

109TH CONGRESS
1ST SESSION

H. R. 2233

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to limit the availability of benefits under an employer's nonqualified deferred compensation plans in the event that any of the employer's defined pension plans are subjected to a distress or PBGC termination in connection with bankruptcy reorganization or a conversion to a cash balance plan, to provide appropriate funding restrictions in connection with the maintenance of nonqualified deferred compensation plans, and to provide for appropriate disclosure with respect to nonqualified deferred compensation plans.

IN THE HOUSE OF REPRESENTATIVES

MAY 10, 2005

Mr. GEORGE MILLER of California (for himself, Ms. SCHAKOWSKY, Mr. SANDERS, Mr. HINCHEY, Ms. LINDA T. SÁNCHEZ of California, Mr. CUMMINGS, Mr. OWENS, Mr. CONYERS, Mr. DOGGETT, Mr. BROWN of Ohio, Mr. PAYNE, Mr. PALLONE, Mr. VAN HOLLEN, Mrs. MCCARTHY, Ms. SOLIS, Mr. GRIJALVA, Mr. ABERCROMBIE, Mr. LYNCH, Mr. STARK, Ms. WOOLSEY, Mr. TIERNEY, Mr. ANDREWS, Mrs. DAVIS of California, Mr. HINOJOSA, and Mr. BISHOP of New York) introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to limit the availability of benefits under an employer's nonqualified deferred compensation plans in the event that any of the employer's defined pension plans

are subjected to a distress or PBGC termination in connection with bankruptcy reorganization or a conversion to a cash balance plan, to provide appropriate funding restrictions in connection with the maintenance of nonqualified deferred compensation plans, and to provide for appropriate disclosure with respect to nonqualified deferred compensation plans.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
 5 “Pension Fairness and Full Disclosure Act of 2005”.

6 (b) TABLE OF CONTENTS.—The table of contents is
 7 as follows:

Sec. 1. Short title and table of contents.

Sec. 2. Findings and purpose.

TITLE I—FAIRNESS IN PLAN TERMINATIONS AND CONVERSIONS

Sec. 101. Termination fairness standard for nonqualified deferred compensation plans in connection with pension plan terminations based on bankruptcy reorganization or in connection with conversions to cash balance plans.

Sec. 102. Excise tax on funding nonqualified deferred compensation plans in the event of a pension plan termination based on bankruptcy reorganization or in the event of a conversion to a cash balance plan.

TITLE II—FAIRNESS IN FUNDING

Sec. 201. Prohibition under ERISA against funding nonqualified deferred compensation plans while maintaining underfunded defined benefit plans.

Sec. 202. Excise tax on funding nonqualified deferred compensation plans while maintaining underfunded defined benefit plans.

TITLE III—FAIRNESS IN DISCLOSURE

Sec. 301. Disclosure with respect to benefits under nonqualified deferred compensation plans.

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 (a) FINDINGS.—The Congress finds as follows:

3 (1) The pension system sponsored by private
4 employers is in a weakened state due to industry-
5 wide crises, changing market forces, and the pres-
6 sures of globalization.

7 (2) Employers increasingly are terminating or
8 reducing the benefits provided under traditional de-
9 fined benefit pension plans.

10 (3) Over 44,000,000 workers, retirees, and
11 their families depend on defined benefit pension
12 plans as a critical component of their retirement se-
13 curity in addition to Social Security.

14 (4) Defined benefit pension plans are currently
15 estimated to be underfunded by over
16 \$450,000,000,000, and the Pension Benefit Guar-
17 anty Corporation, the agency that insures traditional
18 pensions, had a 2004 deficit of over
19 \$23,000,000,000.

20 (5) The Congress in enacting the Employee Re-
21 tirement Income Security Act of 1974 intended em-
22 ployers to adequately fund their pension plans and
23 did not intend for the Pension Benefit Guaranty
24 Corporation to be used as a means for restructuring
25 companies to escape their unfunded pension liabil-
26 ities or circumvent collective bargaining obligations.

1 (6) Cash balance pension plans were created to
2 reduce traditional defined benefit pension obligations
3 without statutory authorization, and adequate stand-
4 ards do not exist to adequately protect the pensions
5 of pension plan participants, particularly older par-
6 ticipants.

7 (7) Corporate executives often preserve or en-
8 hance executive pension and other benefits at the
9 same time the benefits of non-highly paid employees
10 are reduced.

11 (b) PURPOSE.—It is the purpose of this Act to better
12 protect the retirement benefits afforded to workers and
13 retirees by protecting the solvency of the Pension Benefit
14 Guaranty Corporation and ensuring equitable treatment
15 of corporate executives as compared to treatment provided
16 to other employees when restructuring employers shift un-
17 funded pension liabilities onto the Pension Benefit Guar-
18 anty Corporation or convert to cash balance pension plans
19 without adequately protecting the retirement security of
20 older workers.

1 **TITLE I—FAIRNESS IN PLAN**
 2 **TERMINATIONS AND CONVER-**
 3 **SIONS**

4 **SEC. 101. TERMINATION FAIRNESS STANDARD FOR NON-**
 5 **QUALIFIED DEFERRED COMPENSATION**
 6 **PLANS IN CONNECTION WITH PENSION PLAN**
 7 **TERMINATIONS BASED ON BANKRUPTCY RE-**
 8 **ORGANIZATION OR IN CONNECTION WITH**
 9 **CONVERSIONS TO CASH BALANCE PLANS.**

10 (a) IN GENERAL.—Section 206 of the Employee Re-
 11 tirement Income Security Act of 1974 (29 U.S.C. 1056)
 12 is amended by adding at the end the following new sub-
 13 section:

14 “(g) TERMINATION FAIRNESS STANDARD FOR NON-
 15 QUALIFIED DEFERRED COMPENSATION PLANS IN CON-
 16 NECTION WITH PENSION PLAN TERMINATIONS BASED
 17 ON BANKRUPTCY REORGANIZATION OR IN CONNECTION
 18 WITH CONVERSIONS TO CASH BALANCE PLANS.—

19 “(1) IN GENERAL.—In any case in which a cor-
 20 poration is a plan sponsor of a defined benefit plan
 21 with respect to which a plan amendment is adopted
 22 that has the effect of—

23 “(A) implementing a distress termination
 24 of the plan under section 4041(c) based on
 25 bankruptcy reorganization or a termination of

1 the plan initiated by the Pension Benefit Guar-
2 anty Corporation under section 4042 based on
3 bankruptcy reorganization, in any case in which
4 the plan is not sufficient for guaranteed bene-
5 fits (within the meaning of section 4041(d)(2))
6 as of the proposed termination date, or

7 “(B) converting such plan to a cash bal-
8 ance plan, in any case in which the amend-
9 ment—

10 “(i) results in a significant reduction
11 in the rate of future benefit accruals (with-
12 in the meaning of section 204(h)(1)) of
13 participants with at least 10 years of serv-
14 ice under the plan, or

15 “(ii) does not provide for an election
16 by affected participants with at least 10
17 years of service under the plan (and their
18 beneficiaries) to retain coverage under the
19 terms of the plan as in effect immediately
20 prior to the amendment,

21 any covered deferred compensation plan established
22 or maintained by such plan sponsor after the date
23 of the adoption of such plan amendment shall meet
24 the termination fairness standard of this subsection
25 with respect to such plan amendment.

1 “(2) TERMINATION FAIRNESS STANDARD.—A
2 covered deferred compensation plan established or
3 maintained by a plan sponsor described in para-
4 graph (1) meets the termination fairness standard of
5 this subsection with respect to a plan amendment
6 described in paragraph (1) if, during the 5-year pe-
7 riod beginning on the date of the adoption of such
8 plan amendment—

9 “(A) no amount of deferred compensation
10 accrues to a disqualified individual under the
11 terms of such covered deferred compensation
12 plan (irrespective of whether the accrual in de-
13 ferred compensation is expressed in the form of
14 a promise, a guarantee, or any other represen-
15 tation), and

16 “(B) in the case of a covered deferred com-
17 pensation plan established during or after the
18 1-year period preceding the notice date (or any
19 amendment to a covered deferred compensation
20 plan if such amendment is adopted during or
21 after such 1-year period), no distribution of ac-
22 crued deferred compensation is made under
23 such plan (or such amendment) to a disquali-
24 fied individual.

1 “(3) DEFINITIONS.—For purposes of this sub-
2 section—

3 “(A) CASH BALANCE PLAN.—

4 “(i) IN GENERAL.—The term ‘cash
5 balance plan’ means a defined benefit plan
6 under which the accrued benefit is ex-
7 pressed to participants and beneficiaries as
8 an amount other than an annual benefit
9 commencing at normal retirement age.

10 “(ii) REGULATIONS TO INCLUDE SIMI-
11 LAR OR OTHER HYBRID PLANS.—The Sec-
12 retary shall issue regulations which provide
13 that a defined benefit plan (or any portion
14 of such a plan) which has an effect similar
15 to a plan described in clause (i) shall be
16 treated as a cash balance plan. Such regu-
17 lations may provide that if a plan sponsor
18 represents in communications to partici-
19 pants and beneficiaries that a plan amend-
20 ment results in a plan being described in
21 the preceding sentence, such plan shall be
22 treated as a cash balance plan.

23 “(B) NOTICE DATE.—The term ‘notice
24 date’ means, with respect to an amendment de-
25 scribed in paragraph (1)—

1 “(i) in the case of a distress termi-
2 nation under section 4041(d), the date of
3 the advance notice of intent to terminate
4 provided pursuant to section 4041(a)(2),

5 “(ii) in the case of a termination initi-
6 ated by the Pension Benefit Guaranty Cor-
7 poration under section 4042, the date of
8 the application to the court under section
9 4042(c), and

10 “(iii) in the case of a conversion to a
11 cash balance plan, the date of the adoption
12 of the amendment.

13 “(C) COVERED DEFERRED COMPENSATION
14 PLAN.—

15 “(i) IN GENERAL.—The term ‘covered
16 deferred compensation plan’ means any
17 plan providing for the deferral of com-
18 pensation of a disqualified individual,
19 whether or not—

20 “(I) compensation of the dis-
21 qualified individual which is deferred
22 under such plan is subject to substan-
23 tial risk of forfeiture,

24 “(II) the disqualified individual’s
25 rights to the compensation deferred

1 under the plan are no greater than
2 the rights of a general creditor of the
3 plan sponsor,

4 “(III) all amounts set aside (di-
5 rectly or indirectly) for purposes of
6 paying the deferred compensation (in-
7 cluding income), and all income at-
8 tributable to such amounts, remain
9 (until made available to the disquali-
10 fied individual or other beneficiary)
11 solely the property of the plan sponsor
12 (without being restricted to the provi-
13 sion of benefits under the plan),

14 “(IV) the amounts referred to in
15 subclause (III) are available to satisfy
16 the claims of the plan sponsor’s gen-
17 eral creditors at all times (not merely
18 after bankruptcy or insolvency), and

19 “(V) some or all of the com-
20 pensation of the disqualified individual
21 which is deferred under such plan is
22 guaranteed by an insurance company,
23 insurance service, or other similar or-
24 ganization.

1 “(ii) EXCEPTION FOR QUALIFIED
2 PLANS.—Such term shall not include a
3 plan that is—

4 “(I) described in section
5 219(g)(5)(A) of the Internal Revenue
6 Code of 1986, or

7 “(II) an eligible deferred com-
8 pensation plan (as defined in section
9 457(b) of such Code) of an eligible
10 employer described in section
11 457(e)(1)(A) of such Code.

12 “(iii) PLAN INCLUDES ARRANGE-
13 MENTS, ETC.—For purposes of this sub-
14 paragraph, the term ‘plan’ includes any
15 agreement or arrangement.

16 “(D) DISQUALIFIED INDIVIDUAL.—The
17 term ‘disqualified individual’ means a director
18 or executive officer of the plan sponsor.

19 “(E) TERMINATION BASED ON BANK-
20 RUPTCY REORGANIZATION.—A termination of a
21 plan which is a distress termination under sec-
22 tion 4041(c) or a termination instituted by the
23 Pension Benefit Guaranty Corporation under
24 section 4042 is ‘based on bankruptcy reorga-
25 nization’ if such termination is based in whole

1 or in part on the filing, by or against any per-
2 son who is a contributing sponsor of such plan
3 or a member of such sponsor's controlled group,
4 of a petition seeking reorganization in a case
5 under title 11, United States Code, or under
6 any similar law of a State or political subdivi-
7 sion of a State (or such a case in which liquida-
8 tion is sought has been converted to a case in
9 which reorganization is sought).

10 “(F) TITLE IV TERMINOLOGY.—Any term
11 used in this subsection which is defined in sec-
12 tion 4001(a) shall have the meaning provided
13 such term in section 4001(a).

14 “(4) SPECIAL RULES.—

15 “(A) COORDINATED BENEFITS.—If the
16 benefits of 2 or more defined benefit plans es-
17 tablished or maintained by an employer are co-
18 ordinated in such a manner as to have the ef-
19 fect of the adoption of an amendment described
20 in paragraph (1), the sponsor of the defined
21 benefit plan or plans providing for such coordi-
22 nation shall be treated as having adopted such
23 a plan amendment as of the date such coordina-
24 tion begins.

1 “(B) MULTIPLE AMENDMENTS.—The Sec-
2 retary shall issue regulations to prevent the
3 avoidance of the purposes of this subsection
4 through the use of 2 or more plan amendments
5 rather than a single amendment.

6 “(C) CONTROLLED GROUPS, ETC.—For
7 purposes of this subsection, all persons treated
8 as a single employer under subsection (b), (c),
9 (m), or (o) of section 414 of the Internal Rev-
10 enue Code of 1986 shall be treated as 1 em-
11 ployer.

12 “(D) TREATMENT OF EARNINGS.—Ref-
13 erences to deferred compensation shall be treat-
14 ed as including references to income attrib-
15 utable to such compensation or such income.

16 “(5) COORDINATION.—The Secretary and the
17 Secretary of the Treasury shall ensure, through the
18 execution of an interagency memorandum of under-
19 standing among such Secretaries, that regulations,
20 rulings, and interpretations issued by such Secre-
21 taries relating to the same matter over which both
22 such Secretaries have responsibility under this sub-
23 section and section 4980H of the Internal Revenue
24 Code of 1986 are administered so as to have the
25 same effect at all times.

1 “(6) EFFECT OF WAIVER GRANTED BY SEC-
2 RETARY OF THE TREASURY.—To the extent that any
3 requirement of the termination fairness standard of
4 section 4980H(a)(2) of the Internal Revenue Code
5 of 1986 is waived by the Secretary of the Treasury
6 with respect to any disqualified individual under sec-
7 tion 4980H(g) of such Code in the case of any plan
8 amendment having the effect of a termination de-
9 scribed in paragraph (1)(A) of this subsection, such
10 requirement under the termination fairness standard
11 of paragraph (2) of this subsection shall not apply
12 with respect to such individual in the case of such
13 plan amendment.”.

14 (b) EFFECTIVE DATE.—The amendment made by
15 this section shall apply to—

16 (1) plan amendments adopted on or after May
17 10, 2005, and

18 (2) plan amendments adopted before such date
19 implementing a plan termination as described in sec-
20 tion 206(g)(1) of the Employee Retirement Income
21 Security Act of 1974 (as added by this section)
22 based on a bankruptcy reorganization in a case
23 under title 11 of the United States Code (or under
24 any similar law of a State or a political subdivision
25 of a State) pending on such date.

1 **SEC. 102. EXCISE TAX ON FUNDING NONQUALIFIED DE-**
 2 **FERRED COMPENSATION PLANS IN THE**
 3 **EVENT OF A PENSION PLAN TERMINATION**
 4 **BASED ON BANKRUPTCY REORGANIZATION**
 5 **OR IN THE EVENT OF A CONVERSION TO A**
 6 **CASH BALANCE PLAN.**

7 (a) IN GENERAL.—Chapter 43 of the Internal Rev-
 8 enue Code of 1986 (relating to qualified pension, etc.,
 9 plans) is amended by adding at the end the following new
 10 section:

11 **“SEC. 4980H. FUNDING NONQUALIFIED DEFERRED COM-**
 12 **PENSATION PLANS.**

13 “(a) IMPOSITION OF TAX IN THE EVENT OF A PEN-
 14 SION PLAN TERMINATION BASED ON BANKRUPTCY RE-
 15 ORGANIZATION OR IN THE EVENT OF A CONVERSION OF
 16 A PENSION PLAN TO A CASH BALANCE PLAN.—

17 “(1) IN GENERAL.—In any case in which a cor-
 18 poration is a plan sponsor of a defined benefit plan
 19 with respect to which an plan amendment is adopted
 20 that has the effect of—

21 “(A) implementing a distress termination
 22 of the plan under section 4041(c) of the Em-
 23 ployee Retirement Income Security Act of 1974
 24 based on bankruptcy reorganization or a termi-
 25 nation of the plan initiated by the Pension Ben-
 26 efit Guaranty Corporation under section 4042

1 of such Act based on bankruptcy reorganiza-
2 tion, in any case in which the plan is not suffi-
3 cient for guaranteed benefits (within the mean-
4 ing of section 4041(d)(2) of such Act) as of the
5 proposed termination date, or

6 “(B) converting such plan to a cash bal-
7 ance plan, in any case in which the amend-
8 ment—

9 “(i) results in a significant reduction
10 in the rate of future benefit accruals (with-
11 in the meaning of section 4980F(e)(1)) of
12 participants with at least 10 years of serv-
13 ice under the plan, or

14 “(ii) does not provide for an election
15 by affected participants with at least 10
16 years of service under the plan (and their
17 beneficiaries) to retain coverage under the
18 terms of the plan as in effect immediately
19 prior to the amendment,

20 there is hereby imposed a tax on any failure to meet
21 the termination fairness standard of paragraph (2)
22 with respect to such plan amendment.

23 “(2) TERMINATION FAIRNESS STANDARD.—A
24 covered deferred compensation plan established or
25 maintained by a plan sponsor described in para-

1 graph (1) meets the termination fairness standard of
2 this subsection with respect to a plan amendment
3 described in paragraph (1) if, during the 5-year pe-
4 riod beginning on the date of the adoption of such
5 plan amendment—

6 “(A) no amount of deferred compensation
7 accrues to a disqualified individual under the
8 terms of such covered deferred compensation
9 plan, irrespective of whether the accrual in de-
10 ferred compensation is expressed in the form of
11 a promise, a guarantee, or any other represen-
12 tation, and

13 “(B) in the case of a covered deferred com-
14 pensation plan established during or after the
15 1-year period preceding the notice date (or any
16 amendment to a covered deferred compensation
17 plan if such amendment is adopted during or
18 after such 1-year period), no distribution of ac-
19 crued deferred compensation is made under
20 such plan (or such amendment) to a disquali-
21 fied individual.

22 “(b) AMOUNT OF TAX.—The amount of the tax im-
23 posed by subsection (a) shall be equal to the amount of
24 the accrual described in subsection (a)(2)(A) comprising

1 the failure or the distribution described in subsection
2 (a)(2)(B) comprising the failure.

3 “(c) LIABILITY FOR TAX.—The plan sponsor shall be
4 liable for the tax imposed by this section.

5 “(d) DEFINITIONS.—For purposes of this section—

6 “(1) CASH BALANCE PLAN.—

7 “(A) IN GENERAL.—The term ‘cash bal-
8 ance plan’ means a defined benefit plan under
9 which the accrued benefit is expressed to par-
10 ticipants and beneficiaries as an amount other
11 than an annual benefit commencing at normal
12 retirement age.

13 “(B) REGULATIONS TO INCLUDE SIMILAR
14 OR OTHER HYBRID PLANS.—The Secretary
15 shall issue regulations which provide that a de-
16 fined benefit plan (or any portion of such a
17 plan) which has an effect similar to a plan de-
18 scribed in subparagraph (A) shall be treated as
19 a cash balance plan. Such regulations may pro-
20 vide that if a plan sponsor represents in com-
21 munications to participants and beneficiaries
22 that a plan amendment results in a plan being
23 described in the preceding sentence, such plan
24 shall be treated as a cash balance plan.

1 “(2) NOTICE DATE.—The term ‘notice date’
2 means with respect to an amendment described in
3 subsection (a)(1)—

4 “(A) in the case of a distress termination
5 under section 4041(d) of the Employee Retirement
6 Income Security Act of 1974, the date of
7 the advance notice of intent to terminate pro-
8 vided pursuant to section 4041(a)(2) of such
9 Act,

10 “(B) in the case of a termination initiated
11 by the Pension Benefit Guaranty Corporation
12 under section 4042 of such Act, the date of the
13 application to the court under section 4042(c)
14 of such Act, and

15 “(C) in the case of a conversion to a cash
16 balance plan, the date of the adoption of the
17 amendment.

18 “(3) COVERED DEFERRED COMPENSATION
19 PLAN.—

20 “(A) IN GENERAL.—The term ‘covered de-
21 ferred compensation plan’ means any plan pro-
22 viding for the deferral of compensation of a dis-
23 qualified individual, whether or not—

24 “(i) compensation of the disqualified
25 individual which is deferred under such

1 plan is subject to substantial risk of for-
2 feiture,

3 “(ii) the disqualified individual’s
4 rights to the compensation deferred under
5 the plan are no greater than the rights of
6 a general creditor of the plan sponsor,

7 “(iii) all amounts set aside (directly or
8 indirectly) for purposes of paying the de-
9 ferred compensation, and all income attrib-
10 utable to such amounts, remain (until
11 made available to the participant or other
12 beneficiary) solely the property of the
13 (without being restricted to the provision
14 of benefits under the plan),

15 “(iv) the amounts referred to in
16 clause (iii) are available to satisfy the
17 claims of the plan sponsor’s general credi-
18 tors at all times (not merely after bank-
19 ruptcy or insolvency), and

20 “(v) some or all of the compensation
21 of the disqualified individual which is de-
22 ferred under such plan is guaranteed by an
23 insurance company, insurance service, or
24 other similar organization.

1 “(B) EXCEPTION FOR QUALIFIED
2 PLANS.—Such term shall not include a plan
3 that is—

4 “(i) described in section 219(g)(5)(A),
5 or

6 “(ii) an eligible deferred compensation
7 plan (as defined in section 457(b)) of an
8 eligible employer described in section
9 457(e)(1)(A).

10 “(C) PLAN INCLUDES ARRANGEMENTS,
11 ETC.—For purposes of this paragraph, the term
12 ‘plan’ includes any agreement or arrangement.

13 “(4) DISQUALIFIED INDIVIDUAL.—The term
14 ‘disqualified individual’ means a director or executive
15 officer of the plan sponsor.

16 “(5) TERMINATION BASED ON BANKRUPTCY
17 REORGANIZATION.—A termination of a plan which is
18 a distress termination under section 4041(c) of the
19 Employee Retirement Income Security Act of 1974
20 or a termination instituted by the Pension Benefit
21 Guaranty Corporation under section 4042 of such
22 Act is ‘based on bankruptcy reorganization’ if such
23 termination is based in whole or in part on the fil-
24 ing, by or against any person who is a contributing
25 sponsor of such plan or a member of such sponsor’s

1 controlled group, of a petition seeking reorganization
2 in a case under title 11, United States Code, or
3 under any similar law of a State or political subdivi-
4 sion of a State (or such a case in which liquidation
5 is sought has been converted to a case in which reor-
6 ganization is sought).

7 “(6) TITLE IV TERMINOLOGY.—Any term used
8 in this section which is defined in section 4001(a) of
9 the Employee Retirement Income Security Act of
10 1974 shall have the meaning provided such term in
11 such section 4001(a).

12 “(e) SPECIAL RULES.—

13 “(1) COORDINATED BENEFITS.—If the benefits
14 of 2 or more defined benefit plans established or
15 maintained by an employer are coordinated in such
16 a manner as to have the effect of the adoption of an
17 amendment described in subsection (a)(1), the spon-
18 sor of the defined benefit plan or plans providing for
19 such coordination shall be treated as having adopted
20 such a plan amendment as of the date such coordi-
21 nation begins.

22 “(2) MULTIPLE AMENDMENTS.—The Secretary
23 shall issue regulations to prevent the avoidance of
24 the purposes of this section through the use of 2 or

1 more plan amendments rather than a single amend-
2 ment.

3 “(3) CONTROLLED GROUPS, ETC.—For pur-
4 poses of this section, all persons treated as a single
5 employer under subsection (b), (c), (m), or (o) of
6 section 414 shall be treated as 1 employer.

7 “(4) TREATMENT OF EARNINGS.—References to
8 deferred compensation shall be treated as including
9 references to income attributable to such compensa-
10 tion or such income.

11 “(f) COORDINATION.—The Secretary and the Sec-
12 retary of Labor shall ensure, through the execution of an
13 interagency memorandum of understanding among such
14 Secretaries, that regulations, rulings, and interpretations
15 issued by such Secretaries relating to the same matter
16 over which both such Secretaries have responsibility under
17 this section and section 206(g) of the Employee Retire-
18 ment Income Security Act of 1974 are administered so
19 as to have the same effect at all times.

20 “(g) WAIVER.—

21 “(1) IN GENERAL.—In the case of any plan
22 amendment having the effect of a termination de-
23 scribed in subsection (a)(1)(A), the Secretary may
24 waive the application of any requirement of the ter-
25 mination fairness standard of subsection (a)(2) with

1 respect to any disqualified individual who first com-
2 mences service for the plan sponsor after the notice
3 date with respect to such plan amendment. The Sec-
4 retary may grant any such waiver in the case of any
5 such plan amendment with respect to any such dis-
6 qualified individual only after consultation with the
7 Pension Benefit Guaranty Corporation. The Sec-
8 retary shall promptly notify the Secretary of Labor
9 of any such waiver granted by the Secretary.

10 “(2) REQUIREMENTS FOR WAIVER.—A waiver
11 may be granted under paragraph (1) only—

12 “(A) upon the filing with the Secretary by
13 the plan sponsor of an application for such
14 waiver, in such form and manner as shall be
15 prescribed in regulations of the Secretary,

16 “(B) upon a showing, to the satisfaction of
17 the Secretary, that such waiver is a business
18 necessity for the plan sponsor, as determined
19 under such regulations, and is in the interest of
20 plan participants and beneficiaries, as deter-
21 mined under such regulations, and

22 “(C) after the participants, in such form
23 and manner as shall be provided in such regula-
24 tions, have been notified of the filing of the ap-
25 plication for the waiver and have been provided

1 a reasonable opportunity to provide in advance
2 comments to the Secretary regarding the pro-
3 posed waiver.”.

4 (b) CLERICAL AMENDMENT.—The table of sections
5 for chapter 43 of such Code is amended by adding at the
6 end the following new item:

“Sec. 4980H. Funding nonqualified deferred compensation plans.”.

7 (c) EFFECTIVE DATE.—The amendments made by
8 this section shall apply to—

9 (1) plan amendments adopted on or after May
10 10, 2005, and

11 (2) plan amendments adopted before such date
12 implementing a plan termination as described in sec-
13 tion 4980H(a)(1)(A) of the Internal Revenue Code
14 of 1986 (as added by this section) based on a bank-
15 ruptcy reorganization in a case under title 11 of the
16 United States Code (or under any similar law of a
17 State or a political subdivision of a State) pending
18 on such date.

1 **TITLE II—FAIRNESS IN FUNDING**

2 **SEC. 201. PROHIBITION UNDER ERISA AGAINST FUNDING**

3 **NONQUALIFIED DEFERRED COMPENSATION**

4 **PLANS WHILE MAINTAINING UNDERFUNDED**

5 **DEFINED BENEFIT PLANS.**

6 (a) IN GENERAL.—Part 3 of subtitle B of title I of
7 the Employee Retirement Income Security Act of 1974 is
8 amended—

9 (1) by redesignating section 308 as section 309;

10 and

11 (2) by inserting after section 307 the following
12 new section:

13 “FUNDING REQUIREMENTS WITH RESPECT TO UNDER-
14 FUNDED SINGLE-EMPLOYER DEFINED BENEFIT
15 PLAN VIOLATED BY FUNDING OF COVERED DE-
16 FERRED COMPENSATION PLAN

17 “SEC. 308. (a) In any case in which, as of the valu-
18 ation date for any plan year of a defined benefit plan
19 which is a single-employer plan, the funded current liabil-
20 ity percentage of such plan is less than 75 percent, during
21 the period beginning with such date and ending imme-
22 diately before the valuation date for the following plan
23 year—

24 “(1) the plan sponsor of such defined benefit
25 plan (or any member of the plan sponsor’s controlled

1 group) may not contribute to a covered deferred
2 compensation plan maintained by the plan sponsor
3 (or any such member), and

4 “(2) a disqualified individual may not accrue
5 any amount of deferred compensation under the
6 terms of any covered deferred compensation plan
7 maintained by the plan sponsor of such defined ben-
8 efit plan (or by any member of the plan sponsor’s
9 controlled group), irrespective of whether the accrual
10 in deferred compensation is expressed in the form of
11 a promise, a guarantee, or any other representation.

12 “(b) For purposes of this section—

13 “(1) The term ‘funded current liability percent-
14 age’ has the meaning provided in section
15 302(d)(8)(B).

16 “(2) The term ‘covered deferred compensation
17 plan’ has the meaning provided in section
18 206(g)(3)(C).

19 “(3) The term ‘disqualified individual’ has the
20 meaning provided in section 206(g)(3)(D).

21 “(4) The term ‘controlled group’ has the mean-
22 ing provided in section 302(c)(11)(B)(ii).

23 “(c) To the extent that a waiver is granted by the
24 Secretary of the Treasury under section 4980H(b)(2) of
25 the Internal Revenue Code of 1986 with respect to any

1 contribution described in subsection (a)(1) or any accrual
 2 described in subsection (a)(2), the requirements of sub-
 3 section (a) shall not apply with respect to such contribu-
 4 tion or accrual.”.

5 (b) CLERICAL AMENDMENT.—The table of contents
 6 in section 1 of such Act is amended by striking the item
 7 relating to section 308 and inserting the following new
 8 items:

“Sec. 308. Funding requirements with respect to underfunded single-employer
 defined benefit plan violated by funding of covered deferred
 compensation plan.

“Sec. 309. Effective dates.”.

9 (c) EFFECTIVE DATE.—The amendments made by
 10 this section shall apply with respect to plan years begin-
 11 ning on or after January 1, 2006.

12 **SEC. 202. EXCISE TAX ON FUNDING NONQUALIFIED DE-**
 13 **FERRED COMPENSATION PLANS WHILE**
 14 **MAINTAINING UNDERFUNDED DEFINED BEN-**
 15 **EFIT PLANS.**

16 (a) IN GENERAL.—Section 4980H of the Internal
 17 Revenue Code of 1986 (as added by section 102 of this
 18 Act) is amended—

19 (1) by redesignating subsections (b) through (g)
 20 as subsections (c) through (h), respectively; and

21 (2) by inserting after subsection (a) the fol-
 22 lowing new subsection:

1 “(b) IMPOSITION OF TAX ON FUNDING OF COVERED
2 DEFERRED COMPENSATION PLAN WHILE MAINTAINING
3 UNDERFUNDED DEFINED BENEFIT PLAN.—

4 “(1) IN GENERAL.—In any case in which, as of
5 the valuation date for any plan year of a defined
6 benefit plan which is a single-employer plan, the
7 funded current liability percentage of such plan is
8 less than 75 percent, there is hereby imposed a tax
9 on—

10 “(A) the contribution by the plan sponsor
11 of such defined benefit plan (or any member of
12 the plan sponsor’s controlled group), during the
13 period beginning with such date and ending the
14 the valuation date for the following plan year,
15 of any amount to a covered deferred compensa-
16 tion plan maintained by the plan sponsor (or
17 any such member), and

18 “(B) the accrual, during such period, of
19 any amount of deferred compensation to a dis-
20 qualified individual under the terms of any cov-
21 ered deferred compensation plan maintained by
22 the plan sponsor of such defined benefit plan,
23 irrespective of whether the accrual in deferred
24 compensation is expressed in the form of a

1 promise, a guarantee, or any other representa-
2 tion.

3 “(2) WAIVER.—

4 “(A) IN GENERAL.—The Secretary may
5 waive the imposition of a tax under this sub-
6 section on any contribution described in para-
7 graph (1)(A) or any accrual described in para-
8 graph (1)(B). The Secretary may grant any
9 such waiver only after consultation with the
10 Pension Benefit Guaranty Corporation. The
11 Secretary shall promptly notify the Secretary of
12 Labor of any such waiver granted by the Sec-
13 retary.

14 “(B) REQUIREMENTS FOR WAIVER.—A
15 waiver may be granted under subparagraph (A)
16 only—

17 “(i) upon the filing with the Secretary
18 by the plan sponsor of an application for
19 such waiver, in such form and manner as
20 shall be prescribed in regulations of the
21 Secretary,

22 “(ii) upon a showing, to the satisfac-
23 tion of the Secretary, that such waiver is
24 a business necessity for the plan sponsor,
25 as determined under such regulations, and

1 is in the interest of plan participants and
2 beneficiaries, as determined under such
3 regulations, and

4 “(iii) after the participants, in such
5 form and manner as shall be provided in
6 such regulations, have been notified of the
7 filing of the application for the waiver and
8 have been provided a reasonable oppor-
9 tunity to provide in advance comments to
10 the Secretary regarding the proposed waiv-
11 er.”; and

12 (3) in subsection (c) (as redesignated by para-
13 graph (1))—

14 (A) by striking “The amount of the tax”
15 and inserting the following:

16 “(1) SUBSECTION (a).—The amount of the
17 tax”; and

18 (B) by adding at the end the following new
19 paragraph:

20 “(2) SUBSECTION (b).—The amount of the tax
21 imposed by subsection (b) shall be equal to the sum
22 of—

23 “(A) the amount of any contribution de-
24 scribed in subsection (b)(1), plus

1 “(B) the amount of any accrual described
2 in subsection (b)(2).”; and
3 (4) in subsection (d) (as redesignated by para-
4 graph (1)), by striking “the tax” and inserting “any
5 tax”.

6 (b) CONFORMING AMENDMENT.—Section 206(g)(6)
7 of the Employee Retirement Income Security Act of 1974
8 (as added by section 101 of this Act) is amended by strik-
9 ing “section 4980H(g)” and inserting “section
10 4980H(h)”.

11 (c) EFFECTIVE DATE.—The amendments made by
12 this section shall apply with respect to plan years begin-
13 ning on or after January 1, 2006.

14 **TITLE III—FAIRNESS IN** 15 **DISCLOSURE**

16 **SEC. 301. DISCLOSURE WITH RESPECT TO BENEFITS** 17 **UNDER NONQUALIFIED DEFERRED COM-** 18 **PENSATION PLANS.**

19 (a) IN GENERAL.—Section 101 of the Employee Re-
20 tirement Income Security Act of 1974 (29 U.S.C. 1021)
21 is amended—

22 (1) by redesignating subsection (j) as sub-
23 section (k); and

24 (2) by inserting after subsection (i) the fol-
25 lowing new subsection:

1 “(j) DISCLOSURE WITH RESPECT TO BENEFITS
2 UNDER COVERED DEFERRED COMPENSATION PLANS.—

3 “(1) IN GENERAL.—In any case in which—

4 “(A) an amendment to a pension plan is
5 adopted which has the effect of—

6 “(i) eliminating future benefit accru-
7 als under the plan,

8 “(ii) converting the plan to a cash bal-
9 ance plan in a case described in section
10 206(g)(1)(B),

11 “(iii) reducing the rate of future ben-
12 efit accruals under the plan (in the case of
13 a defined benefit plan), or

14 “(iv) reducing future employer con-
15 tributions under the plan (in the case of a
16 defined contribution plan), or

17 “(B) the plan administrator of a pension
18 plan has filed under section 4041(a)(2) a notice
19 of intent to terminate such plan in a distress
20 termination under section 4041(c) based on
21 bankruptcy reorganization or, in advance of fil-
22 ing such a notice, has filed a motion with the
23 court in the proceedings relating to such bank-
24 ruptcy reorganization seeking approval to com-

1 mence proceedings for such a distress termi-
2 nation,
3 the plan administrator shall provide to each plan
4 participant and beneficiary a notice under this sub-
5 section with respect to each covered deferred com-
6 pensation plan maintained by the plan sponsor of
7 the pension plan (and each member of the plan
8 sponsor's controlled group).

9 “(2) NOTICE.—A notice required under this
10 subsection with respect to a covered deferred com-
11 pensation plan shall set forth, in language calculated
12 to be understood by the average pension plan partic-
13 ipant—

14 “(A) a complete summary description of
15 the terms of the covered deferred compensation
16 plan,

17 “(B) the actuarial present value of the
18 benefit liabilities of the covered deferred com-
19 pensation plan, as of the most recent valuation
20 date of such plan,

21 “(C) any additional cost to the plan spon-
22 sor (or to the member of the plan sponsor's
23 controlled group), for the preceding plan year of
24 such plan, of maintaining such covered deferred
25 compensation plan, including tax expenditures

1 attributable to the maintenance of such plan
2 (or, if not known on the date of the notice, a
3 reasonable estimation thereof), and

4 “(D) in any case described in paragraph
5 (1)(B)—

6 “(i) a statement that the notice of in-
7 tent to terminate or motion has been filed,
8 and

9 “(ii) a statement of the extent to
10 which the actuarial present value of benefit
11 liabilities of the pension plan referred to in
12 paragraph (1)(B) is expected to be reduced
13 by reason of the termination.

14 “(3) TIMING OF NOTICE.—A notice under this
15 subsection shall be provided—

16 “(A) not later than 15 days after—

17 “(i) the date of the adoption of the
18 amendment described in paragraph (1)(A),
19 or

20 “(ii) the date of the notice of intent to
21 terminate described in paragraph (1)(B),

22 (as the case may be), and

23 “(B) in the same manner as is provided
24 under section 104(b)(1) with respect to sum-

1 mary descriptions of plan modifications or
2 changes.

3 “(4) DEFINITIONS.—For purposes of this sub-
4 section—

5 “(A) The term ‘cash balance plan’ has the
6 meaning provided in section 206(g)(3)(A).

7 “(B) The term ‘covered deferred com-
8 pensation plan’ has the meaning provided in
9 section 206(g)(3)(C).

10 “(C) The term ‘controlled group’ has the
11 meaning provided in section 302(c)(11)(B)(ii).

12 “(D) Whether a termination of a plan
13 which is a distress termination under section
14 4041(c) is ‘based on bankruptcy reorganization’
15 shall be determined as provided in section
16 206(g)(3)(E).”.

17 (b) ENFORCEMENT.—Section 502(c)(1) of such Act
18 (29 U.S.C. 1132(c)(1)) is amended by striking “or section
19 101(e)(1)” and inserting “or subsection (e)(1) or (j)(1)
20 of section 101”.

21 (c) EFFECTIVE DATE.—The amendments made by
22 this section shall apply with respect to—

23 (1) plan amendments adopted on or after Janu-
24 ary 1, 2006, and

1 (2) notices of intent to terminate or motions
2 (described in section 101(j)(1)(B) of the Employee
3 Retirement Income Security Act of 1974 (as added
4 by this section)) filed on or after such date.

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