

NATIONAL BANKRUPTCY CONFERENCE

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

November 9, 2005

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Re: Proposed PBGC Termination Premium Deficit Reduction Omnibus Reconciliation Act of 2005 - H.R. 4241

Dear Representatives:

I am writing on behalf of the National Bankruptcy Conference ("NBC") to express our concern regarding potentially unintended consequences of the additional premium proposed to be payable to the Pension Benefit Guaranty Corporation ("PBGC") by companies that terminate their pension plans during bankruptcy. As you may know, the NBC is a voluntary, non-profit, self-supporting organization of approximately sixty 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 S. 1932 (Deficit Reduction Omnibus Reconciliation Act of 2005), which was recently passed by the Senate, includes provisions with respect to PBGC premiums that would, among other changes, impose a special premium on employers that terminate their pension plans in bankruptcy. The premium would be \$1,250 multiplied by the number of participants in the plan immediately before the termination, and would be imposed annually for three years. For companies that reorganize in chapter 11, the termination premium would be payable "beginning with

ADMINISTRATIVE OFFICE
SILZANNE ARMSTRONG-BINGHAM
ARMSTRONG & ASSOCIATES
INTERNATIONAL, INC.

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the first month following the month which includes the date the plan sponsor emerges from bankruptcy." Revenue estimates for the S 1932 indicate that this provision is expected to raise over \$1 billion in fiscal years 2006 through 2010.

The NBC understands that various Committee of the House are considering similar proposals as part of H.R. 4241 and otherwise. We urge you to oppose an such proposals.

The NBC believes that imposing this additional premium on companies that successfully reorganize in chapter 11 will make it more difficult for debtor companies to propose plans of reorganization that meet the "feasibility" requirement of the Bankruptcy Code. As a consequence, companies that have no alternative but to terminate their pension plans in order to reorganize in bankruptcy may be forced into liquidation -- to the detriment of all parties in interest. Indeed, debtor companies may not be able to obtain initial financing for their chapter 11 cases because prospective lenders will conclude that reorganization is not possible. This will result in a loss of jobs and a reduction in the recoveries of all creditors, including employees, retirees and the PBGC, with respect to claims that are subject to the bankruptcy proceedings. Moreover, even if a debtor company is not forced into liquidation as a result of the termination premium, the imposition of the premium will require reductions in wages, employee benefits, jobs and distributions to creditors on their claims, including those of the PBGC.

Under current law, to voluntarily terminate a pension plan in bankruptcy, a 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" Thus, to terminate its pension plan, a debtor company must prove that it cannot successfully repay its debts and maintain its pension plan. By reducing likelihood of reorganization and making it more difficult for reorganizing companies to pay their creditors and employees upon emergence from bankruptcy, the proposed reorganization premium will have the perverse effect of *reducing* the PBGC's recoveries -- and those of other governmental units, such as the IRS -- as creditors in bankruptcy. This reduction in governmental recoveries will offset the addition to revenue projected to result from imposing the termination premium. Furthermore, companies that are forced to liquidate as a result of the imposition of the premium will not pay the premium.¹ This too calls into question whether the projected addition to revenue will ever materialize.

We thank you for considering these issues, and we urge you to oppose imposition of such a termination premium. We would be pleased to discuss matter 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

¹ The NBC is also concerned that, although the Senate's intention appears to be to impose the termination premium only if a company reorganizes, the provisions in S. 1932 may also apply to companies that liquidate in bankruptcy. If so, this will adversely affect recoveries by other important constituencies, including the U.S. government in other capacities (such as the IRS and other PBGC claims), employees, retirees and other creditors, to whom the debtor has also made commitments it is unable to keep.