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(Original Signature of Member)

108TH CONGRESS
2^D SESSION

H. R. _____

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.

IN THE HOUSE OF REPRESENTATIVES

Mr. GEORGE MILLER of California introduced the following bill; which was referred to the Committee on _____

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.



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 “Pension Fairness Act
5 of 2004”.

6 **SEC. 1. FINDINGS AND PURPOSE.**

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

8 (1) The pension system sponsored by private
9 employers is in a weakened state due to economic re-
10 cession and heightened global competition.

11 (2) Employers increasingly are terminating or
12 reducing the benefits provided under traditional de-
13 fined benefit pension plans.

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

18 (4) Defined benefit pension plans are currently
19 estimated to be underfunded up to a total of
20 \$400,000,000,000, and the Pension Benefit Guar-
21 anty Corporation, the agency that insures traditional
22 pensions, had a 2003 deficit of over
23 \$10,000,000,000.

24 (5) The Congress in enacting the Employee Re-
25 tirement Income Security Act of 1974 intended em-



1 ployers to adequately fund their pension plans and
2 did not intend for the Pension Benefit Guaranty
3 Corporation to be used as a means for restructuring
4 companies to escape their unfunded pension liabil-
5 ities.

6 (6) Cash balance pension plans were created to
7 reduce traditional defined benefit pension obligations
8 without statutory authorization, and adequate stand-
9 ards do not exist to adequately protect the pensions
10 of pension plan participants, particularly older par-
11 ticipants.

12 (7) Corporate executives often preserve or en-
13 hance executive pension and other employee benefits
14 at the same time the benefits of non-highly paid em-
15 ployees are reduced.

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



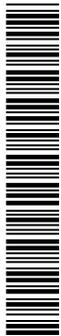
1 **SEC. 2. TERMINATION FAIRNESS STANDARD FOR NON-**
2 **QUALIFIED DEFERRED COMPENSATION**
3 **PLANS IN CONNECTION WITH A PENSION**
4 **PLAN TERMINATION BASED ON BANKRUPTCY**
5 **REORGANIZATION OR IN CONNECTION WITH**
6 **A CONVERSION OF A PLAN TO A CASH BAL-**
7 **ANCE PLAN.**

8 Section 206 of the Employee Retirement Income Se-
9 curity Act of 1974 (29 U.S.C. 1056) is amended by adding
10 at the end the following new subsection:

11 “(g) **TERMINATION FAIRNESS STANDARD FOR NON-**
12 **QUALIFIED DEFERRED COMPENSATION PLANS IN CON-**
13 **NECTION WITH A PENSION PLAN TERMINATION BASED**
14 **ON BANKRUPTCY REORGANIZATION OR IN CONNECTION**
15 **WITH A CONVERSION OF A PENSION PLAN TO A CASH**
16 **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 a plan amendment is adopted
20 that has the effect of—

21 “(A) implementing a distress termination
22 of the plan under section 4041(c) based on
23 bankruptcy reorganization or a termination of
24 the plan initiated by the Pension Benefit Guar-
25 anty Corporation under section 4042 based on
26 bankruptcy reorganization, in any case in which



1 the plan is not sufficient for guaranteed bene-
2 fits (within the meaning of section 4041(d)(2))
3 as of the proposed termination date, or

4 “(B) converting such plan to a cash bal-
5 ance plan, in any case in which the
6 amendment—

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

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

18 any covered deferred compensation plan established
19 or maintained by such plan sponsor after the date
20 of the adoption of such plan amendment shall meet
21 the termination fairness standard of this subsection
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 “(3) DEFINITIONS.—For purposes of this
23 subsection—

24 “(A) CASH BALANCE PLAN.—

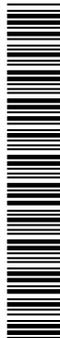


1 “(i) IN GENERAL.—The term ‘cash
2 balance plan’ means a defined benefit plan
3 under which the accrued benefit is ex-
4 pressed to participants and beneficiaries as
5 an amount other than an annual benefit
6 commencing at normal retirement age.

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

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

23 “(i) in the case of a distress termi-
24 nation under section 4041(d), the date of



1 the advance notice of intent to terminate
2 provided pursuant to section 4041(a)(2),

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

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

11 “(C) COVERED DEFERRED COMPENSATION
12 PLAN.—

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

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

22 “(II) the disqualified individual’s
23 rights to the compensation deferred
24 under the plan are no greater than



1 the rights of a general creditor of the
2 plan sponsor,

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

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

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

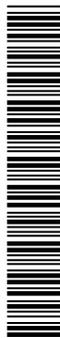


1 “(B) MULTIPLE AMENDMENTS.—The Sec-
2 retary shall issue regulations to prevent the
3 avoidance of the purposes of this subsection
4 through the use of 2 or more plan amendments
5 rather than a single amendment.

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 **“SEC. 4980H. FUNDING NONQUALIFIED DEFERRED COM-**
2 **PENSATION PLANS IN THE EVENT OF A PEN-**
3 **SION PLAN TERMINATION BASED ON BANK-**
4 **RUPTCY REORGANIZATION OR A CONVER-**
5 **SION OF A PENSION PLAN TO A CASH BAL-**
6 **ANCE PLAN.**

7 “(a) IMPOSITION OF TAX.—In any case in which a
8 corporation is a plan sponsor of a defined benefit plan with
9 respect to which an plan amendment is adopted that has
10 the effect of—

11 “(1) implementing a distress termination of the
12 plan under section 4041(c) of the Employee Retirement
13 Income Security Act of 1974 based on bank-
14 ruptcy reorganization or a termination of the plan
15 initiated by the Pension Benefit Guaranty Corpora-
16 tion under section 4042 of such Act based on bank-
17 ruptcy reorganization, in any case in which the plan
18 is not sufficient for guaranteed benefits (within the
19 meaning of section 4041(d)(2) of such Act) as of the
20 proposed termination date, or

21 “(2) converting such plan to a cash balance
22 plan, in any case in which the amendment—

23 “(A) results in a significant reduction in
24 the rate of future benefit accruals (within the
25 meaning of section 4980F(e)(1)) of participants



1 with at least 10 years of service under the plan,
2 or

3 “(B) does not provide for an election by af-
4 fected participants with at least 10 years of
5 service under the plan (and their beneficiaries)
6 to retain coverage under the terms of the plan
7 as in effect immediately prior to the amend-
8 ment,

9 there is hereby imposed a tax on any failure to meet the
10 termination fairness standard of subsection (b) with re-
11 spect to such plan amendment.

12 “(b) TERMINATION FAIRNESS STANDARD.—A cov-
13 ered deferred compensation plan established or maintained
14 by a plan sponsor described in subsection (a) meets the
15 termination fairness standard of this subsection with re-
16 spect to a plan amendment described in subsection (a) if,
17 during the 5-year period beginning on the date of the
18 adoption of such plan amendment—

19 “(1) no amount of deferred compensation ac-
20 crues to a disqualified individual under the terms of
21 such covered deferred compensation plan (irrespec-
22 tive of whether the accrual in deferred compensation
23 is expressed in the form of a promise, a guarantee,
24 or any other representation), and



1 “(2) in the case of a covered deferred com-
2 pensation plan established during or after the 1-year
3 period preceding the notice date (or any amendment
4 to a covered deferred compensation plan if such
5 amendment is adopted during or after such 1-year
6 period), no distribution of accrued deferred com-
7 pensation is made under such plan (or such amend-
8 ment) to a disqualified individual.

9 “(c) AMOUNT OF TAX.—The amount of the tax im-
10 posed by subsection (a) shall be equal to the amount of
11 the accrual described in subsection (b)(1) comprising the
12 failure or the distribution described in subsection (b)(2)
13 comprising the failure.

14 “(d) LIABILITY FOR TAX.—The plan sponsor shall be
15 liable for the tax imposed by this section.

16 “(e) DEFINITIONS.—For purposes of this section—

17 “(1) CASH BALANCE PLAN.—

18 “(A) IN GENERAL.—The term ‘cash bal-
19 ance plan’ means a defined benefit plan under
20 which the accrued benefit is expressed to par-
21 ticipants and beneficiaries as an amount other
22 than an annual benefit commencing at normal
23 retirement age.

24 “(B) REGULATIONS TO INCLUDE SIMILAR
25 OR OTHER HYBRID PLANS.—The Secretary



1 shall issue regulations which provide that a de-
2 fined benefit plan (or any portion of such a
3 plan) which has an effect similar to a plan de-
4 scribed in subparagraph (A) shall be treated as
5 a cash balance plan. Such regulations may pro-
6 vide that if a plan sponsor represents in com-
7 munications to participants and beneficiaries
8 that a plan amendment results in a plan being
9 described in the preceding sentence, such plan
10 shall be treated as a cash balance plan.

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

14 “(A) in the case of a distress termination
15 under section 4041(d) of the Employee Retire-
16 ment Income Security Act of 1974, the date of
17 the advance notice of intent to terminate pro-
18 vided pursuant to section 4041(a)(2) of such
19 Act,

20 “(B) in the case of a termination initiated
21 by the Pension Benefit Guaranty Corporation
22 under section 4042 of such Act, the date of the
23 application to the court under section 4042(c)
24 of such Act, and



1 “(C) in the case of a conversion to a cash
2 balance plan, the date of the adoption of the
3 amendment.

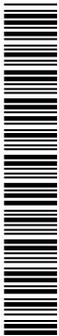
4 “(3) COVERED DEFERRED COMPENSATION
5 PLAN.—

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

10 “(i) compensation of the disqualified
11 individual which is deferred under such
12 plan is subject to substantial risk of for-
13 feiture,

14 “(ii) the disqualified individual’s
15 rights to the compensation deferred under
16 the plan are no greater than the rights of
17 a general creditor of the ,

18 “(iii) all amounts set aside (directly or
19 indirectly) for purposes of paying the de-
20 ferred compensation, and all income attrib-
21 utable to such amounts, remain (until
22 made available to the participant or other
23 beneficiary) solely the property of the
24 (without being restricted to the provision
25 of benefits under the plan),



1 “(iv) the amounts referred to in
2 clause (iii) are available to satisfy the
3 claims of the plan sponsor’s general credi-
4 tors at all times (not merely after bank-
5 ruptcy or insolvency), and

6 “(v) some or all of the compensation
7 of the disqualified individual which is de-
8 ferred under such plan is guaranteed by an
9 insurance company, insurance service, or
10 other similar organization.

11 “(B) EXCEPTION FOR QUALIFIED
12 PLANS.—Such term shall not include a plan
13 that is—

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

16 “(ii) an eligible deferred compensation
17 plan (as defined in section 457(b)) of an
18 eligible described in section 457(e)(1)(A).

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

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

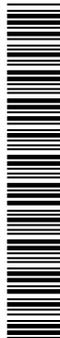


1 “(5) TERMINATION BASED ON BANKRUPTCY
2 REORGANIZATION.—A termination of a plan which is
3 a distress termination under section 4041(c) or a
4 termination instituted by the Pension Benefit Guar-
5 anty Corporation under section 4042 is ‘based on
6 bankruptcy reorganization’ if such termination is
7 based in whole or in part on the filing, by or against
8 any person who is a contributing sponsor of such
9 plan or a member of such sponsor’s controlled
10 group, of a petition seeking reorganization in a case
11 under title 11, United States Code, or under any
12 similar law of a State or political subdivision of a
13 State (or such a case in which liquidation is sought
14 has been converted to a case in which reorganization
15 is sought).

16 “(6) TITLE IV TERMINOLOGY.—Any term used
17 in this section which is defined in section 4001(a) of
18 the Employee Retirement Income Security Act of
19 1974 shall have the meaning provided such term in
20 such section 4001(a).

21 “(f) SPECIAL RULES.—

22 “(1) COORDINATED BENEFITS.—If the benefits
23 of 2 or more defined benefit plans established or
24 maintained by an are coordinated in such a manner
25 as to have the effect of the adoption of an amend-



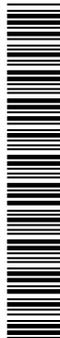
1 ment described in subsection (a), the sponsor of the
2 defined benefit plan or plans providing for such co-
3 ordination shall be treated as having adopted such
4 a plan amendment as of the date such coordination
5 begins.

6 “(2) MULTIPLE AMENDMENTS.—The Secretary
7 shall issue regulations to prevent the avoidance of
8 the purposes of this section through the use of 2 or
9 more plan amendments rather than a single amend-
10 ment.

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

15 “(4) TREATMENT OF EARNINGS.—References to
16 deferred compensation shall be treated as including
17 references to income attributable to such compensa-
18 tion or such income.

19 “(g) COORDINATION.—The Secretary and the Sec-
20 retary of Labor shall ensure, through the execution of an
21 interagency memorandum of understanding among such
22 Secretaries, that regulations, rulings, and interpretations
23 issued by such Secretaries relating to the same matter
24 over which both such Secretaries have responsibility under
25 this section and section 206(g) of the Employee Retire-



1 ment Income Security Act of 1974 are administered so
2 as to have the same effect at all times.

3 “(h) WAIVER.—

4 “(1) IN GENERAL.—In the case of any plan
5 amendment having the effect of a termination de-
6 scribed in subsection (a)(1), the Secretary may
7 waive the application of any requirement of the ter-
8 mination fairness standard of subsection (b) with re-
9 spect to any disqualified individual who first com-
10 mences service for the plan sponsor after the notice
11 date with respect to such plan amendment. The Sec-
12 retary may grant any such waiver in the case of any
13 such plan amendment with respect to any such dis-
14 qualified individual only after consultation with the
15 Pension Benefit Guaranty Corporation. The Sec-
16 retary shall promptly notify the Secretary of Labor
17 of any such waiver granted by the Secretary.

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

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

24 “(B) upon a showing, to the satisfaction of
25 the Secretary, that such waiver is a business



1 necessity for the plan sponsor, as determined
2 under such regulations, and is in the best inter-
3 est of plan participants and beneficiaries, as de-
4 termined under such regulations, and

5 “(C) after the participants, in such form
6 and manner as shall be provided in such regula-
7 tions, have been notified of the filing of the ap-
8 plication for the waiver and have been provided
9 a reasonable opportunity to provide in advance
10 comments to the Secretary regarding the pro-
11 posed waiver.”.

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

“4980H. 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.”.

15 **SEC. 4. EFFECTIVE DATE.**

16 The amendments made by this Act shall apply to plan
17 amendments adopted on or after October 8, 2004.

