is to evade liability to the PBGC, the PBGC should not have to bear the expense and risk of complex litigation to establish the transferor's obligations with respect to the plan's unfunded liabilities. Section 13 of the bill would assure that liability is imposed on the person attempting to escape liability if a distress termination occurs within five years after an evasion transaction.

In addition, the bill would prevent companies from engaging in such transactions in order to

avoid liability for nonguaranteed benefits. The bill assures the transferor company remains liable for any nonguaranteed benefits, as though it were still a contributing sponsor (or controlled group member) of the plan as of the termination date.

3. Minimum funding waivers

Another important problem under current law relates to waivers of the minimum funding standards and extensions of amortization periods under those standards. While the Committee recognizes that in many situations waivers and extensions may be an appropriate means of ameliorating business hardship, many plan sponsors have used the waiver process as a means of obtaining credit from a captive 'lender', the plan they control. Since the waived amounts need only be repaid at the plan's interest rate, ordinarily far less than commercial lending rates, the plan is used as a bank of first resort, to the detriment of plan participants and beneficiaries, who have relied on contributions being made to fund their promised benefits.

In effect, a minimum funding waiver may be viewed simply as a low interest loan from the plan to the employer, given without security, to be paid back over 15 years. At best, the outstanding balance of waived contributions becomes due at plan termination. However, since insufficient terminations often occur in a liquidation or reorganization context, the plan's claim for unpaid contributions will be a general unsecured claim. Since other creditors of a plan sponsor in obvious financial trouble will already have taken *34 steps to secure or otherwise protect themselves, few assets are normally left for the plan or the PBGC, and claims for unpaid contributions are rarely satisfied in full.

Waivers accounted for about 30 percent of the PBGC's losses in termination cases with waivers. The PBGC estimates that the single-employer premium fund has absorbed about $93 million or more in losses due to the granting of minimum funding waivers. About $75 million of this amount is associated with funding waivers in which the outstanding balance of waived contributions become due on plan termination.

**692 Under current law, the Internal Revenue Service (IRS) may impose various conditions on the granting of funding waivers. However, the IRS has been reluctant to condition the granting of waivers on the providing of security to the plant for the waived amounts because of concern that this might be considered a prohibited transaction. The bill clarifies that, under certain circumstances indicating substantial risk of loss to participants and the PBGC insurance fund, the IRS may require that security be provided to a single-employer plan as a condition for the granting of a funding waiver or extension of amortization period, and that providing such security does not constitute a prohibited transaction. The bill also requires the IRS to consider the views of the PBGC and affected parties in deciding whether to grant waivers and extensions, and in setting the terms and conditions (including possible security requirements) of waivers and extensions.

D. HISTORY OF COMMITTEE ACTION

On May 18, 1982, the Executive Director of the PBGC, Edwin M. Jones, wrote to the Chairman of the Committee, the late Carl D. Perkins, to request (on behalf of the Administration) that Congress approve a revised premium schedule for the single-employer termination insurance program. The requested premium was $6.00 per participant per year, effective for plan years beginning on or after January 1, 1983. In addition, Mr. Jones indicated the need for corrective legislation to remedy certain structural flaws in the current law. Similar letters were sent to the Chairman of the House Committee on Ways and Means and the Senate Committees on Labor and Human Resources and Finance.

The Chairman of the Subcommittee on Labor-Management Relations, the late Phillip Burton, was urged at the time by Representative John Erlenborn, representatives of the business community, and the PBGC itself to defer immediate consideration of the premium increase request until some consensus could be reached on the structural reforms. The representatives of organized labor supported the need for both the premium increase and reforms but were not as adamant as the aforementioned as to the need to link the reforms to the premium increase.

Therefore, the Committee did not take action on the recommended premium increase in the 97th Congress. Rather, the Chairman of the Subcommittee urged interested parties to assist the Subcommittee in fashioning reforms to close certain loopholes, thereby strengthening the long-term self-financing nature of the single-employer program. The aim of this effort was to develop a reform *35 package which could be enacted together with the premium increase.

In the 98th Congress, the Subcommittee on Labor-Management Relations, under the leadership of its Chairman, William L. Clay held hearings on September 28, 1983, to consider compehensive bipartisan legislation, H.R. 3930. H.R. 3930, introduced by Chairman Clay and Representative Erlenhorn, was designed to strengthen the operation of the single-employer program by increasing the PBGC **693 premium and adopting structural reforms to close obvious loopholes in the law which, if left unattended, could jeopadize the PBGC's long-range financial stability. In addition, the legislation was designed to make it more likely that participants would receive their full promised and earned benefits after plan termination. Witnesses representating business and labor supported the general principles of the bill and pledged to work with the Subcommittee to produce consensus legislation.

On October 6, 1983, the Subcommittee on Labor-Management Relations ordered reported a revised version of H.R. 3930. While significant progress had been made in fashioning acceptable legislation incorporating reasonable solutions to the problems faced by the PBGC and plan participants, it was clear that additional work remained to be done before the consensus necessary for full Committee action on H.R. 3930 could be reached.

On March 20, 1984, in testimony before the Oversight Subcommittee of the Committee on Ways and Means, PBGC Executive Director Charles Tharp indicated that, because its previous request for a premium increase had not been granted and the financial condition of the PBGC was continuing

to deteriorate, while the Administration supported comprehensive legislation, it revised its premium increase request to Congress to $7.00 (effective retroactively for plan years beginning after December 31, 1983) and urged quick action. In addition, Mr. Tharp testified that if no increase were to be effective until January 1, 1985, PBGC's request would likely exceed $7.50.

In light of that testimony and subsequent meetings with the PBGC and other interested parties, on June 12, 1984, the Committee adopted, as an amendment to two bills relating to pension plans of state and local governments (H.R. 5143 and 5144), a provision which authorized a premium of $8.50 per participant per year of plan years beginning after December 31, 1983. At the time, the Committee indicated that despite the decoupling of the premium increase and the reforms for purposes of the amendment, it had not set aside its efforts to achieve the necessary comprehensive reforms in H.R. 3930. It was the Committee's strongly held view then, as it is now, that the premium increase alone is insufficient to safeguard participant's rights and the fiscal soudness of the PBGC.

In the 99th Congress, work on comprehensive reforms continued. Three new bipartisan bills were introduced by Chairman Clay and the ranking minority member of the Subcommittee, Representative Marge Roukema, in order to provide the greatest procedural flexibility for the Committee to assure passage of legislation this Congress. H.R. 2821 authorized a premium increase only ($8.50 effective for plan years beginning after December 31, 1985). H.R. 2811 *36 contained both the premium increase and the total reform package. Both H.R. 2811 and 2812 were jointly referred to this Committee and to the Committee on Ways and Means. H.R. 2813 contained only those reforms solely within the jurisdiction of this Committee. Unlike H.R. 3930, these bills did not contain provisions with respect to security for plans when funding waivers are granted or explicit rules governing transferor liability. In addition, virtually all **694 of the provisions of H.R. 3930 which had engendered controversy were either dropped completely or significantly revised.

In addition, on April 9, 1985, the Acting Executive Director of the PBGC, David M. Walker, by letter to Chairman Augustus F. Hawkins, relayed the Administration's new premium request of $7.50 per participant per year, retroactive to plan years beginning after December 31, 1984, and indicated that reform legislation would shortly be submitted by the Administration for the Committee's consideration. In the backup material which accompanied the request, the PBGC noted that if the premium increase were effective only prospectively, the $7.50 would have to be $8.10. The Administration's legislation was introduced by Representative Roukema and Representative James Jeffords, ranking minority member of the full Committee, as H.R. 2995 on July 15, 1985.

On July 16, 1985, the Subcommittee on Labor-Management Relation held hearings on H.R. 2811, 2812, and 2813. Witnesses representing organized labor, and participant and retiree groups strongly supported the bills and urged quick action. Witnesses representing business commended the Subcommittee on its progress in fashioning acceptable reforms but still had some reservations with respect to some concepts in the bills, even though they had supported some of these same concepts and the need for comprehensive legislation in the past. They acknowledged the need for a premium increase but questioned the amount suggested in the bills. The PBGC continued to press

for immediate action both on the premium increse and the structural reforms.

On July 31, 1985, the Subcommittee favorably reported all three bills, as amended, by voice vote. Among the amendments adopted by the Subcommittee were: 1) limitations with respect to time and amount of the liability for persons who enter into transactions, a purpose of which is to evade liability for plan termination, and 2) authorizing the Internal Revenue Service to require security for the plan when certain large funding waivers are granted and requiring the service to consult with the PBGC before certain waivers are granted or security required.

On September 11, 1985, the Committee unanimously adopted an amendment in the nature of a substitute for the bills adopted by the Subcommittee on Labor-Management Relations. It unanimously ordered reported all three bills (H.R. 2811, 2812, and 2813) as amended. In addition, the Committee unanimously adopted an amendment in the nature of a substitute (identical in substance to H.R. 2811 as reported by the Committee) for section 505 of H.R. 3128, the Deficit Reduction Amendments of 1985, a bill which was sequentially referred to the Committee on July 31, 1985, for a period ending on September 11, 1985. Section 505 of the bill, as reported by the Committee on Ways and Means on July 31, 1985, authorized a temporary increase in the single-employer premium to *37 $8.00 for plan years beginning after December 31, 1985 and before January 1, 1989.

**695 III. REQUIREMENTS OF RULES X, XI, XII AND COST ESTIMATES

A. OVERSIGHT STATEMENT

In compliance with clause (2)(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee states that no findings or recommendations of the Committee on Government Operations were submitted to the Committee with respect to matters covered by the bill. The oversight findings and recommendations conducted by the Committee on Education and Labor have all been previously described herein.

B. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4), rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of Sec. 505 of H.R. 3128 will have a net salutory impact with respect to the operation of the national economy. To the extent that the increased premium amounts required to be paid to the Pension Benefit Guaranty Corporation under the bill serve to reduce the deficit of the Federal government, the Committee believes that the enactment of the bill will serve to reduce inflation.

C. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee on Education and Labor agrees with the following report submitted by the Congressional Budget Office in accordance with rule XI of the Rules of the House of Representatives.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 11, 1985.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared an estimate of the budgetary effects of H.R. 2811 as ordered reported by the Committee on Education and Labor on September 11, 1985. The bill would provide for an increase in the single-employer pension plan premium from $2.60 to $8.50 per participant, effective January 1, 1986. The bill would also amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954 to improve the single-employer pension plan termination insurance program and would authorize appropriations for an advisory council to conduct a study of the single-employer pension plan termination program.

Should you so desire, we would be pleased to provide further detail on the attached cost estimate.

With best wishes,
Sincerely,

ERIC HANUSHEK
(For Rudolph G. Penner).

**696 *38 CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 2811.

2. Bill title: The Single-Employer Pension Plan Amendments Act of 1985.

3. Bill status: As ordered reported by the Committee on Education and Labor, September 11, 1985.

4. Bill purpose: To provide for an increase in the single-employer plan premium to $8.50 per participant, effective January 1, 1986, to amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954 to improve the single-employer pension plan termination insurance program, and to authorize appropriations for a study of the single-employer pension plan termination insurance program.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1986	1987	1988	1989	1990
Estimated authorization level	([1])	(1)			
Outlays	(1)	(1)			

Budget authority					
Outlays	-174	-231	-261	-294	-332

FN1 Costs of less than $500,000.

The budget authority and outlay effects of this bill would fall within function 600.

Basis of estimate: The bill authorizes such sums as may be necessary to establish an advisory council that would conduct a study of the premiums established in the single-employer plan termination insurance program. Since members of the advisory council would serve without compensation and would only be reimbursed for travel and related expenses, CBO estimates that the cost of the advisory council and the study would be well under $500,000 per year.

The savings from the bill result from an increase in the single-employer premium rate from $2.60 to $8.50, which would return an additional $5.90 per participant in premium income annually to the Pension Benefit Guaranty Corporation (PBGC). The PBGC estimates that approximately 32 million employees will participate in single-employer plans in 1986. The additional income would be credited to the revolving fund, resulting in the estimated outlay reduction shown above.

The bill would also set forth procedures and requirements for the termination of single-employer pension plans. The bill would expand the authority of the PBGC to recover assets from plan sponsors that terminate plans with unfunded pension liabilities and to take action against plan sponsors that attempt to evade obligations to pay benefits or to shift unfunded pension liabilities to the PBGC and other premium payers. The effect of the reforms would likely be to reduce net claims against the PBGC and, therefore, reduce the subsequent long-range benefit payments to retired participants of terminated plans that the PBGC would be required to finance.

**697 *39 The near-term effect of discouraging termination and reducing claims against the PBGC would be a small reduction in the amount of benefits payable from the single-employer fund and, perversely, a reduction in the interest income on assets collected by the PBGC from terminated plans. The net result during the projections period of this reduction in benefits payable and interest income is expected to be near zero.

All net claims against the PBGC eventually show up as outlays when benefits for which the PBGC has assumed responsibility are paid. Over the long term, as current single-employer plan participants reach retirement age, the outlays savings resulting from a reduction in the net claims against the PBGC could be considerable. It is difficult to estimate with any degree of confidence, however, what the long-range impact of these amendments might be, since the results would depend on the number of plan terminations that would be avoided by the measures.

6. Estimated cost to State and local governments: The Congressional Budget Office has determined that the budgets of state and local governments would not be directly affected by the enactment of this bill.

7. Estimate comparison: On September 11, 1985, the Congressional Budget Office prepared cost estimates for H.R. 2812 and H.R. 2813. H.R. 2812 would provide for an increase in the single-employer pension plan premium rate to $8.50 per participant, effective January 1, 1986 but would not amend the Employee Retirement Security Act of 1974 to improve the single-employer pension plan termination program. H.R. 2813 is the same as H.R. 2811 except that it would not provide for an increase in the single-employer plan premium.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marianne Deignan.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

IV. COMMITTEE VIEWS: OBJECTIVES OF THE MAIN PROVISIONS OF THE SINGLE-EMPLOYER PENSION PLAN INSURANCE PROVISIONS IN THE DEFICIT REDUCTION AMENDMENTS OF 1985

Single-employer defined benefit pension plans directly affect the well being and retirement income security of millions of workers. A sound termination insurance program is essential to that security. The Committee is mindful of the original purposes of Title IV, and ERISA in general, to encourage the establishment and maintenance of defined benefit plans while providing for the security of promised pension benefits. The Committee believes, after intensive study, that continued achievement of these goals requires structural reforms to the single-employer termination insurance program.

The Committee also recognizes that structural reforms, by themselves, will not be sufficient to restore the program to a sound financial condition. As of the end of fiscal 1984, the program had a $462 million deficit. Projected future claims, if realized, would only increase this deficit unless a premium increase is put into effect. The longer action on the increase is delayed, the larger will be the **698 *40 increase needed to retire the existing deficit and to cover future costs as they are incurred.

A. PREMIUMS FOR SINGLE-EMPLOYER PLANS

The bill increases the annual per capita premium from $2.60 to $8.50, effective January 1, 1986, in order to allow the Corporation to retire its unacceptably high deficit over a reasonable period of time and to provide for future claims at a realistic level. The $8.50 premium in this bill is slightly higher than the premium requested by the Administration ($7.50 beginning January 1, 1985, which is equivalent to $8.10 beginning January 1, 1986). However, the Committee believes that the Administration's proposal does not provide sufficient protection against the development of new deficits.

In addition, the process by which Congress may adopt any future premium increases is changed from a concurrent to a joint resolution procedure, in response to the decision of the U.S. Supreme Court in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 [1a] (1983).

An advisory council is established under the bill to study the structure of the single-employer plan premiums and the effect of the amendments made by this Act on the insurance program. Not later than two years after the date of the enactment of this bill, the advisory council must report to Congress on whether any legislative changes should be made. The council will consist of individuals expert in these matters who represent affected groups: plan sponsors, employee organizations and the general public. The Committee expects this council, during he two years it is in effect, to work closely with the PBGC in formulating its recommendations.

The bill also incorporates certain former provisions in section 4006(a) in lieu of the cross reference thereto. This provision is simply a technical correction and is not intended to make any substantive change.

B. FROZEN PLANS

The bill codifies and continues the practice, permitted under current law under various rulings and interpretations issued by the Internal Revenue Service, relating to the freezing of plans.

Under current law and under the bill, if a plan amendment is adopted and the sole effect of the amendment is to provide that some or all service performed on or after a specified date will not be taken into account for purposes of determining the benefits accrued in or after such date, the plan is considered to be frozen and not terminated. Similarly, a frozen plan may also keep constant some or all of the relevant factors used to determine the amount of benefits based on service prior to the specified date. For example, for pay-related plans, they pay level for a participant may be frozen as of the date specific in the plan amendment.

On the other hand, if a plan is amended to provide that some or all service performed after the specified date will not be taken into account for purposes of determining nonforfeitability of benefits accured before the specified date or determining satisfaction of any other eligibility requirements with respect to those accrued benefits, the plan will be considered terminated. In contrast, under **699 *41 frozen plans, participants are permitted ‘to grow into’ eligibility for benefits and continue to earn vesting credit.

Under current law and under the bill, a frozen plan is subject to all the same requirements of ERISA and the Code as other ongoing plans, including the vesting and funding requirements of Title I and the premium requirements of Title IV.

One new requirement for frozen plans is contained in the bill. Plan administrators must provide 60-day advance notice to affected parties before a plan can be frozen.

C. PLAN TERMINATION IN GENERAL

As under current law, the Committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated. The Committee therefore believes that a recent case before the U.S. Bankruptcy Court for the Western District of New York, *In re The Bastion*

Company, Inc. (No. 83–21071, Jan. 16, 1985), which held that ERISA does not impair other Federal law, and therefore, a pension plan can be rejected as an executory contract, was incorrectly decided.

Title IV of ERISA currently recognizes two types of termination of single-employer plans: a termination instituted by the plan administrator under section 4041 and a termination instituted by the PBGC under section 4042. That general framework is continued under the bill.

Under current law, no distinction is made between types of plan terminations initiated by plan administrators under section 4041. As a result of the Committee's oversight activities over the past 11 years since the single-employer program was established, however, the Committee has concluded that it is now necessary to distinguish between different types of voluntary plan terminations based generally on the employer's financial viability on the proposed date of termination.

Therefore, the bill sets out two categories of voluntary plan terminations: standard termination and distress termination. General rules governing both standard and distress termination are established, as well as certain specialized requirements applicable to each type of termination. None of these new rules apply to terminations initiated by the PBGC under section 4042.

Currently, plan sponsors are free to terminate their single-employer pension plans at any time (subject to any contractual limitations). Whenever a plan is terminated with insufficient assets to pay for all guaranteed benefits, the PBGC is obligated to trustee the plan and to guarantee the payment of certain benefits under section 4022. The contributing sponsors of the plan and the members of their controlled groups are then liable to the PBGC for the difference between the value of the assets in the plan and the amount of guaranteed benefits, up to 30 percent of their net worth. These persons generally have no obligation to pay for any benefits beyond those guaranteed by the PBGC. This has led to two separate abuses.

First, there have been a number of situations in which profitable employers with low net worth terminated their plans in order to transfer the unfunded pension liabilities onto the PBGC. This has ****700** ***42** led to an increase in the obligations of the PBGC and upward pressure on the level of premiums paid by other plan sponsors to finance the termination insurance program.

Second, there have been situations in which profitable employers terminated their pension plans in order to evade responsibility for paying certain benefits which participants and beneficiaries had earned, but which were not guaranteed by the PBGC. At a hearing held on July 16, 1985, the Subcommittee on Labor-Management Relations heard compelling testimony from several witnesses describing situations in which participants and beneficiaries lost substantial portions of the pension benefits to which they were entitled under the terms of their pension plan upon the termination of the plan, because these benefits were not guaranteed by the PBGC. The contributing sponsors of these plans and the members of their controlled groups were able to avoid any responsibility for paying for these nonguaranteed benefits, even though they continued in business

and remained highly profitable.

The bill addresses both of these abuses by establishing a distinction between 'standard terminations' and 'distress terminations'. Unless it is demonstrated that the contributing sponsors of a plan and the members of their controlled groups meet certain objective criteria of economic hardship (as described below), a pension plan can only be terminated in a standard termination.

Moreover, the bill changes the obligation of contributing sponsors and members of their controlled groups so that wherever possible, participants and beneficiaries will receive their full benefit entitlements upon plan termination. The mechanism for satisfying this obligation to provide benefit entitlements differs depending on whether the termination is a standard termination or a distress termination. For this purpose, the rules governing terminations by the PBGC under 4042 and distress terminations are the same.

The term 'benefit entitlements' means, as of any date, all benefits provided by a plan with respect to a participant or beneficiary which (1) are guaranteed by the PBGC under section 4022; (2) would be guaranteed by the PBGC, but for the operation of subsection 4022(b); or (3) constitute early retirement supplements or subsidies, plant closing benefits, or death benefits (to the extent not guaranteed by the PBGC), if the participant or beneficiary has satisfied all of the conditions required under the terms of the plan to establish entitlement to such benefits.

Under present law, the PBGC does not necessarily guarantee all benefits to which participants and beneficiaries are entitled under the terms of a plan. In particular, the PBGC does not guarantee any benefits which are not fully 'phased in' or otherwise exceed the limitations under section 4022(b). Moreover, the PBGC provides no guarantee or only a partial guarantee for certain types of early retirement supplements, early retirement subsidies, plant closing benefits, and death benefits.

The Committee intends that the definition of 'benefit entitlements' include not only all benefits which are guaranteed by the PBGC, but also all benefits which would be guaranteed but for the operation of the phase-in rules and other limitations under section 4022(b), and all early retirement supplements and subsidies, plant closing benefits, and death benefits to which participants and beneficiaries **701 *43 are entitled under the terms of the plan. Thus, the Committee intends the definition of 'benefit entitlements' to be more extensive than the definition of 'guaranteed benefits.' Except as specifically provided in section 616(c)(9) and (10), the Committee does not intend to change existing law concerning the types of benefits which are guaranteed by the PBGC.

Benefit entitlements include early retirement supplements or subsidies, plant closing benefits, and death benefits, irrespective or whether any such benefits are guaranteed under section 4022. In determining whether benefits promised under a plan qualify as early retirement supplements or subsidies, plant closing benefits, or death benefits, and hence are benefit entitlements, the Committee intends that any determinations by plan administrators, the PBGC, section 4049 trustees (as described below in section E(2)), and the courts be based on the documents and

instruments governing the plan, insofar as such documents and instruments are consistent with the provisions of Title I and Title IV of ERISA. Since the definition of benefit entitlements and the provisions of the bill relating to standard terminations and the section 4049 trustee are remedial provisions, the Committee further intends that these terms be construed in a liberal manner.

Thus, for example, the term ‘early retirement supplements or subsidies' encompasses any form or subsidy or supplemental benefit that is paid to a participant or beneficiary in connection with early retirement. An example of such a benefit would be a temporary supplement payable until the attainment of the age for eligibility for Social Security benefits. Another example would be any form of subsidy that is payable to a participant or beneficiary so that benefits are not reduced on an actuarial basis for early retirement. These types of supplements and subsidies are commonly paid under so-called ‘30-and-out’ and ‘85 point’ early retirement provisions.

Similarly, the term ‘plant closing benefit’ encompasses any benefit payable to participants and beneficiaries in connection with the partial or total closing, shutdown, or cessation of operations by an employer at a plant or facility. In situations in which a previously closed facility is reopened, whether plant closing benefits are payable will depend on all of the facts and circumstances in each case, including the plan provisions.

The term ‘death benefits' encompasses any benefit payable to a participant or beneficiary by reason of the participant's or beneficiary's death, regardless of the form of payment of the benefit.

Only those early retirement supplements or subsidies, plant closing benefits, or death benefits, which participants or beneficiaries are entitled to as of the date in question are benefit entitlements. In other words, the participant or beneficiary must have satisfied all of the conditions required under the provisions of the plan to establish his or her entitlement to the benefit. Thus, the definition does not include any benefits for which the participant or beneficiary is not yet eligible.

For example, if a participant has not, as of the termination date, satisfied the service requirements under a plan in order to be entitled to an early retirement benefit, that benefit would not be considered a benefit entitlement. If age is a requirement for entitlement ***44** ****702** to a particular benefit (as opposed to simply establishing the starting date for a benefit), a participant has no benefit entitlement to that benefit until he or she reaches that age.

Similarly, if a plant closing or disability does not occur until after the termination date, any plant closing or disability benefits would not be encompassed within the definition of benefit entitlement.

However, in determining whether a participant or beneficiary has satisfied all of the conditions required under the terms of a plan to establish entitlement to a benefit, the submission of a formal application, retirement, the completion of a required waiting period, death, or the designation of a beneficiary will be disregarded.

D. TYPES OF SINGLE-EMPLOYER PLAN TERMINATION

1. Voluntary terminations by plan administrators

The bill contains general rules governing terminations of single-employer plan by plan administrators under section 4041. These rules apply both to standard terminations and to distress terminations, but do not apply to terminations by the corporation under section 4042.

a. General rules

Under the bill, except for involuntary terminations by the corporation under section 4042, a single-employer plan may only be terminated by the plan administrator in either a standard termination or a distress termination. The Committee intends to make it clear that these two types of terminations are the exclusive ways a plan administrator can initiate the termination of a single-employer plan.

Under the bill, a plan administrator must provide each affected party with 60-day advance notice of the proposed termination. In addition, certain procedures must be followed in the event there is a 'related adjudicatory proceeding' challenging a proposed termination. In the past, the PBGC has processed the termination of a plan, even though an affected party was challenging the validity of the proposed termination in another forum. Although it was subsequently determined that the termination violated the contractual rights of the affected party, the arbitrator declined to order restoration of the plan because the PBGC had already processed the termination, making any restoration impracticable.

The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, whether or not the plan should be restored) also rests with the appropriate adjudicative entity, government agency or court.

However, the Committee also believes that the PBGC should not, by its actions in processing a proposed termination, effectively ****703** ***45** decide a dispute and preclude other affected parties from obtaining the relief to which they may be entitled, which might include treating the plan as if no termination had occurred.

Accordingly, in the case of a standard termination, the bill provides that if, during the 60-day period prior to the proposed termination date, the plan administrator receives written notice from an affected party that a related adjudicatory proceeding is pending with respect to the proposed termination, the plan administrator may either (1) suspend processing or implementing the termination, or (2) proceed with the termination, provided that certain steps (including segregating

assets and maintaining plan records) are taken to assure that the plan can be restored if the termination is later found to be invalid. The plan administrator has complete discretion as to which course of action—suspension of the termination or proceeding with the termination—it will follow. The Committee intends that plan administrations should make case by case determinations, depending on all of the facts and circumstances. Of course, the plan administrator may decide to suspend temporarily the processing of the termination until there is a preliminary decision by an arbitrator, government agency, or court, and then subsequently reevaluate whether or not to proceed with the processing of the proposed termination.

The bill further provides that the same procedures shall apply whenever there is a related adjudicatory procedure with respect to a prosposed distress termination. Thus, for example, if the PBGC receives timely notice that there is pending a related adjudicatory proceeding challenging the propriety of a proposed distress termination, it has the discretion as to whether to proceed with the processing of the proposed termination or to suspend processing of the proposed termination. If the PBGC decides to proceed with the termination, it too must take whatever steps are necessary and appropriate so that it can effectively restore the plan if the proposed termination is finally determined to have been improper and restoration of the plan is ordered. The bill applies this requirement both to plan administrators and to the corporation (or other person serving as trustee under section 4042), since either may be responsible for administering a plan at different points during the pendency of a distress termination.

In adopting these provisions, the Committee does not intend to make any substantive change in the law governing the contractual or statutory rights of any affected parties, or the remedies which may be granted by any adjudicative entity, government agency, or court. Rather, the Committee intends to ensure that, if an adjudicative entity, government agency, or court should finally determine that the proposed termination was in violation of any contractual or statutory rights, and should order that the plan be restored, the plan administrator will still be in a position to comply with such a remedy.

A ‘related adjudicatory proceeding’ includes a grievance proceeding before an appropriate adjudicative entity, an administrative proceeding before an appropriate government agency, or a civil action in a court of competent jurisdiction, in which an affected party alleges that the proposed termination would violate the contractual or statutory rights of any affected party.

**704 *46 For example, this would include a grievance which is filed alleging that a proposed termination would violate a collective bargaining agreement, the filing of an unfair labor practice charge with the National Labor Relations Board alleging that the termination violates the National Labor Relations Act, and the filing of a lawsuit in any court alleging that the proposed termination violates any contractual or statutory rights of any affected party.

The term ‘related adjudicatory proceeding’ also includes any timely appeals from grievance proceedings, administrative proceedings, or civil actions. Grievance proceedings before an

approprate adjudicative entity include the preliminary steps in a grievance procedure, as well as proceedings before an arbitrator, joint board, or other entity empowered to decide grievances.

In order to be considered a 'related adjudicatory proceeding', the proceeding must allege that the proposed termination violates the contractual or statutory rights of any affected party. If no such allegation is made in the proceeding, the plan administrator or the PBGC is not bound by the procedures set forth in the bill. Furthermore, in the challenge is to the proposed termination of only part of the plan, then the procedures (including the requirements that plan assets be segregated and that plan records by maintained) only apply to that portion of the plan in dispute. If, as part of a proposed termination, the plan sponsor is spinning off assets into a new plan, then the procedures would apply to the assets in the new plan, as well as the plan being terminated.

The plan administrator and the PBGC are only required to comply with these procedures during the pendency of a related adjudicatory proceeding. The related adjudicatory proceeding shall not be considered 'pending' after there is a final determination that the proposed termination did not violate the contractual or statutory rights of any affected party, or after a preliminary determination by the adjudicative entity, government agency, or court that, taking into consideration all of facts and circumstances, the affected party is not likely to prevail and the equities clearly favor discontinuing compliance with the procedures.

Whenever the plan administrator or the PBGC suspends the processing of any termination, and the termination is finally determined in the related adjudicatory proceeding not to be in violation of the contractual or statutory rights of any affected party, the termination will be effective retroactive to the original proposed termination date.

b. Requirements and procedures relating to standard terminations

Under a standard termination, the plan must contain sufficient assets to pay for the benefit entitlements of all participants and beneficiaries. That is, the plan must be made sufficient not only for all benefits guaranteed by the PBGC under section 4022, but also for the other nonguaranteed benefits encompassed within the definition of benefit entitlements. This requirement protects the PBGC, participants and beneficiaries against the types of abuses described above. Since the plan must be sufficient for all benefit entitlements, the PBGC will not be required to trustee the plan or to guarantee the payment of any benefits. Furthermore, participants ****705** ***47** and beneficiaries will receive all benefits to which they are entitled under the terms of the plan.

Because the PBGC and the participants and beneficiaries are protected under a standard termination, the procedures for entering into such a termination are streamlined so as to allow most of the procedures to be handled by private parties, with minimal involvement by the PBGC. This is intended to reduce the administrative burdens on the PBGC and plan sponsors. At the same time, various safeguards are included in the procedures in order to insure that the requirements for a standard termination are met, and that the interests of the PBGC and the participants and beneficiaries are in fact fully protected.

In order to terminate a single-employer plan under a standard termination, certain requirements must be met. The plan administrator must notify affected parties 60 days before the proposed termination date. The plan must to made sufficient for benefit entitlements before assets can be distributed.

Under the streamlined procedures, the plan administrator is simply required to send the PBGC a certification by an enrolled actuary of the estimated amount of assets in the plan as of the proposed date of final distribution of assets, the estimated present value of benefit entitlements of participants and beneficiaries under the plan as of such date, and a statement that the plan will be sufficient for benefit entitlements as of such proposed date of final distribution of assets. The Committee expects that these estimates will be based on reasonable expectations representing the actuary's best estimate of anticipated experience under the plan. The plan administrator must also send the PBGC any additional information required in regulations of the PBGC, as well as certification that all of the information on which the actuarial certification and information provided to the PBGC was based is accurate and complete.

The plan administrator must also notify each participant and beneficiary of the amount of benefit entitlements (if any) to which they are entitled under the terms of the plan, expressed in terms of the normal form of benefit under the plan (*e.g.*, monthly payments, lump sum, etc.).

After receiving the information described above from the plan administrator, the PBGC has 60 days to review the information. If, based on information provided by affected parties or as a result of its own investigations, the PBGC has reason to believe that any of the requirements for a standard termination have not been met, or that the plan is not sufficient for benefit entitlements, the PBGC must issue a notice of noncompliance. The PBGC and the plan administrator may agree to extend the 60-day period. The Committee would expect the PBGC (as under the current law) to issue a notice of noncompliance in any situation in which it is unable to determine, on the basis of the information available to it, that the requirements for a standard termination have been met.

The plan administrator may commence the final distribution of assets pursuant to the standard termination after the expiration of the 60-day (or extended) period, provided the PBGC has not issued a notice of noncompliance, and the plan is sufficient for benefit entitlements. If the plan was sufficient for benefit entitlements as of **706 *48 the proposed termination date, but due to a decline in the value of the plan assets it no longer is sufficient for benefit entitlements as of the proposed date of final distribution of assets, the plan administrator may not proceed with the final distribution of assets, and the plan will not be considered terminated under a standard termination unless the deficiency is corrected.

In connection with the final distribution of assets, as under current law, the assets must be allocated in accordance with section 4044. The assets must always be used to provide when due all benefit entitlements under the plan. In the event there are sufficient assets to pay for benefits in excess of the benefit entitlements, the assets must be used to provide such benefits according to

the priorities set forth in section 4044. Within 30 days after completing the final distribution of assets, the plan administrator must certify to the PBGC that the foregoing requirements have been met.

The Committee expressly states that nothing in this legislation changes the obligations of plan sponsors under section 411(d)(6) of the Internal Revenue Code of 1954 and 204(g) of ERISA (as amended by section 301 of the Retirement Equity Act of 1984, P.L. 98–397, August 23, 1984).

Moreover, the Committee expressly states that nothing in this legislation is intended to express its opinion on the legality of desirability of the current practice of termination of overfunded pension plans and recapture of excess assets by plan sponsors.

Under the bill, the PBGC retains its existing authority under section 4003 of ERISA to conduct audits of plans, both prior to and after the termination of a plan. Even if the plan administrator has certified to the PBGC that the assets of the plan have been distributed so as to provide when due all benefit entitlements and all other benefits to which assets are allocated under section 4044, the PBGC is still obligated to guarantee the payment of benefits under section 4022 if it is subsequently determined that not all guaranteed benefits were in fact distributed under a standard termination, and the contributing sponsors of the plan and the members of their controlled groups do not promptly provide for the payments of such benefits.

c. Requirements and procedures relating to distress terminations

In order to terminate a single-employer plan under a distress termination, certain requirements must be met. The plan administrator must give 60-day advance notice to affected parties and must provide pertinent information and certifications to the PBGC. Most importantly, the contributing sponsors and the members of their controlled groups must satisfy certain tests indicative of a financial inability to continue the funding of a plan.

If all of the criteria for a distress termination are met and the plan is terminated, as under current law, all future participation, funding, accrual and vesting cease. The Corporation trustees all plans which qualify for a distress termination *and* which do not have sufficient assets to cover guaranteed benefits. Plans in which the assets are sufficient to provide guaranteed benefits are closed out as under current law. The Corporation appoints a section 4049 trustee in those situations in which plans do not have sufficient ****707** ***49** assets to provide all benefit entitlements. The section 4049 trustee in turn establishes a trust which is used to accumulate certain profits liability payments from the contributing sponsors and members of their controlled groups, and to use the accumulated funds to pay to participants and beneficiaries the difference between benefit entitlements and guaranteed benefits.

i. Distress Termination Tests

The Committee believes that the four tests for a distress termination contained in the bill describe

the types of hardship situations in which a transfer of liabilities to the insurance program is appropriate. In fashioning these tests, the Committee tried to balance the need to limit access to the insurance system to cases of genuine need against the danger of making the tests so stringent that nothing short of total liquidation would qualify for PBGC assistance.

The first distress test requires that the contributing sponsors of a terminating plan have received funding waivers from the IRS in at least three of the past five years, and thereby already have demonstrated 'substantial business hardship' to the IRS under section 412(d) of the IRC for each year a waiver was granted. The first distress test also requires that 'substantial' controlled group members have received at least one recent funding waiver for all their other single-employer plans. This assures that the entire controlled group is experiencing financial distress. Otherwise, a strong controlled group could escape responsibility for the benefits promised by a weak member with a large underfunded plan. Applying the test on a controlled group basis discourages a controlled group from shifting assets within the group in order to leave a weak member with huge pension liabilities and then attempting to transfer those liabilities onto the insurance program.

Similarly, the second distress test applies only when the contributing sponsor and substantial controlled group members are all in liquidation proceedings under tile II, United States Code, or a similar State law. This prevents a strong controlled group from transferring liabilities to the PBGC when a weak member liquidates. In the event the liquidation proceedings are dismissed or converted to reorganization proceedings within one year of the filing of the bankruptcy petitions, the distress termination shall be void and the plan restored to pretermination status as of the proposed termination date, unless the Corporation determines that one of the other distress criteria is satisfied.

The Committee recognizes that there may be hardship situations which would not meet the other distress tests in the bill, but which would present an appropriate case for the use of PBGC funds to guarantee pension benefits. Accordingly, the third test would authorize a distress termination when a contributing sporsor demonstrates to the satisfaction of the corporation that, unless a distress termination occurs, the contributing sponsors and each substantial member of such sponsors' controlled groups will be unalbe to pay their respective debts when due and will be unable to continue in business. This test also focuses on the financial condition of the controlled group and not just on the financial health of the contributing sponsor.

**708 *50 Under the fourth distress test, the entire controlled group must demonstrate that, solely as a result of a decline in the workforce, the costs of providing pension coverage have become unreasonably burdensome. This test is satisfied when each of two objective ratios has doubled since the last benefit increases were made. These ratios compare all required single-employer plan contributions, first, to the total annualized wages of active participants, and second, to the consolidated gross income of the controlled group. The two ratios are intended to measure the financial burden of maintaining single-employer defined benefit plans. The PBGC is given the authority to promulgate regulations with respect to this test.

This test is designed to permit a distress termination in situations in which a controlled group may have promised certain pension benefits, but due to a sudden decline in the workforce, the controlled group no longer can afford to maintain the full level of benefits under its pension plans.

For purposes of the distress tests, the term 'substantial member of a controlled group' means a person whose assets comprise 5 percent or more of the total assets of the controlled group as a whole. This term also includes controlled group members who do not meet the 5 percent test as of the termination date, but who do meet this test (1) as of the year of the first waiver, if distress is determined under the funding waiver test or (2) as of the petition filing date, if distress is determined under the court-supervised liquidation test. The Committee believes that the financial condition of a controlled group member whose assets comprise 5 percent or more of the group's total assets has a substantial impact on the financial strength of the group as a whole.

ii. Benefit Payments

Under current law, benefit payments in some terminated plans have been made at the plan's benefit levels after the termination date and before final guaranteed benefits are calculated. When guaranteed benefits are less than nonforfeitable benefits under the plan, the difference must be recouped since Title IV currently provides that participants are entitled only to guaranteed benefits following termination of a plan. The Committee recognizes that recoupment of benefit overpayments can result in hardship to participants and beneficiaries. Also, lump sum distributions of plan assets in a terminated plan, either directly to participants or to purchase annuities from insurers, during the course of a termination would dilute plan assets and may adversely affect participants' benefits under Title IV and the PBGC's recovery.

Accordingly under the bill, beginning on the date the notice of intent to terminate in a distress termination is filed, the plan administrator must pay benefits attributable to employer contributions, other than death benefits, only in the form of an annuity and must not use plan assets to purchase irrevocable commitments to provide benefits from an insurer. As of the proposed termination date, the plan administrator is required to limit the payment of benefits to estimated guaranteed benefits plus the estimated level of nonguaranteed benefits to which assets are allocated under section ***51** ****709** 4044. These rules apply even during the pendency of a related adjudicatory proceeding in order to avoid overpayments. If the plan is later determined not to have terminated in a distress termination, any benefits not paid as a result of this limitation are due and payable (with interest) immediately.

2. Involuntary terminations by the PBGC

The PBGC's authority to terminate a plan involuntarily under section 4042 is generally unchanged, except that the PBGC is required to institute proceedings to involuntarily terminate a plan that does not have enough assets to pay benefits that are currently due.

E. LIABILITY FOLLOWING PLAN TERMINATION

1. Liability to the corporation

The bill amends section 4062 to apply to single-employer plan distress terminations and terminations by the corporation. It makes explicit the current law provisions upheld in *Pension Benefit Guaranty Corporation* v. *Ouimet Corp.*, that the plan sponsor(s) (contributing sponsor(s) under the bill) and all members of its controlled group are liable under section 4062 and that all such persons are jointly and severally liable.

a. Liability for unfunded guaranteed benefits

When a single-employer plan terminates under current law without sufficient assets to provide all guaranteed benefits, the employer is liable to the PBGC for the lesser of (A) the amount of unfunded guaranteed benefits in the plan at termination or (B) 30 percent of the employer's net worth. The intent of this employer liability rule was two-fold: (1) to discourage employers from terminating underfunded plans while giving financial relief to employers for whom payment of the full amount of unfunded guaranteed benefits would be disastrous and (2) to defray the costs of the insurance program.

In the case of terminations because of business hardship, the PBGC has recovered little or nothing because of the 30 percent of net worth cap. The Committee believes that a better balance is needed between the cost to the employer terminating the plan and the cost to other premium payers resulting from that termination. However, the improvement in the PBGC's collections should not jeopardize the survival or recovery of struggling companies. The Committee believes that these objectives can be achieved by removing the net worth cap and making the resulting increase in the PBGC's claim contingent on the future profitability of the employer.

Accordingly, the bill provides, in general, that an employer is liable for the amount of unfunded guaranteed benefits as of the date of plan termination plus interest accrued from that date. Thus the bill contains an express provision underscoring the PBGC's authority under current law to assess interest commencing on the date of plan termination. The bill further provides that if the amount of unfunded guaranteed benefits as of the date of termination exceeds the 30 percent of net worth cap, the 30 percent **710 *52 amount is payable in cash or securities acceptable to PBGC and the remainder of the unfunded guaranteed benefits is payable by means of up to ten annual installments equal to ten percent of the annual pre-tax profits of the contributing sponsor and its controlled group. In calculating the sum of the pre-tax profits, losses of one person do not offset profits of other persons.

The annual liability payments are required for the ten consecutive one-year periods beginning with the earlier of (A) the first one-year period beginning one year after the end of the last plan year preceding the termination date in which any liable person earns a pre-tax profit, or (B) the fourth one-year period beginning after the end of the last plan year preceding the termination date. In order to assure that employers obligated to make annual liability payments are required to pay no more than the sum of the amount of unfunded guaranteed benefits plus interest accrued from the

termination date, the obligation to make such payments ceases when such sum has been paid. The bill also allows the PBGC to make alternative arrangements for payment of the amount of annual liability payments.

For purposes of the 30 percent of net worth rule, the employer's net worth is computed in the same manner as under current law; the employer's net worth is the sum of the individual net worths of each contributing sponsor who has a positive net worth and of each member of the contributing sponsor's controlled group who has a positive net worth.

b. Liability for unpaid contributions

Under current law, the plan administrator or a successor trustee must attempt to collect unpaid contributions due to plans. Generally, the PBGC, as successor trustee, has been responsible for the collections. The Committee views this approach as unnecessarily cumbersome. Therefore, the bill makes the employer liable directly to the PBGC for the outstanding balances, as of the date of plan termination, of accumulated funding deficiencies, funding deficiencies waived prior to termination, decreases in the minimum funding standard allowed by virtue of an extension of amortization period prior to termination and pending requests for waivers and extensions. Interest accrues on these balances from the date of plan termination.

2. Liability to participants and beneficiaries

In addition to the liability to the PBGC described above, when a plan terminates in a distress termination or is terminated by the corporation under section 4042, certain liabilities continue for the unpaid benefit entitlements which are in excess of the benefits guaranteed by the PBGC. The mechanism for payment of these liabilities is through a trust administered by the 'section 4049 trustee'. Thus, the contributing sponsors of the terminated plan and the members of their controlled groups are jointly and severally liable to the section 4049 trustee pursuant to the provisions of section 4062(c).

The purpose of these provisions is to ensure that the contributing sponsors and members of their controlled groups do not evade responsibility for paying benefits which have been earned by participants ***53** ****711** and beneficiaries, but which are not guaranteed by the PBGC or otherwise paid by the plan. Under a standard termination, the plan must be sufficient for the benefit entitlements of all participants and beneficiaries. In contrast, when the PBGC trustees a plan under a distress termination, it simply guarantees the payment of certain benefits under section 4022. Thus, if there is a significant difference between the value of the guaranteed benefits and the value of the benefit entitlements, the contributing sponsors of the plan and the members of their controlled groups would have an incentive to satisfy the requirements for a distress termination in order to evade responsibility for paying for nonguaranteed benefits.

In order to close this potential loophole, the bill provides that the contributing sponsors and members of their controlled groups are also liable to the section 4049 trustee for 5 percent of their

pretax profits for a limited period of time in order to pay for any such nonguaranteed benefits. By adding these provisions, the Committee intends to discourage profitable employers from attempting to manipulate the distress criteria in order to evade responsibility for paying nonguaranteed benefits, and to insure to the maximum extent possible that participants and beneficiaries receive all benefits to which they are entitled under the terms of the plan.

The contributing sponsors and members of their controlled groups are liable under section 4062(c) only if the participants and beneficiaries have any outstanding benefit entitlements, i.e., if there are benefit entitlements which are not guaranteed by the PBGC or otherwise paid by the plan. Furthermore, the contributing sponsors and members of their controlled groups are only liable if they earn any pre-tax profits.

The amount of the liability is fixed at 5 percent of the pre-tax profits with respect to the entire controlled group. In calculating the sum of the pre-tax profits, the losses of one person do not offset the profits of another person. The contributing sponsors and members of their controlled groups are jointly and severally liable for 5 percent of the pre-tax profits with respect to the entire controlled group. This liability may be paid (and collected from) any of the members of the controlled group, and the entire liability for any year shall be satisfied upon the payment by any member of the controlled group of the entire 5 percent of profits liability. The duration of the liability runs for 10 years commencing with the earlier of the first year in which any member of the controlled group earns a profit or the fourth year following the termination date of the plan.

The form of the liability payments, the due date for the payments, the rules governing satisfaction of the liability and the determination of liability payment years are the same for the 5 percent of profits liability payments to the section 4049 trustee as they are for the 10 percent of profits liability payments to the PBGC under section 4062(b).

Section 4049 sets forth the mechanism and procedures under which the section 4049 trustee receives these liability payments and makes distributions to the paricipants and beneficiaries to pay for any nonguaranteed benefits. These procedures are structured in a manner so as to minimize the administrative burdens and expenses *54 **712 on the trustee, so that most of the liability payments from employers can be used to pay benefits to participants and beneficiaries.

The PBGC has the discretion to appoint either itself or another person to act as the section 4049 trustee. In the event the PBGC appoints another person to act as the section 4049 trustee, the Committee expects that the PBGC will appoint a bank or some other appropriate financial institution. The PBGC is required to give the section 4049 trustee various information needed by the trustee to enable it to carry out its responsibilities under this section. Of course, under its regulatory authority, PBGC could require the plan administrator to furnish the necessary information to it, or to the section 4049 trustee directly.

The section 4049 trustee appointed by the PBGC must establish a trust, which shall be used exclusively for receiving liability payments from contributing sponsors and members of their

controlled groups, making distributions to participants and beneficiaries, and defraying the reasonable administrative expenses incurred by the trustee. However, the trust need not be established until the first year in which contributing sponsors or members of their controlled groups have profits and are required to make liability payments under section 4062(c). Any trust established under section 4049 shall be exempt from taxation under section 501(c)(24) of the Internal Revenue Code of 1954.

The section 4049 trustee may receive liability payments from the contributing sponsors of the terminated plan and the members of their controlled groups at various times during the course of the year (depending on the fiscal years of such persons). Within 30 days after the end of each liability payment year (as defined in section 4062(d)(4)), the section 4049 trustee must distribute any monies accumulated in the trust during the preceding year to the persons who were participants and beneficiaries under the terminated plan as of the termination date. The section 4049 trustee must pay each participant or beneficiary an amount equal to his or her outstanding benefit entitlement (including interest calculated from the termination date), minus the actuarial present value of any amounts previously paid by the section 4049 trustee to such participant or beneficiary. At the dete of termination, the outstanding benefit entitlements of a participant or beneficiary is the actuarial present value of the amount of benefit entitlements, minus the actuarial present value of any benefits guaranteed by the corporation or otherwise paid by the plan. In the event the section 4049 trust has not accumulated sufficient monies during the course of the liability payment year to pay the entire outstanding benefit entitlements to each participant or beneficiary, the section 4049 trustee must pay a pro-rata share to each participant or beneficiary. If the amount that would be payable to any participant or beneficiary is less than $25, for administrative convenience such amount may be carried over to the next year and paid at that time.

The concept of the section 4049 trust is based on the premise that, to the extent it receives sufficient liability payments, the trustee should pay to each person who was a participant or beneficiary under the terminated plan (determined as of the termination date) an amount equal to his or her outstanding benefit entitlements,, ***55** ****713** that is, the difference between the actuarial present value of the benefit entitlements and the actuarial present value of the benefits guaranteed by the PBGC or otherwise paid by the plan. This amount is treated as though it were a debt owed by the section 4049 trustee to each participant and beneficiary. Each year the section 4049 trustee pays off a portion of this debt, depending on how much funds have been accumulated during the year. The amount payable to each participant and beneficiary is adjusted each year to reflect interest payable from the termination date, as well as any amounts previously paid by the section 4049 trustee. Since the section 4049 trustee is required to pay each participant and beneficiary their outstanding benefit entitlements, which reflect actuarial present values of their benefit entitlements, distributions must be made to all participants and beneficiaries each year, regardless of when they would have been placed into pay status had the plan not been terminated. Furthermore, such payments are made regardless of whether a participant or beneficiary has died. Since the amounts are treated as a debt payable by the section 4049 trust to the participant or

beneficiary, the payment would still be made to the individual's estate.

The PBGC is given the authority to promulgate whatever regulations it considers necessary to carry out the purposes of section 4049. The Committee expects that the PBGC will promulgate regulations so as to insure that section 4049 trustees are able to manage the trusts in a manner which facilitates the payment of benefits to participants and beneficiaries and which minimizes the administrative burdens on the trustee.

F. TREATMENT OF TRANSACTIONS TO EVADE LIABILITY; EFFECT OF CORPORATE REORGANIZATIONS

Currently there is no express provision in Title IV regarding transactions intended to avoid liability in the single-employer program. The bill incorporates court decisions under current law by adding explicit statutory language to make clear that transactions, a principal purpose of which is to evade liability under the statute, are to be ignored in determining liability.

In the case of *Solar* v. *PBGC*, 504 F. Supp. 116 (D.C.N.Y. 1981). *affirmed* 666 F. 2d 28 (2nd Cir. 1981), the court correctly ruled that a transaction intended to avoid liability should be disregarded for Title IV liability purposes. It has always been the intent of the law that solvent employers who benefit from work performed in return for pension promises, pay for those pension benefits rather than shift that cost to other companies which fund plans that pay PBGC premiums.

The absence of an express provision has perhaps increased the likelihood that abusive schemes would be attempted. The bill's evasion rule is intended to deter such attempts, which can lead to complex, costly litigation. The rule in Committee's bill is written in general terms. In the last Congress, H.R. 3039, the predecessor single-employer reform bill in the House, attempted to specify abusive transfers of liability transactions. There was some concern expressed by employer groups and others that such a detailed provision might result in unintended imposition of liability in some ****714** ***56** cases and fail to impose intended liability in others. Therefore, a more general rule has been adopted by the Committee in this bill.

The Committee hopes that the existence of this explicit statutory provision will deter shifting of pension obligations to very week companies. It is the Committee's intention that the PBGC carefully scrutinize transfers of unfunded pension liabilities from stronger to weaker companies, especially where a financial connection exists or has existed between the companies.

In addition to transactions designed to evade liability to the PBGC, this provision also applies to any situations in which a principal purpose of a transaction is to evade liability to participants and beneficiaries for benefit entitlements. For example, if a principal purpose behind a spinoff transaction is to enable the person to evade responsibility for paying certain benefit entitlements that are not quaranteed by the PBGC, such as early retirement supplements, the person shall continue to be subject to liability for those benefits as if the person was a contibuting sponsor of the plan as of the termination date. In the event the person and the members of its controlled group would not have been able to satisfy the criteria for a distress termination, they shall be

directly responsible for making the plan sufficient for all benefit entitlements, just as under a standard termination. In the event they would have qualified for a distress termination, they shall still be liable for the 5 percent of profits payments to the section 4049 trustee under section 4062(c).

The bill contains a 5-year look back limit for purposes of this provision. Thus if a distress termination occurs more than 5 years after a transaction to evade liability, there will be no liability under this section with respect to such transaction.

The bill also makes it clear that a transferor controlled group shall never be held liable for any benefit increases or improvements that were adopted after the date the transaction became effective.

Notwithstanding this provision, the transferor controlled group may still be held liable for all benefits which were adopted prior to the date of the transaction, even though participants and beneficiaries did not grow into eligibility or such benefits until after the date of the transactions. Thus, for example, if it is determined that a principal purpose of the transaction was to evade liability for certain previously negotiated early retirement or shutdown benefits which participants were going to 'grow into' in the next several years, the transferor controlled group may still be held liable for the full value of those benefits.

G. MINIMUM FUNDING WAIVERS

When a plan that has obtained one or more funding waivers later terminates, under current law, the PBGC usually is unable to recover the waived amounts from the plan sponsor. The PBGC must assert its claim for these amounts as successor trustee. However, plan termination may be intentionally or unwittingly delayed until the plan sponsor no longer has enough assets to cover pension obligations. Even if the waivers were granted to the plan on the condition that outstanding amounts become due and payable on **715 *57 plan termination (and the Committee trusts that this condition will be applied to all waivers), the plan would still have an unsecured claim, and thus a poor chance of recovery, in a bankruptcy proceeding.

In order to improve the chances for the PBGC to recover on its claims for waived contributions and other amounts not paid due to extensions of amortization periods, the bill permits the Secretary of the Treasury to require security as a condition of granting a waiver of the minimum funding standard or an extension of amortization period. Because the PBGC is not at much risk unless the amount of plan underfunding is large and the company maintaining the plan is weak, the bill includes a de minimis exception to the security provision. Under this provision, security could be required only if the plan's outstanding contributions (including waivers and extensions and pending applications for waivers and extensions) exceed $1 million.

The Committee expects that the security requirements will be imposed when the prospects of repayment of waivers and extensions is questionable, unless imposition of security would, by itself, cause a business to fail. In order to assure that the potential effect of a waiver or extension on the

PBGC insurance program is taken into account, the bill provides that the Secretary of the Treasury must solicit the views of the PBGC (providing the PBGC notice of the waiver request and adequate time to respond) and consider the PBGC's views in deciding whether the waiver or extension should be granted and its terms and conditions (including whether and what type of security should be required). The bill also requires that, before revising the terms of a waiver or extension (including a waiver or extension granted before enactment of this bill), the Secretary consider the views of the PBGC and other affected parties under the same rules that apply to the granting of waivers and extensions. In addition, the Secretary shall consider the views of any other affected parties which have been submitted in writing.

A written contract to reimburse the plan by a member of the plan sponsor's controlled group generally will not be an acceptable form of security. Controlled group members may all be in a weakened condition, and therefore inappropriate guarantors, or, if they are strong, the plan probably will not qualify for a funding waiver or extension.

In order to insulate the plan administrator from a possible conflict of interest, a security interest may only be perfected and enforced by the Corporation or by the company maintaining the plan at the Corporation's direction, at the cost of such sponsor and its controlled group.

The Committee expects that, as under current practice, the PBGC will continue to be notified by the Internal Revenue Service of funding waiver requests over $50,000 (or such higher level as the PBGC requests) and that the Secretary of the Treasury will consider the views of the PBGC in deciding on those requests.

The bill specifically authorizes the Secretary of Treasury to provide security only for funding waivers and extensions of amortization provisions which are granted by the Secretary on or after the date of enactment of this Act. This authority to require security also applies to any modifications of existing waivers or extensions **716 *58 which are granted on or after the date of enactment of this Act in order to prevent companies from attempting to evade the security requirements by simply applying for a modification of an existing waiver or extension, rather than seeking a new one. However, the Committee intends that this latter provision only apply to situations in which the requested modification would enlarge or otherwise relax the terms and conditions of existing waivers or extensions.

H. ENFORCEMENT

The bill adds a new section 4070 to ERISA which sets forth the rights of employers, contributing sponsors and members of their controlled groups, participants, beneficiaries and employee organizations to enforce certain Title IV provisions.

For instance, if a contributing sponsor wished to challenge the determination by the PBGC that the distress criteria were not met, the sponsor would have standing under this section to bring an action in Federal court. Another type of action which is authorized under this section is by a

participant or beneficiary to enforce the provisions of a standard termination if that individual did not receive his or her full entitlements under the plan.

The PBGC's enforcement authority, as under current law, is described in section 4003.

I. MISCELLANEOUS AMENDMENTS

The Committee wishes to highlight and explain two amendments made under the bill.

One amendment is intended to clarify current law by reversing the portion of the decision by the United States Court of Appeals for the Sixth Circuit in *PBC & UAW v. Lear Siegler, Inc.* (Case Nos, 79–1361, 1362, 1363 (1979)), relating to the calculation of how long a benefit increase has been in effect for purposes of the phase-in rules under section 4022(b)(7). The amendment reestablishes the interpretation previously adopted by the PBGC that, in calculating how long a benefit increase has been in effect, the first day a benefit or plan amendment became effective must be counted. Thus, for example, in the *Lear Siegler* case, the plan provided for benefit increases on May 1, 1973, May 1, 1974, and May 1, 1975 respectively. The plan was subsequently terminated at midnight on April 30, 1976. Thus, this amendment clarifies that the May 1, 1975 benefit increase would be deemed to have been in effect for one full year, and therefore would be guaranteed under section 4022. The purpose of this amendment is to avoid the unduly restrictive interpretation of the benefit grarantees under the Sixth Circuit decision, and to recognize the fact that benefit increases are commonly made effective on the anniversary dates of a collective bargaining agreement.

Another amendment clarifies the treatment of preretirement survivor benefits. The PBGC has taken the position that a preretirement survivor benefit with respect to a participant is not guaranteed under section 4022 in situations in which the participant has not died prior to the date a plan is terminated, because the benefit is not 'nonforfeitable'. This position is based on the view ****717** ***59** that the death of the participant is a condition precedent to the beneficiary's entitlement to the benefit. The PBGC has adopted this position with respect to preretirement survivor benefits both in situations in which the participant was eligible to retire but had not yet actually retired as of the termination date, and in situations in which the participant was not yet eligible to retire under the terms of the plan. The PBGC's position with respect to both categories of preretirement survivor benefits is currently being challenged on the grounds that such benefits should be considered 'nonforfeitable', and therefore should be guaranteed under section 4022. The amendment is designed to clarify prospectively that such benefits should not be considered forefeitable solely because the participant has not died as of the termination date, and accordingly that such benefits should be guaranteed by the PBGC under section 4022. The Committee intends that no inference be drawn as a result of this amendment as to whether or not these benefits were already guaranteed under preexisting law (under either the amendments made by the Retirement Equity Act or under ERISA).

J. EFFECTIVE DATE

Except as otherwise described above, the provisions of the bill are effective upon enactment. With respect to notices of intent to terminate received by the PBGC before the effective date that propose dates of termination no later than 10 days from the date of the notice, the Committee expects that these terminations will be processed as under current law.

In addition, the Committee shares the concern expressed by many of the witnesses at hearings that constant legislative changes which require virtually annual plan amendments are both administratively costly and time consuming. Although the Committee does not anticipate plan amendments will be necessary, the bill provides that any amendments required to maintain the plan's tax qualified status need not be made until the earlier of the first date the plan is otherwise amended or the beginning of the first plan year beginning after December 31, 1989, as long as the plan is administered in accordance with the Act in the interim.

V. SECTION-BY-SECTION ANALYSIS OF THE SINGLE-EMPLOYER PENSION PLAN INSURANCE PROVISIONS IN THE DEFICIT REDUCTION AMENDMENTS OF 1985

SEC. 601. SHORT TITLE AND TABLE OF CONTENTS

This section contains the short title (‘Single-Employer Pension Plan Amendments Act of 1985’) and the table of contents of this Act.

SEC. 602. FINDINGS AND DECLARATION OF POLICY

This section contains the Congress' findings that, *inter alia*: a sound termination insurance program is fundamental to the retirement income security of millions of persons covered by single-employer defined benefit pension plans; that the current system in some instances encourages employers to terminate plans, evade their obligations to pay benefits and shift unfunded pension liabilities ***60** ****718** to the insurance program; that it is desirable to limit claims against the program to cases of severe hardship; and that it is necessary to properly finance the program.

This section also states that the policy of this Act is, *inter alia*: to increase the likelihood that participants will receive their full benefits, to limit claims against the PBGC insurance system to instances of severe hardship and to assure that the program is prudently financed.

SEC. 603. AMENDMENT OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

This section states that the provisions of this Act are amendments to the Employee Retirement Income Security Act of 1974 (ERISA), unless otherwise specified.

SEC. 604. DEFINITIONS

This section adds the following definitions to section 4001(a):

‘Substantial employer’ means, with respect to a single-employer plan year, contributing sponsors who are members of the same affiliated group and whose required contributions equal or exceed

ten percent of all required contributions.

'Contributing sponsor' means, swith respect to a single-employer plan, a person who is responsible for meeting the minimum funding requirements under title I of ERISA and the Internal Revenue Code (IRC) or a member of such persons' controlled group that has employed a significant number of plan participants while such person was so responsible for funding.

'Controlled group' means a group consisting of a person and all other persons under common control with such person under regulations consistent and coextensive with regulations prescribed under section 414(c) of the Internal Revenue Code.

'Single-employer plan' means any plan which is not a multiemployer plan.

'Benefit entitlements' means all benefits provided by a single-employer plan which are guaranteed under section 4022, would be guaranteed but for the operation of section 4022(b), or constitute early retirement supplements or subsidies, plant closing benefits or death benefits if a participant or beneficiary has satisfied all conditions of entitlement other than submission of a formal application, retirement, completion of a waiting period, death or designation of a beneficiary.

'Amount of unfunded guaranteed benefits' means the excess of (A) the actuarial present value of benefits guaranteed under this title based on assumptions prescribed by the corporation for purposes of section 4044, over (B) the current value of the assets of the plan which are allocated to those benefits in accordance with section 4044.

'Amount of unfunded benefit entitlements' means the excess of (A) the actuarial present value of benefit entitlements based on assumptions prescribed by the corporation for purposes of section 4044 over (B) the current value of the assets of the plan which are allocated to those benefits in accordance with section 4044.

**719 *61 'Outstanding amount of benefit entitlements' means the excess of (A) the actuarial present value of benefit entitlements over (B) the acturial present value of benefits guaranteed under this title or to which assets of the plan are allocated in accordance with section 4044.

'Person' has the same meaning as under title I of ERISA.

'Affected party' means the PBGC, a participant, beneficiary of a deceased participant, beneficiary who is an alternate payee under a qualified domestic relations order, employee organization representing participants and any person designated to receive notice on behalf of an affected party.

'Section 4049 trustee' means the trustee of a terminated plan appointed under section 4049(a).

This section also contains a technical correction of an error in the Multiemployer Pension Plan Amendments Act of 1980.

SEC. 605. INCREASE IN PREMIUM RATES; REVISION OF PROCEDURES FOR ESTABLISHING PREMIUM RATES; PREMIUM STUDY

Section 5 provides for an increase in the single-employer premium from $2.60 to $8.50 per participant for plan years beginning after December 31, 1985. This section also changes the statutory procedure for effecting a premium increase from Congressional approval of the increase by concurrent resolution to enactment of a joint resolution approving this increase.

This section provides for establishment of a temporary Advisory Council to study single-employer premiums and the effect of amendments made by this Act on the insurance program. The council is required to report the results of its study, together with any recommendations for statutory changes, to the Congress no later than 2 years after the enactment of this Act. The council is to be appointed by the Chairmen of the Committees on Education and Labor and Ways and Means of the House of Representatives and the Chairmen of the Committees on Labor and Human Resources and Finance of the Senate and to be composed of an equal number of representatives of single-employer plan sponsors, employee organizations and the general public. Upon request, the Pension Benefit Guaranty Corporation (corporation or PBGC) and other Federal agencies shall make available, to the extent not prohibited by law, any data, analyses or other information necessary to conduct the study. Authorization is provided for appropriations to cover the costs of the Advisory Council.

SEC. 606. CLARIFICATION OF AUTHORITY TO FREEZE PLANS

This section clarifies that the adoption of an amendment providing solely that all service performed after a specified date shall not be taken into account for benefit accrual purposes (the 'freezing of a plan') is not a termination under section 4041 or 4042. The freezing of certain other factors used to compute benefit amounts is also permitted. However, under a frozen plan, service must continue to be taken into account for purposes of vesting and other eligibility requirements. The freezing of a plan will be effective only if affected parties are notified at least 60 days before the effective date of **720 *62 the freeze. This section is intended to codify the current law permitting a so-called 'shallow freeze.'

SEC. 607. GENERAL REQUIREMENTS RELATING TO TERMINATION OF SINGLE-EMPLOYER PLANS BY PLAN ADMINISTRATORS

Section 6 amends section 4041 of ERISA to provide that, except as provided in section 4042 (termination by the PBGC), a plan may only be terminated in a standard or a distress termination.

This section also requires the plan administrator to notify each affected party of the intended termination. Such notification must be made not less than 60 days before the proposed termination date.

During the pendency of a 'related adjudicatory proceeding' (defined as a grievance proceeding

before an appropriate adjudicatory entity, an administrative proceeding before an appropriate governmental agency, or a civil action in a court of competent jurisdiction, in which an affected party alleges that a proposed termination would violate the contractual or statutory rights of any affected party), the plan administrator and the PBGC are given the option of suspending standard or distress termination or structuring the termination so that the plan may be effectively restored.

SEC. 608. STANDARD TERMINATION OF SINGLE-EMPLOYER PLANS

Under section 8, a single-employer plan may terminate under a standard termination only if (1) plan assets are sufficient (when the final distribution of assets occurs) to provide all benefit entitlements, (2) the plan administrator provides the required 60-day advance notice to affected parties, (3) an enrolled actuary's certification of sufficiency and certain other information are provided to the PBGC, (4) notice of benefit entitlements is provided to participants, and (5) the PBGC does not issue a notice of noncompliance. The PBGC has 60 days to make its compliance determination unless the period is extended by agreement. The plan administrator shall commence the final distribution of assets pursuant to the standard termination after expiration of such 60-day period, provided the PBGC has not issued a notice of noncompliance and the plan is sufficient for benefit entitlements when the final distribution occurs.

The plan administrator shall distribute assets in accordance with section 4044. Within 30 days after the final distribution of assets is complete, the plan administrator is required to certify to the PBGC that the assets have been distributed in accordance with section 4044 and that all benefit entitlements have been distributed.

A standard termination is effective on the date specified in the notice of intent to terminate.

SEC. 609. DISTRESS TERMINATION OF SINGLE-EMPLOYER PLANS

Under section 9, a single-employer plan may terminate under a distress termination only if—(1) the plan administrator provides the required 60-day advance notice to affected parties, (2) pertinent actuarial data and certifications are provided to the PBGC, and (3) ****721** ***63** the PBGC notifies the plan that it has made a finding of ‘distress' as described below.

A distress termination may occur only after the plan administrator demonstrates to the satisfaction of the corporation that one of the following requirements has been met:

1. a waiver of the minimum funding standard was granted to the terminating plan for a least 3 of the 5 plan years preceding the termination date, and a waiver also was granted to all other single-employer plans maintained by any contributing sponsors of the terminating plan or ‘substantial’ members of their controlled groups for at least 1 of the 3 plan years preceding the termination date;

2. the contributing sponsors and substantial members of their controlled groups are in a liquidation proceeding under title 11, United States Code, or a similar State law, which has not, as

of the termination date, been dismissed or converted to a reorganization proceeding. (If the petition is dismissed or converted to a reorganization proceeding during the year following the bankruptcy petition, unless it is shown that another of the distress criteria is applicable, the distress termination is void and the plan shall be restored.);

3. a contributing sponsor provides to the corporation substantial evidence that, unless a distress termination is granted, the contributing sponsors and substantial controlled group members will each be unable to pay their respective debts (including debts to the plan) when due and will be unable to continue in business; or

4. solely as a result of a decline in the workforce, determined under PBGC regulations, each of the following two ratios, computed for the plan year in which the termination date occurs, is at least twice the corresponding ratio, computed for the latest of the fifth preceding plan year, the initial plan year, or the plan year following the effective date of the most recent benefit increase:

A. the ratio of the required contributions under all single-employer plans maintained by the contributing sponsors and members of their controlled groups to the total annualized wages of the active participants in such plans; and

B. the ratio of the required contributions under all single-employer plans maintained by the contributing sponsors or members of their controlled groups to the consolidated gross income of all such persons.

The term 'substantial member' of a controlled group means a person whose assets comprise at least 5 percent of the total assets of the controlled group. This term also includes controlled group members who do not meet the 5 percent test as of the termination date, but who do meet this test (1) as of the year of the first waiver, if distress is determined under the funding waiver requirement and (2) as of the petition filing date, if distress is determined under the court-supervised liquidation requirement.

If the corporation determines that the requirements for a distress termination have been met, it shall determine whether the plan's assets are sufficient to pay guaranteed benefits and benefit ****722** ***64** entitlements. Upon a determination by the corporation that assets are sufficient to provide all guaranteed benefits, the plan administrator shall, as under current law, distribute the plan assets in accordance with section 4044. (If, during the course of a final distribution of assets it is found that assets will not be sufficient to provide all guaranteed benefits, the corporation shall institute appropriate proceedings under section 4042.)

If the corporation determines that plan assets are not sufficient to provide all guaranteed benefits (or that it is unable to determine whether the plan is sufficient for all guaranteed benefits based on the information available to it) it shall commence proceedings to terminate the plan in accordance with section 4042.

Upon a determination by the corporation that plan assets are not sufficient to provide all benefit entitlements, the corporation shall appoint a section 4049 trustee for the plan, and the plan

administrator shall notify each contributing sponsor and controlled group member of possible liability under section 4062(c).

Once the plan administrator notifies the PBGC of a proposed distress termination, the plan shall pay employer-funded benefits (except death benefits) only in annuity form, shall not purchase annuities from an insurer, and shall continue to pay when due all benefit entitlements under the plan, except that, commencing on the proposed date of termination, the plan administrator shall limit the payment of benefits to guaranteed or funded amounts. In the event the plan is later determined not to have terminated in a distress termination, any benefits not paid due to this restriction shall be due and payable immediately (with interest).

SEC. 610. TERMINATION PROCEEDINGS; DUTIES OF THE CORPORATION

This section amends section 4042 to require the PBGC to institute court proceedings to terminate a plan whenever it determines that the plan does not have sufficient assets to pay benefits that are currently due.

Section 10 further amends section 4042 to clarify that the PBGC has the power to collect contributions due under the minimum funding standards or the terms of the plan as well as other amounts due the plan.

SEC 611 AMENDMENTS TO PRIMARY LIABILITY PROVISIONS; LIABILITY RELATING TO BENEFIT ENTITLEMENTS IN EXCESS OF BENEFITS GUARANTEED BY THE CORPORATION

Under this section, the contributing sponsors and members of their controlled groups are jointly and severally liable to the corporation for the following amounts, with certain limitations, when a plan is terminated under a distress termination or terminated involuntarily under section 4042:

1. the total amount (in cash or securities acceptable to the corporation) of the 'funding shortage' (defined as the sum of the outstanding balance of any accumulated funding deficiencies as of the termination date, the outstanding balance of waived funding deficiencies and the outstanding balance of the amount of decreases in the minimum funding standard due to extensions of amortization periods) and

**723 *65 2. the amount of unfunded guaranteed benefits under the plan as of the termination date, determined after taking into account the value of any amounts described in (1).

However, if the portion of the liability described in the second item is greater than 30 percent of the sum of the net worths (greater than zero) of each of the contributing sponsors and their controlled group members on the termination date, then that portion of employer liability is limited to—

1. such 30 percent of net worth, payable only in cash or securities acceptable to the corporation at the time of termination, and

2. an amount equal to 10 percent of the pretax profits (if any) of the contributing sponsors and their controlled group members for ten years, or until the amount of unfunded guaranteed benefits, with interest, has been paid to the corporation.

Liability for the 30 percent of net worth amount is due and payable as of the termination date. A person's liability to the corporation for the 10 percent of profits accrues at the end of each fiscal year and shall be paid not later than 30 days after the later of the end of the liability payment year or the latest date on which a liable person is required to file a Federal income tax return.

The PBGC and liable persons may agree to alternative arrangements for payment of liability to the PBGC.

In addition to liability to the PBGC, this section provides for liability to the section 4049 trustee in the amount of unfunded benefit entitlements (other than unfunded guaranteed benefits) with interest. Section 4049 liability is satisfied by annual payments to be made during the ten liability payment years for the termination, with each annual payment equal to 5 percent of the sum of the individual annual pretax profits of the same persons that are liable to the corporation under section 4062. The due persons that are liable for annual liability payments to the PBGC. Section 4049 liability may also be satisfied before the expiration of the 10 year period upon receipt by the PBGC of the full amount of section 4049 liability with interest.

Section 11 also defines the term ‘pretax profits', which means, for any fiscal year of any person, such person's consolidated net income (excluding any extraordinary charges to income and including any extraordinary credits to income) for such fiscal year, as shown on audited financial statements prepared in accordance with generally accepted accounting principles, before provision for or deduction of Federal or other income tax, any contribution to any single-employer pension plan with respect to which such person is a contributing sponsor during the period beginning on the termination date and ending with end of such fiscal year, or any payments required under section 4062. The corporation may by regulation require information necessary to determine the existence and amount of such pretax profits.

Liability payments to the PBGC and to section 4049 trustees are deductible without limitation under the Internal Revenue Code.

**724 *66 SEC. 612. DISTRIBUTION TO PARTICIPANTS AND BENEFICIARIES OF LIABILITY PAYMENTS TO SECTION 4049 TRUSTEE

This section adds a new section 4049 which requires the corporation to appoint either itself or another person as the ‘section 4049 trustee’ whenever a terminated plan is not sufficient for benefit entitlements. The trustee must establish and maintain the trust exclusively: (1) to receive the annual 5 percent of profits liability payments, (2) to make distributions to participants and beneficiaries and (3) to defray reasonable administrative expenses. Within 30 days after the end of each liability payment year, the trustee must distribute to each participant and beneficiary the

outstanding amount of each person's benefit entitlement (with interest) or, if the trust balance is not enough, a pro rata share of the person's outstanding benefit entitlement.

This section also makes section 4049 trusts tax-exempt under section 501(c) of the Internal Revenue Code.

SEC. 613. TREATMENT OF TRANSACTIONS TO EVADE LIABILITY; EFFECT OF CORPORATION REORGANIZATION

This section adds a new section 4069 which clarifies that the liability provisions of this Act apply without regard to any transaction if a principal purpose of the transaction is to evade liability under the Act. Any person entering into such a transaction, is treated as if that person were a contributing sponsor as of the termination date. However, this provision applies only to evasion transactions that occur within the 5-year period immediately preceding the termination date. However, a person liable under this section will not be responsible for any increases in the amount of liability adopted occur as a result of benefit increases or improvements adopted after the date of the transaction that triggers the operation of this section.

This section also incorporates the existing rules under section 4062(d) for assessing liability in the case of reorganizations that merely change identity, liquidations into parent corporations, mergers, consolidations or divisions.

SEC. 614. ADDITIONAL ENFORCEMENT AUTHORITY RELATING TO TERMINATIONS OF SINGLE-EMPLOYER PLANS

This section adds a new section 4070 which permits a fiduciary, employer, contributing sponsor, controlled group member, participant, beneficiary, or employee organization representing participants, adversely affected by an act that violates any provision under this Act relating to plan terminations and liability, to bring an action to enjoin such act or obtain other appropriate equitable relief.

A single-employer plan may be sued as an entity. However, if the plan has not designated an agent for service of legal process, the corporation can be served in its place and must so notify the plan within 15 days after receiving such service. Any money judgment against a plan is not enforceable against any other person unless liability is established in that person's individual capacity.

****725** ***67** Federal district courts shall have exclusive jurisdictionof civil actions under this section. The Corporation shall receive a copy of the complaint and has the right to intervene in any action.

In any action brought under this section, the court may award all or a portion of the costs of such action, including reasonable attorney's fees, to any party who prevails or substantially prevails. However, no plan shall be required to pay any such costs.

In any action alleging a violation of the requirements relating to the standard termination of a plan, the court shall award the plaintiff costs, including reasonable attorney's fees. In any action relating to the failure to make timely payment of any liability payment under section 4062(c), the court shall award the plaintiff costs, including reasonable attorney's fees, unless the defendant demonstrates that the failure was based on reasonable cause.

Actions under new section 4070 may not be brought after the later of (1) 6 years after the cause of action arose or (2) 3 years after the earliest date the plaintiff acquired or should have acquired actual knowledge of the cause of action (or 6 years after discovery in the case of fraud or concealment).

SEC. 615. SECURITY FOR WAIVERS OF MINIMUM FUNDING STANDARD AND EXTENSION OF AMORTIZATION PERIOD

This section adds a new section 306 to title I of ERISA under which the Secretary of the Treasury may require security to a single-employer plan as a condition of granting a minimum funding waiver or an extension of amortization period to the plan. The providing of such security shall not be considered a prohibited transaction. The security requirement may be perfected and enforced only by the PBGC or by the contributing sponsor at the direction of the PBGC.

The security requirement may be imposed only if the sum of the outstanding minimum contributions (including waived amounts, amounts deferred because of extensions and pending requests for waivers and extensions) equals or exceeds $1 million. In such cases, the Secretary of the Treasury must solicit and consider the views of the PBGC regarding the waiver, extension or imposition of security. The PBGC is allowed a reasonable amount of time to provide its views. The Secretary must also consider the views of any other interested party that are submitted in writing.

This section applies to waivers and extensions granted after the date of enactment of this Act and to revisions made after such date to the terms or conditions of prior waivers and extensions.

SEC. 616. CONFORMING, CLARIFYING, TECHNICAL AND MISCELLANEOUS AMENDMENTS

This section conforms other sections of ERISA with the amendments made by this Act and amends the table of contents of ERISA.

This section also amends sections 303 and 304 of ERISA to require that, before granting a minimum funding waiver or extension of amortization period, the Secretary of the Treasury shall require that the applicant provide satisfactory evidence that the applicant **726 *68 notified the corporation, each employee under the plan and each employee organization of the application for a waiver or extension.

SEC. 617 EFFECTIVE DATE

This section states that, except as provided otherwise, the provisions of this Act are effective on

the date of enactment. It also specifies that it, as a result of amendments made by this Act, an ongoing plan fails to meet the requirements for qualification under section 401(a) of the Internal Revenue Code, but is administered in accordance with such requirements, the plan need not be amended to conform to such requirements until the earlier of the post-enactment date on which the plan is first amended or the beginning of the first plan year beginning after December 31, 1989.

1. 100 S.Ct. 1723, 64 L.Ed.2d 354, rehearing denied 100 S.Ct. 3051.

1a. 103 S.Ct. 2764, 77 L.Ed.2d 317.

H.R. REP. 99-241(II), H.R. REP. 99-241, H.R. Rep. No. 241(II), 99TH Cong., 1ST Sess. 1985, 1986 U.S.C.C.A.N. 685, 1985 WL 25930 (Leg.Hist.)

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