NATIONAL BANKRUPTCY CONFERENCE

A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

December 7, 2005

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United States Senate

Re: S. 1932 (Deficit Reduction Omnibus Reconciliation Act of 2005)
S. 1783 (Pension Security & Transparency Act of 2005)

Dear Senators:

The National Bankruptcy Conference ("NBC") writes to inform you of potentially unintended consequences of the additional premium proposed to be levied for the benefit of the Pension Benefit Guaranty Corporation ("PBGC") against companies that have been authorized to terminate their pension plans as an essential cost-saving step to enable them to reorganize under chapter 11 of the Bankruptcy Code or have been forced to terminate their plans by the PBGC. As you may know, the NBC is a voluntary, non-profit, self-supporting organization of about sixty-five lawyers, law teachers, and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws. NBC has been working cooperatively with Congress on bankruptcy legislation since the 1930's.

We understand that the Senate has passed S. 1932 (Deficit Reduction Omnibus Reconciliation Act of 2005), section 720(b)-(d) of which would impose an additional premium on employers whose pension plans are terminated in chapter 11. The reorganization premium would be $1,250 multiplied by the number of participants

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in the plan immediately before termination, payable in each of the three years "beginning with the first month following the month which includes the date the plan sponsor emerges from bankruptcy." A similar provision is also included as section 2201(d) of H.R. 4241 (Deficit Reduction Act of 2005), which was recently passed by the House, and inserted in S. 1932 in lieu thereof. However, language identical to section 702(b)-(d) of S. 1932 was removed from the Senate's permanent pension reform bill (S. 1783) prior to its consideration on the Floor and passage.

The NBC believes that imposing this additional premium on companies that reorganize in chapter 11 will have the unintended consequence of preventing the reorganization of debtors that must terminate their pension plans in bankruptcy to survive and forcing them into liquidation instead – to the detriment of all creditors and other parties in interest, including the PBGC, retirees and workers. Imposing additional burdens on companies that reorganize is fundamentally inconsistent with the principal objective of chapter 11 of the Bankruptcy Code, which is designed to foster reorganization whenever possible so that all constituents can share in the enhanced value of the enterprise. Under current law, to voluntarily terminate a pension plan in chapter 11, a reorganizing debtor must demonstrate "that, unless the plan is terminated, [the debtor] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process . . . ." 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). A debtor struggling to reorganize under chapter 11, who has been granted authority to terminate a pension plan only because the termination is essential to reducing the company's cost to a manageable level, may well be unable to afford the substantial added cost of the proposed premium. As a result, it may well be unable to persuade the court and its creditors that any chapter 11 reorganization plan is feasible, as required by Bankruptcy Code § 1129(a)(11). As a consequence, the company will be forced to liquidate. Indeed, reorganizations may be precluded from the outset if potential lenders who are considering providing debtor in possession financing conclude that the financing would be imprudent because the special premium forecloses any reasonable prospect for reorganization.

Moreover, the proposed levy is unlikely to accomplish its intended results. By forcing companies to liquidate rather than reorganize, this reorganization premium is unlikely to raise the revenue forecast by the Congressional Budget Office ("CBO") in connection with S. 1932. Since all creditors, including the PBGC, generally receive more value from a reorganization than they would from a forced liquidation, the special reorganization premium could well have the perverse effect of *reducing* the PBGC's recoveries in bankruptcy, rather than raising the additional revenue forecast by CBO.

Revenue estimates for S. 1932 indicate that this provision is expected to raise over $1 billion in fiscal years 2006 through 2010. However, this hypothesis is based on the following key assumption, which we believe is erroneous: "Based on recent PBGC data on terminations, CBO estimates that underfunded plans that will be terminated over the next five years would contain about 120,000 participants per year, *with three-quarters of these terminations relating to nonliquidation bankruptcy filings*" (emphasis added). CBO apparently assumed that companies in chapter 11 usually reorganize. However, most companies that file for chapter 11 end up liquidating, with their assets sold to one or more acquirers. This was true in both the Bethlehem Steel and LTV cases, in which the PBGC held its two largest claims (as shown in its most recent Pension Insurance Data Book). Indeed, 7 of the largest 10 claims in the PBGC's history relate to chapter 11 debtors that liquidated. Thus, the revenue estimate for the proposed premium is unlikely to be realized,

even if the premium itself does not change future behavior. In addition, if as we expect, the proposed special reorganization premium makes the likelihood of liquidations even greater, the PBGC's overall recoveries on its claims will be even smaller and PBGC will not collect the proposed premium.

For these reasons, we urge you to support removal of this unworkable and damaging impediment to successful reorganization from both S. 1932 and any permanent pension reform legislation.

Thank you for considering these issues. We would be pleased to discuss this provision and its ramifications with you or your staff, at your pleasure. I can be reached at (212) 310-8214; my e-mail address is marcia.goldstein@weil.com.

Sincerely,

Marcia L. Goldstein, Chair
Committee on Employee Benefits & Compensation,
National Bankruptcy Conference