II

109TH CONGRESS
1ST SESSION

S. 991

To amend title I of the Employee Retirement Income Security Act of 1974 to limit the availability of benefits under an employer's nonqualified deferred compensation plans in the event that any of the employer's defined benefit 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 SENATE OF THE UNITED STATES

MAY 10, 2005

Mr. KENNEDY (for himself, Mr. DURBIN, Mr. HARKIN, and Mr. AKAKA) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 to limit the availability of benefits under an employer's nonqualified deferred compensation plans in the event that any of the employer's defined benefit 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

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

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

SEC. 2. FINDINGS AND PURPOSE.

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

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

(2) Employers increasingly are terminating or reducing the benefits provided under traditional defined benefit pension plans.

(3) More than 44,000,000 workers, retirees, and their families depend on defined benefit pension plans as a critical component of their retirement security in addition to Social Security.

(4) Many defined benefit pension plans are underfunded and the Pension Benefit Guaranty Corporation, the agency that insures traditional pensions, has also gone into deficit.

(5) Congress in enacting the Employee Retirement Income Security Act of 1974 intended employers to adequately fund their pension plans and did not intend for the Pension Benefit Guaranty Corporation to be used as a means for restructuring companies to escape their unfunded pension liabilities, or circumvent collective bargaining obligations.

(6) Cash balance pension plans often reduce traditional defined benefit pension obligations and adequate standards do not exist to adequately protect the pensions of pension plan participants, particularly older participants.

(7) Corporate executives often preserve or enhance executive pension and other benefits at the

same time the benefits of non-highly paid employees are reduced.

(b) PURPOSE.—It is the purpose of this Act to better protect the retirement benefits afforded to workers and retirees by protecting the solvency of the Pension Benefit Guaranty Corporation and ensuring equitable treatment of corporate executives as compared to treatment provided to other employees when restructuring employers shift unfunded pension liabilities onto the Pension Benefit Guaranty Corporation or convert to cash balance pension plans without adequately protecting the retirement security of older workers.

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.

(a) IN GENERAL.—Section 206 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1056) is amended by adding at the end the following new subsection:

"(g) 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.—

"(1) IN GENERAL.—In any case in which a corporation is a plan sponsor of a defined benefit plan with respect to which a plan amendment is adopted that has the effect of—

"(A) implementing a distress termination of the plan under section 4041(c) based on bankruptcy reorganization or a termination of the plan initiated by the Pension Benefit Guaranty Corporation under section 4042 based on bankruptcy reorganization, in any case in which the plan is not sufficient for guaranteed benefits (within the meaning of section 4041(d)(2)) as of the proposed termination date; or

"(B) converting such plan to a cash balance plan, in any case in which the amendment—

"(i) results in a significant reduction in the rate of future benefit accruals (within the meaning of section 204(h)(1)) of participants with at least 10 years of service under the plan; or

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

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

"(2) TERMINATION FAIRNESS STANDARD.—A covered deferred compensation plan established or maintained by a plan sponsor described in paragraph (1) meets the termination fairness standard of this subsection with respect to a plan amendment described in paragraph (1) if, during the 5-year period beginning on the date of the adoption of such plan amendment—

"(A) no amount of deferred compensation accrues to a disqualified individual under the terms of such covered deferred compensation plan (irrespective of whether the accrual in deferred compensation is expressed in the form of a promise, a guarantee, or any other representation); and

"(B) in the case of a covered deferred compensation plan established during or after the 1-year period preceding the notice date (or any amendment to a covered deferred compensation plan if such amendment is adopted during or after such 1-year period), no distribution of accrued deferred compensation is made under such plan (or such amendment) to a disqualified individual.

"(3) DEFINITIONS.—For purposes of this subsection—

"(A) CASH BALANCE PLAN.—

"(i) IN GENERAL.—The term 'cash balance plan' means a defined benefit plan under which the accrued benefit is expressed to participants and beneficiaries as an amount other than an annual benefit commencing at normal retirement age.

"(ii) REGULATIONS TO INCLUDE SIMILAR OR OTHER HYBRID PLANS.—The Secretary shall issue regulations which provide that a defined benefit plan (or any portion of such a plan) which has an effect similar to a plan described in clause (i) shall be treated as a cash balance plan. Such regulations may provide that if a plan sponsor represents in communications to participants and beneficiaries that a plan amendment results in a plan being described in the preceding sentence, such plan shall be treated as a cash balance plan.

"(B) NOTICE DATE.—The term 'notice date' means, with respect to an amendment described in paragraph (1)—

"(i) in the case of a distress termination under section 4041(c), the date of the advance notice of intent to terminate provided pursuant to section 4041(a)(2);

"(ii) in the case of a termination initiated by the Pension Benefit Guaranty Corporation under section 4042, the date of the application to the court under section 4042(c); and

"(iii) in the case of a conversion to a cash balance plan, the date of the adoption of the amendment.

"(C) Covered deferred compensation plan.—

"(i) In general.—The term 'covered deferred compensation plan' means any plan providing for the deferral of compensation of a disqualified individual, whether or not—

"(I) compensation of the disqualified individual which is deferred under such plan is subject to substantial risk of forfeiture;

"(II) the disqualified individual's rights to the compensation deferred under the plan are no greater than the rights of a general creditor of the plan sponsor;

"(III) all amounts set aside (directly or indirectly) for purposes of paying the deferred compensation (including income), and all income attributable to such amounts, remain (until made available to the disqualified individual or other beneficiary) solely the property of the plan sponsor (without being restricted to the provision of benefits under the plan);

''(IV) the amounts referred to in subclause (III) are available to satisfy the claims of the plan sponsor's general creditors at all times (not merely after bankruptcy or insolvency); and

''(V) some or all of the compensation of the disqualified individual which is deferred under such plan is guaranteed by an insurance company, insurance service, or other similar organization.

''(ii) EXCEPTION FOR QUALIFIED PLANS.—Such term shall not include a plan that is—

''(I) described in section 219(g)(5)(A) of the Internal Revenue Code of 1986; or

''(II) an eligible deferred compensation plan (as defined in section 457(b) of such Code) of an eligible employer described in section 457(e)(1)(A) of such Code.

"(iii) PLAN INCLUDES ARRANGEMENTS, ETC.—For purposes of this subparagraph, the term 'plan' includes any agreement or arrangement.

"(D) DISQUALIFIED INDIVIDUAL.—The term 'disqualified individual' means a director or executive officer of the plan sponsor.

"(E) TERMINATION BASED ON BANKRUPTCY REORGANIZATION.—A termination of a plan which is a distress termination under section 4041(c) or a termination instituted by the Pension Benefit Guaranty Corporation under section 4042 shall be treated as based on bankruptcy reorganization if such termination is based in whole or in part on the filing, by or against any person who is a contributing sponsor of such plan or a member of such sponsor's controlled group, of a petition seeking reorganization in a case under title 11, United States Code, or under any similar law of a State or political subdivision of a State (or such a case in which liquidation is sought has been converted to a case in which reorganization is sought).

"(F) TITLE IV TERMINOLOGY.—Any term used in this subsection which is defined in section 4001(a) shall have the meaning provided such term in section 4001(a).

"(4) SPECIAL RULES.—

"(A) COORDINATED BENEFITS.—If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in paragraph (1), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

"(B) MULTIPLE AMENDMENTS.—The Secretary shall issue regulations to prevent the avoidance of the purposes of this subsection through the use of 2 or more plan amendments rather than a single amendment.

"(C) CONTROLLED GROUPS, ETC.—For purposes of this subsection, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

"(D) TREATMENT OF EARNINGS.—References to deferred compensation shall be treated as including references to income attributable to such compensation or such income.

"(5) WAIVER.—

"(A) IN GENERAL.—In the case of any plan amendment having the effect of a termination described in paragraph (1)(A), the Secretary may waive the application of any requirement of the termination fairness standard of section paragraph (2) with respect to any disqualified individual who first commences service for the plan sponsor after the notice date with respect to such plan amendment. The Secretary may grant any such waiver in the case of any such plan amendment with respect to any such disqualified individual only after consultation with the Pension Benefit Guaranty Corporation.

"(B) REQUIREMENTS FOR WAIVER.—A waiver may be granted under subparagraph (A) only—

"(i) upon the filing with the Secretary by the plan sponsor of an application for such waiver, in such form and manner as shall be prescribed in regulations of the Secretary;

"(ii) upon a showing, to the satisfaction of the Secretary, that such waiver is a business necessity for the plan sponsor, as determined under such regulations, and is in the interest of plan participants and beneficiaries, as determined under such regulations; and

"(iii) after the participants, in such form and manner as shall be provided in such regulations, have been notified of the filing of the application for the waiver and have been provided a reasonable opportunity to provide in advance comments to the Secretary regarding the proposed waiver.

"(6) EFFECT OF WAIVER GRANTED BY SECRETARY.—To the extent that any requirement of the termination fairness standard of this section is waived by the Secretary with respect to any disqualified individual under paragraph (5) in the case of any plan amendment having the effect of a termination described in paragraph (1)(A), such requirement under the termination fairness standard of paragraph (2) shall not apply with respect to such individual in the case of such plan amendment.''.

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

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

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

SEC. 102. PENALTY ON FUNDING NONQUALIFIED DEFERRED COMPENSATION PLANS IN THE EVENT OF A PENSION PLAN TERMINATION BASED ON BANKRUPTCY REORGANIZATION OR A CONVERSION OF A PENSION PLAN TO A CASH BALANCE PLAN.

(a) IN GENERAL.—Section 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) is amended—

(1) in subsection (a)—

(A) in paragraph (8), by striking ''; or'' and inserting a semicolon;

(B) in paragraph (9), by striking the period and inserting ''; or''; and

(C) by adding at the end the following:

''(10) by a fiduciary of a defined benefit plan described in section 206(g) to enjoin any act or practice that violates such section and to obtain relief described under subsection (c)(8).''; and

(2) in subsection (c), by—

(A) redesignating paragraph (8) as paragraph (9); and

(B) inserting after paragraph (7) the following:

''(8) In an action pursuant to subsection (a)(10), if the court finds a violation of section 206(g), the court shall order the plan sponsor to pay to the defined benefit plan an amount equal to the amount of the accrual described in section 206(g)(2)(A) comprising the failure or the amount of the distribution described in section 206(g)(2)(B) comprising the failure, whichever is applicable.''.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to—

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

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

TITLE II—FAIRNESS IN FUNDING

SEC. 201. PROHIBITION UNDER ERISA AGAINST FUNDING NONQUALIFIED DEFERRED COMPENSATION PLANS WHILE MAINTAINING UNDERFUNDED DEFINED BENEFIT PLANS.

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

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

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

"SEC. 308. FUNDING REQUIREMENTS WITH RESPECT TO UNDERFUNDED SINGLE-EMPLOYER DEFINED BENEFIT PLAN VIOLATED BY FUNDING OF COVERED DEFERRED COMPENSATION PLAN.

"(a) IN GENERAL.—In any case in which, as of the valuation date for any plan year of a defined benefit plan which is a single-employer plan, the funded current liability percentage of such plan is less than 75 percent, during the period beginning with such date and ending immediately before the valuation date for the following plan year—

"(1) the plan sponsor of such defined benefit plan (or any member of the plan sponsor's controlled group) may not contribute to a covered deferred compensation plan maintained by the plan sponsor (or any such member); and

"(2) a disqualified individual may not accrue any amount of deferred compensation under the terms of any covered deferred compensation plan maintained by the plan sponsor of such defined benefit plan (or by any member of the plan sponsor's controlled group), irrespective of whether the accrual in deferred compensation is expressed in the form of a promise, a guarantee, or any other representation.

"(b) DEFINITIONS; SPECIAL RULE.—For purposes of this section—

"(1) The term 'funded current liability percentage' has the meaning provided in section 302(d)(8)(B).

"(2) The term 'covered deferred compensation plan' has the meaning provided in section 206(g)(3)(C).

"(3) The term 'disqualified individual' has the meaning provided in section 206(g)(3)(D).

"(4) The term 'controlled group' has the meaning provided in section 302(c)(11)(B)(ii).

"(5) Any reference to deferred compensation shall be treated as including references to income attributable to such compensation or income.

"(c) WAIVER.—

"(1) IN GENERAL.—The Secretary may waive the application of any requirement with respect to any contribution described in subsection (a)(1) or any accrual described in subsection (a)(2). The Secretary may grant such waiver only after consultation with the Pension Benefit Guaranty Corporation.

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

"(A) upon the filing with the Secretary by the plan sponsor of an application for such waiver, in such form and manner as shall be prescribed in regulations of the Secretary;

"(B) upon a showing, to the satisfaction of the Secretary, that such waiver is a business necessity for the plan sponsor, as determined under such regulations, and is in the interest of plan participants and beneficiaries, as determined under such regulations; and

"(C) after the participants, in such form and manner as shall be provided in such regulations, have been notified of the filing of the application for the waiver and have been provided a reasonable opportunity to provide in advance comments to the Secretary regarding the proposed waiver.

"(d) EFFECT OF WAIVER.—To the extent that a waiver is granted by the Secretary under subsection (c) with respect to any contribution described in subsection (a)(1) or any accrual described in subsection (a)(2), the requirements of subsection (a) shall not apply with respect to such contribution or accrual.".

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

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to plan years beginning on or after January 1, 2006.

SEC. 202. PENALTY ON FUNDING NONQUALIFIED DEFERRED COMPENSATION PLANS WHILE MAINTAINING UNDERFUNDED DEFINED BENEFIT PLANS.

(a) IN GENERAL.—Subsection 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) is amended—

(1) in subsection (a)(10) (as added by section 101), by inserting "or 308" after "206(g)"; and

(2) in subsection (c) (as amended by section 101), by amending paragraph (8) to read as follows:

"(8) In an action pursuant to subsection (a)(10), if the court finds a violation—

"(A) of section 206(g), the court shall order the plan sponsor to pay to the defined benefit plan an amount equal to the amount of the accrual described in section 206(g)(2)(A) comprising the failure or the distribution described in section 206(g)(2)(B) comprising the failure, whichever is applicable; and

"(B) of section 308, the court shall order the plan sponsor to pay to the defined benefit plan an amount equal to the amount of any deferred compensation accrued to a disqualified individual in violation of such section.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to plan years beginning on or after January 1, 2006.

TITLE III—FAIRNESS IN DISCLOSURE

SEC. 301. DISCLOSURE WITH RESPECT TO BENEFITS UNDER NONQUALIFIED DEFERRED COMPENSATION PLANS.

(a) IN GENERAL.—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended—

(1) by redesignating subsection (j) as subsection (k); and

(2) by inserting after subsection (i) the following new subsection:

"(j) DISCLOSURE WITH RESPECT TO BENEFITS UNDER COVERED DEFERRED COMPENSATION PLANS.—

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

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

“(i) eliminating future benefit accruals under the plan;

“(ii) converting the plan to a cash balance plan in a case described in section 206(g)(1)(B);

“(iii) reducing the rate of future benefit accruals under the plan (in the case of a defined benefit plan); or

“(iv) reducing future employer contributions under the plan (in the case of a defined contribution plan); or

“(B) the plan administrator of a pension plan has filed under section 4041(a)(2) a notice of intent to terminate such plan in a distress termination under section 4041(c) based on bankruptcy reorganization or, in advance of filing such a notice, has filed a motion with the court in the proceedings relating to such bankruptcy reorganization seeking approval to commence proceedings for such a distress termination,

the plan administrator shall provide to each plan participant and beneficiary a notice under this subsection with respect to each covered deferred compensation plan maintained by the plan sponsor of the pension plan (and each member of the plan sponsor's controlled group).

"(2) NOTICE.—A notice required under this subsection with respect to a covered deferred compensation plan shall set forth, in language calculated to be understood by the average pension plan participant—

"(A) a complete summary description of the terms of the covered deferred compensation plan;

"(B) the actuarial present value of the benefit liabilities of the covered deferred compensation plan, as of the most recent valuation date of such plan;

"(C) any additional cost to the plan sponsor (or to the member of the plan sponsor's controlled group), for the preceding plan year of such plan, of maintaining such covered deferred compensation plan, including tax expenditures attributable to the maintenance of such plan (or, if not known on the date of the notice, a reasonable estimation thereof); and

"(D) in any case described in paragraph (1)(B)—

"(i) a statement that the notice of intent to terminate or motion has been filed; and

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

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

"(A) not later than 15 days after—

"(i) the date of the adoption of the amendment described in paragraph (1)(A); or

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

(as the case may be), and

"(B) in the same manner as is provided under section 104(b)(1) with respect to summary descriptions of plan modifications or changes.

"(4) DEFINITIONS; SPECIAL RULE.—For purposes of this subsection—

"(A) The term 'cash balance plan' has the meaning provided in section 206(g)(3)(A).

"(B) The term 'covered deferred compensation plan' has the meaning provided in section 206(g)(3)(C).

"(C) The term 'controlled group' has the meaning provided in section 302(c)(11)(B)(ii).

"(D) Whether a termination of a plan which is a distress termination under section 4041(c) is based on bankruptcy reorganization shall be determined as provided in section 206(g)(3)(E).".

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

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

(1) plan amendments adopted on or after January 1, 2006; and

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

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