



Position Paper Submitted to the United States Congress by the Commercial Law League of America and its Bankruptcy Section

**Regarding H.R. 4241
Deficit Reduction Act of 2005**

December 7, 2005

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and insolvency. Its membership exceeds 3,100 individuals. The CLLA has long been associated with the representation of creditor interests while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The Bankruptcy Section of the CLLA is made up of approximately 950 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and large practices, who represent divergent interests in bankruptcy cases. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

The League is in agreement with letters recently circulated by the National Bankruptcy Conference ("NBC"), the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW") [attached] opposing the pension termination surcharge provision contained in the recently passed S. 1932 Deficit Reduction Omnibus Reconciliation Act of 2005 and in the corresponding provisions now pending in the House in H.R. 4241, entitled Deficit Reduction Act of 2005. While the CLLA acknowledges the legislative attempt to improve the solvency of the Pension Benefit Guaranty Corporation ("PBGC"), the proposed surcharge will have a disastrous impact on debtor-companies attempting to reorganize and thus, also on retirees, employees and creditors.

It is critical that you reassess and consider the possible consequences of this proposal. Under H.R. 4241, a surcharge of \$1,250 per defined benefit plan participant for three years will be assessed on companies that terminate their pension plans during the pendency of bankruptcy. Thus, for example, Delta Airlines, which has approximately 28,000 retirees, would have to prove to the satisfaction of the Bankruptcy Court that it could repay a termination surcharge of \$105 million within three years in order to exit bankruptcy. If Delta could not, the Court could not approve a plan of reorganization and more importantly, greatly increase the possibility that the company could not reorganize and a liquidation would follow. Thus, not only would the retirees suffer but also the current employees, creditors and the overall airline industry. Ironically, H.R. 4241 would have the **opposite** affect on retirees and current employees, which explains the AFL-



COMMERCIAL LAW LEAGUE OF AMERICA®

CIO's and UAW's opposition to the proposal. In addition, trade creditors, that provided unsecured credit to the employers' operations (and likely helped pay retirees' and current employees' benefits and wages) would suffer losses since the PBGC would have a priority claim over unsecured creditors' claims in both reorganization and liquidation scenarios under the proposed law.

The CLLA urges that you take into full consideration the potential adverse consequences of the pension termination surcharge provisions of H.R. 4241 and oppose the proposal. For all of these reasons we urge your no vote. The CLLA thanks you for the opportunity to speak on this subject and stands ready to work with you in this regard.

Respectfully Submitted,

Jerry T. Myers
President
Commercial Law League of America

Cathy S. Pike
Chair, Bankruptcy Section
Commercial Law League of America

Randy T. Slovin
Co-Chair, Governmental Affairs Committee
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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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Honorable John A. Boehner, Chair
Committee on Education and the Workforce
House of Representatives

Honorable George Miller, Ranking Member
Committee on Education and the Workforce
House of Representatives

Honorable William M. Thomas, Chair
Committee on Ways and Means
House of Representatives

Honorable Charles B. Rangel, Ranking Member
Committee on Ways and Means
House of Representatives

Honorable F. James Sensenbrenner, Jr., Chair
Committee on the Judiciary
House of Representatives

Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
House of Representatives

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 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.

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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.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS



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LEGISLATIVE ALERT!

(202) 537-5090

October 25, 2005

The Honorable John Boehner, Chairman
House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable George Miller, Ranking Minority Member
House Committee on Education and the Workforce
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Boehner and Ranking Member Miller:

The AFL-CIO is deeply concerned that the budget reconciliation proposal currently under consideration to meet the Committee's spending target poses a significant threat to already fragile pension plans and to the income and retirement security of millions of American families.

The Chairman's proposal would impose a new Pension Benefit Guaranty Corporation (PBGC) premium in the case of terminated underfunded pension plans and increase the flat rate premium applicable to all plans. The new termination premium would be set at \$1,250 per participant, payable each year for three years after the termination (or after the company emerges from bankruptcy). The annual flat rate premium would be increased immediately to \$30 per participant (from \$19 today) and would be indexed annually to the growth in wages. The PBGC also would be given the authority to increase premiums by an additional 20 percent each and every year over the previous year's premium rate.

The AFL-CIO strongly opposes establishing a new post-termination annual premium of \$1,250 per plan participant. In some cases, this large new premium will result in the liquidation of the company and the destruction of even more jobs. In other cases, the premium cost will be borne primarily by workers and retirees through cuts in wages and benefits that are even greater than those already imposed in the bankruptcy reorganization process.

Furthermore, we are troubled by the breadth of the premium increase, particularly the broad authority granted to the PBGC to increase premiums. Congress should not cede its authority to set pension premium levels to the PBGC. The large premium increases contemplated by this grant of authority will encourage even more companies to terminate their defined benefit plans.

Thank you for consideration of our views.

Sincerely,

William Samuel, Director
DEPARTMENT OF LEGISLATION

C: All members of the Committee on House Education and Workforce



INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

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IN REPLY REFER TO

November 18, 2005

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Hon. John Boehner, Chairman
House Committee on Education and the Workforce
House of Representatives
Washington, D.C. 20515

Honorable George Miller, Ranking Member
House Committee on Education and the Workforce
House of Representatives
Washington, D.C. 20515

Dear Chairman Boehner and Ranking Member Miller:

The Committee on Education and the Workforce is scheduled to mark up its budget reconciliation legislation this coming Wednesday, October 26, 2005. We understand that this measure will increase the regular premium paid by employers to the Pension Benefit Guarantee Corporation from \$19 to \$29 per pension plan participant, give the PBGC authority to raise this premium by an additional 20 percent, and also impose a new premium of \$1250 per plan participant on companies that exit from bankruptcy proceedings after having terminated their pension plans. The UAW opposes these counterproductive provisions.

In our judgment, the PBGC should not be given authority to increase the premium beyond the \$29 level. This would impose undue burdens on employers who are already experiencing financial difficulties. It would also encourage companies to leave the defined benefit pension system, thereby hurting workers and retirees and potentially creating a "death spiral" for the PBGC.

We also strongly oppose the new \$1250 per participant premium on companies that exit bankruptcy proceedings. This enormous financial burden will simply drive more companies to liquidate in Chapter 7 bankruptcy proceedings, resulting in more job and benefit loss. In addition, this represents a back door means of giving PBGC a greater claim in bankruptcy proceedings. This will have the perverse effect of reducing the amounts received by workers and retirees in these proceedings, and in particular, could lead to more extreme cutbacks in

retiree health insurance coverage. Because of these considerations, we believe this provision raises issues within the jurisdiction of the Judiciary Committee.

For all of the foregoing reasons, the UAW opposes the pension provisions in the budget reconciliation legislation that is scheduled to be considered by the Committee on Education and the Workforce this week. Thank you for considering our views on these issues.

Sincerely,

Handwritten signature of Alan Reuther in cursive script.

Alan Reuther
Legislative Director

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cc: Members, Committee on
Education and the Workforce