

111TH CONGRESS  
1ST SESSION

# H. R. 4281

To amend the Employee Retirement Income Security Act of 1974 and title 11, United States Code, to provide necessary reforms for employee pension benefit plans.

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## IN THE HOUSE OF REPRESENTATIVES

DECEMBER 10, 2009

Mr. VISCLOSKY introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committee on the Judiciary, 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

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## A BILL

To amend the Employee Retirement Income Security Act of 1974 and title 11, United States Code, to provide necessary reforms for employee pension benefit 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.**

4 This Act may be cited as the “Employees’ Pension  
5 Security Act of 2009”.

1           **TITLE I—TRUSTEESHIP OF**  
2           **SINGLE-EMPLOYER PLANS**

3   **SEC. 101. REQUIREMENTS RELATING TO TRUSTEESHIP OF**  
4           **SINGLE-EMPLOYER PLANS.**

5           (a) IN GENERAL.—Section 403(a) of the Employee  
6 Retirement Income Security Act of 1974 (29 U.S.C.  
7 1103(a)) is amended—

8                 (1) by redesignating paragraphs (1) and (2) as  
9                 subparagraphs (A) and (B), respectively;

10                (2) by inserting “(1)” after “(a)”; and

11                (3) by adding at the end the following new  
12                paragraph:

13                “(2)(A) The assets of a pension plan which is a sin-  
14                gle-employer plan shall be held in trust by a joint board  
15                of trustees, which shall consist of two or more trustees  
16                representing on an equal basis the interests of the em-  
17                ployer or employers maintaining the plan and the interests  
18                of the participants and their beneficiaries.

19                “(B)(i) Except as provided in clause (ii), in any case  
20                in which the plan is maintained pursuant to one or more  
21                collective bargaining agreements between one or more em-  
22                ployee organizations and one or more employers, the trust-  
23                ees representing the interests of the participants and their  
24                beneficiaries pursuant to subparagraph (A) shall be des-  
25                ignated by such employee organizations.

1       “(ii) Clause (i) shall not apply with respect to a plan  
2 described in such clause if the employee organization (or  
3 all employee organizations, if more than one) referred to  
4 in such clause file with the Secretary, in such form and  
5 manner as shall be prescribed in regulations of the Sec-  
6 retary, a written waiver of their rights under clause (i).

7       “(iii) In any case in which clause (i) does not apply  
8 with respect to a pension plan which is a single-employer  
9 plan because the plan is not described in clause (i) or be-  
10 cause of a waiver filed pursuant to clause (ii), the trustee  
11 or trustees representing the interests of the participants  
12 and their beneficiaries shall consist of one or more partici-  
13 pants under the plan elected to serve as such in accord-  
14 ance with this clause. The Secretary shall provide by regu-  
15 lation for a secret ballot of the participants under the plan  
16 for purposes of such election, and for certification of the  
17 results thereof to the participants (and any employee orga-  
18 nization referred to in clause (ii)) and to the employer.”.

19       (b) CONFORMING AMENDMENTS.—Section 403(a)(1)  
20 of such Act (as redesignated under subsection (a)) is  
21 amended—

22               (1) by striking “Such trustee or trustees” and  
23               inserting “Except as provided in paragraph (2), such  
24               trustee or trustees”;

1           (2) by striking “fiduciary, and upon accept-  
2           ance” and inserting “fiduciary. Upon acceptance”;  
3           and

4           (3) in subparagraph (A) (as so redesignated),  
5           by striking “the plan” the first place it appears and  
6           inserting “in the case of a plan other than a pension  
7           plan which is a single-employer plan, the plan”.

8   **SEC. 102. EFFECTIVE DATE.**

9           The amendments made by this title shall apply with  
10          respect to plan years beginning after 180 days after the  
11          date of the enactment of this Act. The Secretary of Labor  
12          shall prescribe the initial regulations necessary to carry  
13          out the provisions of such amendments not later than 90  
14          days after the date of the enactment of this Act.

15                           **TITLE II—INVESTMENT**  
16                           **INFORMATION**

17   **SEC. 201. PROVISION TO PARTICIPANTS AND BENE-**  
18                           **FICIARIES OF MATERIAL INVESTMENT IN-**  
19                           **FORMATION IN ACCURATE FORM.**

20          (a) IN GENERAL.—Section 404(c) of the Employee  
21          Retirement Income Security Act of 1974 (29 U.S.C.  
22          1104(c)) is amended by adding at the end the following  
23          new paragraph:

24                           “(6) PROVISION OF ACCURATE MATERIAL IN-

25          VESTMENT ADVICE.—The plan sponsor and plan ad-

1 administrator of a pension plan described in paragraph  
2 (1) shall have a fiduciary duty to ensure that each  
3 participant and beneficiary under the plan, in con-  
4 nection with the investment by the participant or  
5 beneficiary of plan assets in the exercise of his or  
6 her control over assets in his account, is provided  
7 with all material investment information regarding  
8 investment of such assets to the extent that the pro-  
9 vision of such information is generally required to be  
10 disclosed by the plan sponsor to investors in connec-  
11 tion with such an investment under applicable secu-  
12 rities laws. The provision by the plan sponsor or  
13 plan administrator of any misleading investment in-  
14 formation shall be treated as a violation of this para-  
15 graph.”.

16 (b) ENFORCEMENT.—

17 (1) IN GENERAL.—Section 502(e) of such Act  
18 (29 U.S.C. 1132(e)) is amended—

19 (A) by redesignating the second paragraph  
20 (10) (relating to ongoing consultation between  
21 the Secretary of Labor and the Secretary of  
22 Health and Human Services) as paragraph  
23 (12); and

24 (B) by inserting after the first paragraph  
25 (10) the following new paragraph:

1           “(11) SECRETARIAL ENFORCEMENT AUTHORITY  
2           RELATING TO PROVISION OF ACCURATE MATERIAL  
3           INVESTMENT ADVICE.—The Secretary may assess a  
4           civil penalty against any person of up to \$1,000 a  
5           day from the date of the person’s failure or refusal  
6           to comply with the requirements of section 404(c)(6)  
7           until such failure or refusal is corrected.”.

8           (2)     CONFORMING     AMENDMENT.—Section  
9           502(a)(6) of such Act (29 U.S.C. 1132(a)(6)) is  
10          amended by striking “(8), or (9)” and inserting  
11          “(8), (9), (10), or (11)”.

12 **SEC. 202. EFFECTIVE DATE OF TITLE.**

13          The amendments made by this title shall apply with  
14          respect to investments made on or after the date of the  
15          enactment of this Act.

16 **TITLE III—STRENGTHENED PRO-**  
17 **TECTIONS AGAINST ABUSE**  
18 **OF THE BANKRUPTCY AND**  
19 **TERMINATION PROCESS**

20 **SEC. 301. ADDITIONAL REQUIREMENTS FOR TERMINATION.**

21          (a)     ADDITIONAL REQUIREMENTS FOR DISTRESS  
22          TERMINATION.—Section 4041(c)(2) of the Employee Re-  
23          tirement Income Security Act of 1974 (29 U.S.C.  
24          1341(c)(2)) is amended by adding at the end the fol-  
25          lowing:

1           “(E) ADDITIONAL REQUIREMENTS.—Not-  
2           withstanding any other provision of this section,  
3           unless the corporation or the court, in the case  
4           of a distress termination pursuant to subpara-  
5           graph (B)(ii), has determined that reasonable  
6           efforts to consider available alternatives to ter-  
7           mination (including, but not limited to, alter-  
8           natives described in section 4042(c)(4)) have  
9           been undertaken by such person (and, in the  
10          case of a plan maintained pursuant to a collec-  
11          tive bargaining agreement, have been under-  
12          taken by the bargaining parties in good faith  
13          bargaining), the plan may not be terminated. A  
14          participant or beneficiary of the plan or an em-  
15          ployee organization representing such partici-  
16          pants or beneficiaries may bring an action in  
17          the appropriate court to challenge such deter-  
18          mination by the corporation and seek equitable  
19          relief or must be afforded an opportunity to be  
20          heard by the appropriate court if a court is  
21          making such determination.”.

22          (b) ADDITIONAL REQUIREMENTS FOR COURT DE-  
23          CREES.—Section 4042(c)(1) of such Act (29 U.S.C.  
24          1342(c)(1)) is amended—

1           (1) by inserting after the first sentence the fol-  
2           lowing new sentences: “The court may not enter  
3           such a decree unless that court has found that rea-  
4           sonable efforts to consider available alternatives to  
5           termination (including, but not limited to, alter-  
6           natives described in paragraph (4)) have been under-  
7           taken by the plan sponsor (and, in the case of a plan  
8           maintained pursuant to a collective bargaining  
9           agreement, have been undertaken by the bargaining  
10          parties in good faith bargaining). There is a pre-  
11          sumption that a plan need not be terminated if the  
12          plan sponsor can continue in business, outside a case  
13          under title 11, United States Code (or under any  
14          similar law of a State or a political subdivision of a  
15          State) in which reorganization is sought, without  
16          terminating the plan.”; and

17          (2) in the sentence following the sentences in-  
18          serted by paragraph (1), by striking “the preceding  
19          sentence” and inserting “the first sentence of this  
20          paragraph,”.

21          (c) RIGHT TO INTERVENE TO CHALLENGE COURT  
22          DECREE.—Section 4042(c) of such Act (as amended by  
23          subsection (b)) is further amended by inserting after the  
24          fourth sentence the following new sentence: “If any party  
25          consisting of the plan sponsor, a plan participant, or (in

1 the case of a plan maintained pursuant to a collective bar-  
2 gaining agreement) the employee organization rep-  
3 resenting plan participants for purposes of collective bar-  
4 gaining disagrees with any such determination by the cor-  
5 poration, such party may intervene in the proceeding to  
6 challenge the determinations of the corporation.”.

7 (d) CONSIDERATION OF ALTERNATIVES BY COR-  
8 PORATION AND PLAN SPONSOR.—Section 4042(c) of such  
9 Act (as amended by the preceding provisions of this sec-  
10 tion) is further amended by adding after the seventh sen-  
11 tence the following: “The corporation and the plan admin-  
12 istrator may proceed with such an agreement only if they  
13 have made reasonable efforts to consider available alter-  
14 natives to termination (including, but not limited to, alter-  
15 natives described in paragraph (4) of this subsection) and  
16 the plan participants and beneficiaries have been provided  
17 with at least 60 days notice before such agreement is given  
18 effect. During such 60-day period, a participant or bene-  
19 ficiary of the plan or an employee organization rep-  
20 resenting such participants or beneficiaries may bring an  
21 action in the appropriate court to seek appropriate equi-  
22 table relief if such reasonable efforts have not been  
23 made.”.

24 (e) EFFORTS BY THE CORPORATION AT CONSULTA-  
25 TION WITH PARTIES.—Section 4042(c) of such Act is

1 amended by adding at the end the following new para-  
2 graph:

3           “(4) CONSULTATION REGARDING REASONABLE  
4 AVAILABLE ALTERNATIVES TO TERMINATION.—

5           “(A) IN GENERAL.—Prior to making any  
6 determination referred to in the preceding pro-  
7 visions of this subsection, the corporation shall  
8 consult with the plan participants and (in the  
9 case of a plan maintained pursuant to a collec-  
10 tive bargaining agreement) the employee orga-  
11 nization representing plan participants for pur-  
12 poses of collective bargaining to determine  
13 whether there are any reasonable available al-  
14 ternatives to termination (including, but not  
15 limited to, alternatives described in subpara-  
16 graph (B)).

17           “(B) REASONABLE ALTERNATIVES TO  
18 TERMINATION.—The reasonable alternatives to  
19 termination referred to in subparagraph (A)  
20 consist of measures which are in the best inter-  
21 est of plan participants and which include (but  
22 are not limited to) the following: —

23           “(i) Financing or loans sought by any  
24 member of the plan sponsor’s controlled  
25 group, with or without assistance from the

1 corporation, in order to obtain plan financ-  
2 ing, including back-up guarantees to any  
3 such financing which the corporation is  
4 hereby authorized to provide for such pur-  
5 pose.

6 “(ii) New plan structures agreed to by  
7 the parties, such as transfer of plan liabil-  
8 ities to multiemployer plans, new benefit  
9 formulas for new hires or non-vested par-  
10 ticipants, or other plan restructuring alter-  
11 natives agreed to by the parties.

12 “(iii) Reinsurance which the corpora-  
13 tion is hereby authorized to obtain for the  
14 plan.

15 “(iv) An agreement by the parties au-  
16 thORIZING alternative funding schedules, ap-  
17 proved by the corporation, which would  
18 modify plan funding, subject to the min-  
19 imum funding requirements for the plan  
20 under part 3 of subtitle B of title I.

21 “(v) Purchase by the plan sponsor of  
22 an annuity contract to cover liabilities of  
23 the plan, which the corporation is hereby  
24 authorized to guarantee as necessary to se-  
25 cure such a contract.”

1 (f) NOTICE OF RIGHT TO CHALLENGE DETERMINA-  
2 TIONS RELATING TO PLAN TERMINATION.—

3 (1) PROCEDURE FOR STANDARD TERMI-  
4 NATIONS.—Section 4041(b)(2)(B) of such Act (29  
5 U.S.C. 1341(b)(2)(B)) is amended in clause (i) by  
6 striking “and” at the end, in clause (ii)(V) by strik-  
7 ing “require.” and inserting “require, and”, and by  
8 inserting after clause (ii) the following new clause:

9 “(iii) describing the right of partici-  
10 pants and beneficiaries to challenge deter-  
11 minations under this section.”.

12 (2) TERMINATION PROCEEDINGS FOR DISTRESS  
13 TERMINATIONS AND TERMINATIONS COMMENCED BY  
14 THE PBGC.—Section 4042(a) of such Act (29 U.S.C.  
15 1342(a)) is amended by adding at the end the fol-  
16 lowing new sentence: “Prior to commencing pro-  
17 ceedings under this section with respect to any plan,  
18 the corporation shall provide notice to plan partici-  
19 pants and beneficiaries of the right to challenge de-  
20 terminations under this section, written in a manner  
21 likely to be understood by the participant or bene-  
22 ficiary.”.

23 **SEC. 302. EFFECTIVE DATE OF TITLE.**

24 The amendments made by this title shall apply with  
25 respect to any plans undergoing termination proceedings

1 pursuant to section 4041 or 4042 of the Employee Retirement  
2 ment Income Security Act of 1974 which are pending on  
3 or after the date of the enactment of this Act.

4 **TITLE IV—RECOVERY OF BENEFIT LIABILITIES WHICH ARE**  
5 **NOT GUARANTEED**  
6

7 **SEC. 401. AMENDMENT TO TITLE 11 OF THE UNITED**  
8 **STATES CODE.**

9 Section 507(a)(1) of title 11, United States Code, is  
10 amended by adding at the end the following:

11 “(D) Subject to subparagraphs (A), (B),  
12 and (C), allowed unsecured claims for benefit li-  
13 abilities to participants and beneficiaries under  
14 a single-employer plan (as defined in section  
15 4001(a)(15) of the Employee Retirement In-  
16 come Security Act of 1974) in connection with  
17 the termination of the plan, in excess of the  
18 benefits payable to the participants and bene-  
19 ficiaries by the Pension Benefit Guaranty Cor-  
20 poration under section 4022 of the Employee  
21 Retirement Income Security Act of 1974 in  
22 connection with such termination.”.

23 **SEC. 402. EFFECTIVE DATE; APPLICATION OF AMENDMENT.**

24 (a) EFFECTIVE DATE.—Except as provided in sub-  
25 section (b), section 401 and the amendment made by such

1 section shall take effect on the date of the enactment of  
2 this Act.

3 (b) APPLICATION OF AMENDMENT.—The amendment  
4 made by section 401 shall not apply with respect to cases  
5 commenced under title 11 of the United States Code be-  
6 fore the date of the enactment of this Act.

○