

INSOLVENCY INSURANCE FOR PRIVATE PLANS

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After five years of experience in administering Title IV of the Employee Retirement Income Security Act of 1974 (ERISA),¹ the Pension Benefit Guaranty Corporation (PBGC) is presently considering proposals for substantial modification of the original structure of the plan termination insurance program that ERISA instituted in 1974. This reevaluation of some of the assumptions underlying the original provisions of Title IV suggests that the basic benefit guaranty program and its accompanying imposition of liability upon employers who terminate underfunded plans may be in need of alteration.² ERISA was designed to strengthen the integrity and financial responsibility of private retirement plans. To that end, Titles I and II of the Act contain salutary requirements with respect to participation, vesting, funding, disclosure, fiduciary accountability and other aspects of the operation of ongoing private pension plans.³ However, Congress recognized that despite the provisions of Titles I and II, some defined benefit pension plans⁴ would terminate without sufficient assets to pay promised benefits in full. To protect employees from complete or substantial loss of benefits in such

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 29, 31, 42 U.S.C.) [hereinafter cited by session law sections of ERISA];

PENSION BENEFIT GUARANTY CORPORATION, CONTINGENT EMPLOYER LIABILITY INSURANCE: STATUS REPORT TO THE CONGRESS (1978) [hereinafter cited as CELI REPORT].

1. ERISA §§ 4001-4082.

2. *See* CELI REPORT. This Article is concerned with the termination insurance program covering single employer defined benefit plans. These plans account for about 75% of approximately 30 million employees who are covered by defined benefit plans. [1977] PENSION BENEFIT GUARANTY CORP. ANN. REP. 21. Recommendations regarding multiemployer plans are presently pending before Congress.

3. ERISA §§ 1001-1034.

4. A defined benefit plan promises a participant a fixed, measurable benefit, usually related to earning levels over a specified period of time and to length of service. A defined benefit is not affected by the amount of contributions made to the plan by the employer. *See Connolly v. PBGC*, 581 F.2d 729, 733 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1278 (1979).

event, the PBGC was created under Title IV to guarantee certain basic benefits within limits defined by the Act.⁵

To provide payment of such basic benefits⁶ when an underfunded pension plan is terminated, the PBGC acts as an insurer of the plan.⁷ The premiums for this insurance are paid by all private defined pension plans.⁸ When the PBGC becomes trustee of the plan for termination purposes, it acquires the assets of the plan⁹ and can collect from the employer the amount necessary to make up any deficiencies in the plan's assets.¹⁰

Employer liability was included in the Act not only to provide the PBGC with an additional means of financing the insurance program but also, and perhaps more importantly, to deter solvent employers from abusing the system by making unrealistic pension promises and unnecessarily discontinuing plans, thus saddling the basic insurance program with all or a portion of their unfulfilled obligations.¹¹ Consequently, section 4062 imposes liability upon an employer who terminates an insufficient plan for the amount of the plan's asset insufficiency, but limits such liability to thirty percent of the employer's net worth.¹²

To alleviate further the possible adverse impact of liability upon the employer's business operations and credit, the PBGC was granted

5. ERISA § 4022. The major purposes of the PBGC are

(i) to provide participants and beneficiaries in a defined benefit plan with certain minimal guarantees as to the receipt of benefits under the plan, and (ii) to provide a mechanism for administering and distributing to participants and beneficiaries of a defined benefit plan the benefits to which they are entitled in case the plan is unable, or apparently unable, upon termination to pay such benefits.

M. CANAN, QUALIFIED RETIREMENT PLANS § 19.1, at 459 (1977).

6. A basic benefit is essentially one payable monthly as a straight life annuity. The benefits generally commence when the participant reaches age 65 and are based upon the employee's earnings and length of service. See 29 C.F.R. § 2605.4 (1978).

7. The basic benefit insurance program insures the participants of the plan against loss of benefits, but does not provide the employer with insurance against contingent liability that may stem from plan termination. See M. CANAN, *supra* note 5, § 19.1, at 461. See generally *id.* § 19.6.

8. Initially, the rate of the premium was one dollar per participant for single employer plans and 50 cents per participant in multiemployer plans. ERISA § 4006(a)(3). The premium for single employer plans was changed to \$2.60 per participant, effective for plan years beginning on or after January 1, 1978. Act of December 19, 1977, Pub. L. No. 95-214, 91 Stat. 1502, to be codified at 29 U.S.C. § 1381.

9. ERISA § 4042(d)(1)(A)(ii).

10. *Id.* § 4062. Other than funds generated through investment of plan assets, see *Id.* § 4042(d)(1)(A)(iii), the premiums (and income thereon), plan assets and employer liability are the only sources of revenue for the PBGC. The United States is not liable for any of the PBGC's obligations. *Id.* § 4002(g)(2).

11. S. REP. NO. 383, 93d Cong., 1st Sess. 89 (1973), reprinted in 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1157 (1976).

12. ERISA § 4062(b)(2).

discretionary authority to enter into arrangements for deferred payment terms.¹³ Pursuant to section 4023 of the Act, it was also contemplated that a program of contingent employer liability insurance (CELI) would be developed by the PBGC to insure employers against liability. The PBGC had authority to make CELI either mandatory or voluntary.¹⁴

In summary, although ERISA does not restrict an employer's right to terminate its plan, once an employer has terminated its plan several provisions of ERISA would come into play. First, if the guaranteed benefits could not be provided from the plan's assets, the PBGC, as trustee, would provide, through the plan termination insurance program, the plan's participants with the basic benefits guaranteed under ERISA. Second, in such event, the employer would be liable to the PBGC for the insufficiency up to a maximum of thirty percent of the employer's net worth upon termination. Third, to protect employers from the contingent liability imposed upon termination, the PBGC could set up a CELI program.

This Article appraises the current method of handling plan termination under ERISA and suggests that a more realistic approach to plan termination might involve elimination of the immediate imposition of liability in the case of ongoing employers, limitation of plan termination insurance to insolvency situations and elimination of CELI. Transforming the present structure of unrestricted plan termination into an insolvency insurance program could serve to strengthen the maintenance and the integrity of the private pension system at an acceptable premium cost that might be lower than the foreseeable cost under Title IV of ERISA. Examining this prospect is pertinent when the necessity and the desirability of the private pension system, as opposed to a government-administered retirement program, is being questioned.¹⁵

I. PLAN TERMINATION INSURANCE, EMPLOYER LIABILITY AND CELI

On July 1, 1978, after more than three years of study and effort to develop a workable CELI program, the staff of the PBGC reported its conclusion to Congress that CELI, as contemplated by section 4023 of

13. *Id.* § 4067; S. REP. NO. 383, *supra* note 11, at 88-89, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 11, at 1156-57.

14. ERISA § 4023(b).

15. *Califano Raises Doubts on Private Pensions*, Pensions & Investments, Apr. 24, 1978, at 1, col. 1.

ERISA, was neither feasible nor desirable.¹⁶ This determination was motivated primarily by a conceptual and pragmatic conviction that an insurance program insulating ongoing and solvent employers from all or substantially all liability for plan termination would, in effect, eliminate employer liability from the Act. Such a result would upset the original structural balance between employee protection and abuse of the system that guaranty of employee benefits and accompanying employer liability were designed to accomplish.¹⁷ A CELI program could well encourage unnecessary terminations by otherwise financially sound employers and thus shift the cost of the unfunded liabilities of their plans to the other premium payers of the system who are required to support the termination insurance program.¹⁸

The CELI analysis has also led to a reconsideration of the time when termination insurance should become available and of the present statutory structure of employer liability.¹⁹ The PBGC staff's major concern with the present design of the termination insurance program was the unilateral ease with which an ongoing employer could abandon its commitment to its pension obligations when its business condition did not necessarily require or warrant complete plan termination. Because ERISA places no limitations upon an employer's decision to terminate a plan (other than potential liability for unfunded obligations) and because termination insurance is available to employees without any prior condition, financial convenience, rather than financial difficulty, can be the reason for termination. The thirty percent of net worth limitation²⁰ on employer liability enables ongoing and otherwise financially sound employers with sizeably underfunded plans to relieve themselves of their administrative and financial burdens at a maximum cost of thirty percent of their net worth.²¹ In many cases, recovery of employer liability by the PBGC has accounted for only a relatively small portion of the guaranteed benefits that the PBGC is required to

16. CELI REPORT 2, 5.

17. "Employer liability was imposed by Congress primarily to deter unrealistic pension promises, to discourage unnecessary terminations and to protect against possible abuse of the basic program. CELI would eliminate such liability and remove an essential cost control from the termination insurance program." CELI REPORT 3.

18. *Id.* 4.

19. *Id.* 5-6.

20. In effect, equity owners of terminating employers are already insured to the extent of 70% of their net worth. CELI would merely have increased such coverage to a higher percentage.

21. Thirty percent of the net worth of a corporation could amount to a substantial liability. This limitation on potential liability for nonpayment of a debt has few parallels in law. For instance, a corporate maker of a promissory note lacks the comforting knowledge that should it fail to pay the note upon tender, its obligation is limited to 30% of its net worth. In effect, for employers, § 4062(b)(2) gives the equity owners of a business double-limited liability: first, limited to the extent of their equity investment; and second, limited to only 30% of such investment.

pay employees of the terminated plan.²² The deficit necessarily must be absorbed by the community of premium payers under the basic program.

This possibility could indicate that the present program might not be fulfilling the first of the three statutorily stated purposes of Title IV—"to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants . . ."²³ If employers can, with relative impunity, abandon their plans and shift the major burden of their pension promises to the termination insurance program at a time that would be financially advantageous to them, the present provisions of ERISA could well encourage termination rather than continuance of such plans.

A recent survey has compared unfunded pension liabilities to the net worth and to the operating income of more than 1,500 major corporations.²⁴ Several of the firms in the survey listed unfunded vested liabilities of between twenty-five percent and thirty-five percent of their net worth. For some, the unfunded pension liabilities exceeded fifty percent of net worth.²⁵ These numbers could, of course, change with a fair market value standard for the measurement of net worth, but it is reasonable to assume that the presentation of stockholders equity at book value is as likely to overstate a company's fair market value as it is to understate it.²⁶ No matter how net worth is measured, however, there is good reason to believe that many companies sponsoring pension plans have unfunded liabilities that account for a large percentage of employer net worth. Nonetheless, in most instances the sponsors are fully capable of discharging the liabilities. For example, the unfunded vested benefits of 100 major companies in another recent survey totalled \$18.5 billion, approximately 7.2% of the net worth of the 100 corporations.²⁷

22. PBGC ANN. REP., *supra* note 2, at 27.

23. ERISA § 4002(a).

24. *See* INVESTORS MANAGEMENT SCIENCES, INC., UNFUNDED PENSION LIABILITIES 1977 (1977). Net worth was measured on a book value basis. *Id.* iv.

25. *Id.*

26. For example, many companies in the natural resources industries (*e.g.*, paper and mining) may carry real estate assets at historical cost rather than market value. In many cases this undervalues a company's assets. Such a conclusion could also be drawn with respect to service industries and other labor intensive businesses that operate without the need for large amounts of capital but that have a higher margin of profit. On the other hand, manufacturing firms in specialized industries, or ones with outdated plant and equipment, may, in many instances, find the company's fair market value less than listed stockholder equity.

27. *Unfunded Pension Liabilities: A Continuing Burden*, BUS. WEEK, Aug. 14, 1978, at 60-61. Only three of the 100 companies had unfunded vested benefits in excess of 50% of their corporate net worth. *Id.*

Many members of the pension community, including members of the CELI Panel, think that it is inappropriate to relieve an ongoing employer of its pension obligation through the use of net worth limitations when the sponsor is financially capable of meeting that obligation over a reasonable period of time. Thus, one may question whether the current thirty percent net worth limitation on employer liability should be applicable in all circumstances and whether the net worth limitation operates effectively as a cost control device for the termination insurance program.

Second, the necessity of making the net worth calculation has proven to be very burdensome and expensive. Net worth is an extremely difficult valuation to make in practice. The statute calls for a definition of net worth that "best reflects . . . the current status of the employer's operations and prospects at the time . . ." ²⁸ As a result, net worth is not viewed as an accounting concept, but as the fair market value of the business. In situations where net worth might become a limiting factor for employer liability, disputes inevitably arise as to the appropriate methodology to be applied in measuring net worth and the exact amount of the valuation.

Third, the PBGC presently may lack sufficient flexibility to respond to the financial problems faced by employers following plan termination. Although many situations involving financial hardship can be solved through the use of deferred settlement, not all can be, especially in cases of employers on the edge of bankruptcy. ²⁹ Furthermore, even in the case of deferred payment terms, ³⁰ it was not presumed that they would be universally available to all employers, but rather that the PBGC would exercise some degree of selectivity in granting such terms. ³¹

The present sections of Title IV that provide relief from employer liability thus may in some instances provide too much relief (thirty percent of net worth limitations) ³² and in other instances too little relief (repayment terms). ³³ There is good reason to question whether simply

28. ERISA § 4062(c)(1).

29. Where temporary cash flow problems exist, deferred terms ordinarily would be appropriate. Where business failure appears imminent, deferred terms would put the PBGC at risk and could result in default that would have an impact upon premium dollars and premium payers.

30. Under § 4067 of ERISA, the PBGC is authorized to arrange for equitable and appropriate deferred payment terms.

31. During the legislative process, the Senate Finance Committee cautioned that deferred terms should not be used to "defeat the purpose for imposing this contingent liability — deterrence of unrealistic promises and of abuse of the insurance system." S. REP. NO. 383, *supra* note 11, at 89, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 11, at 1157.

32. ERISA § 4062.

33. *Id.* § 4067.

eliminating CELI³⁴ would leave the imposition of employer liability as it should be. Repeal of section 4023 would still leave the termination insurance program with other potential weaknesses. The easy access to voluntary terminations by solvent employers can lead to unnecessary benefit losses for plan participants and cause the PBGC administrative expense to be passed on to other plan sponsors through premiums. It was a concern over these consequences that led the CELI Panel and the PBGC staff to consider alternative approaches to the plan termination insurance process.³⁵ These alternatives would, in varying degrees, transform the termination insurance program from one based on voluntary terminations into one where the insurable event was keyed to business hardship or to employer insolvency. If properly implemented, an insolvency insurance program could substantially lower the potential guaranty and administrative costs of the present program, persuade employers to make their commitments to defined benefit plans more realistically sustainable and ultimately assure greater benefits to employee participants.

II. INSOLVENCY INSURANCE

Various approaches to insolvency insurance, which the staff of the PBGC is presently considering, might better implement the purposes of ERISA than the present provisions for termination insurance. This section will: first, describe the two proposals made to Congress for possible implementation of an insolvency program;³⁶ second, outline a third alternative that has been formulated since the CELI report was presented to Congress;³⁷ and finally, discuss the West German and Swedish insolvency insurance programs, all of which suggest that insolvency insurance may be, to some extent, a practical alternative to the present termination insurance program.

A. *The CELI Panel Proposal: Alternative A.*

Under the CELI Panel's³⁸ proposal, the PBGC would still provide plan termination insurance for any plan termination now qualifying under ERISA. Irrespective of the reasons for termination, the employer would not be immediately liable to the PBGC for the entire un-

34. *Id.* § 4023.

35. *See generally* CELI REPORT.

36. *See id.* 35-50.

37. Appendix I sets forth in tabular form the main features of the present statute and the three alternative proposals described in notes 38-72 *infra* and accompanying text.

38. The members of the panel are listed in REPORT TO THE PBGC ADVISORY COMM. app. A, reprinted in CELI REPORT app. II, at xiii.

funded amount. Instead, the employer would be liable for equal annual payments, approximating the contribution level, until the entire unfunded obligation has been satisfied.³⁹ This provision would eliminate the possibility of a single immediate payment of the liability, thus providing significant relief to all terminating sponsors.⁴⁰

To deter the attractiveness of plan termination that automatic deferral of payments would provide under the Panel proposal⁴¹ and, in part, out of a conviction that "those employers who were financially capable of living up to their commitments should be required to do so,"⁴² the CELI Panel proposed that the thirty percent net worth limitation on an ongoing employer's liability be eliminated and that the thirty percent net worth limitation might only become applicable to an employer who ceases doing business.⁴³ Thus, if an ongoing business terminated its plan, there would be no limitation on liability.⁴⁴ If a plan were terminated in conjunction with a liquidation of the corporation, there might be a thirty percent net worth limitation on liability.⁴⁵ In addition to requiring employers to fund their contractually-incurred obligations after termination, this proposal would reduce the number

39. CELI REPORT 35, 37, app. II, at iii-iv.

40. ERISA § 4067 provides the PBGC with the power to arrange for deferred payment of liabilities as the PBGC "deems equitable and appropriate," but it is clear from the legislative history that such power was not to be exercised unless it could be justified by business hardship. See authorities cited in note 13 *supra*.

41. CELI REPORT 37-38.

42. *Id.* 38.

Many businesses that do not have large net worth could still be capable of discharging significant financial obligations over time. For example, service industries can conceivably generate sufficient cash flow to pay for their pension liabilities. The use of net worth limitations to reduce the pension obligations of a healthy employer was considered an unfair burden to place on responsible employers through the premium system.

Id. 38-39.

43. *See id.* 36, 37-39.

44. *Id.* app. II, at x-xi. "The main problem that CELI was to solve—buffering the single sum employer payment on plan termination—could be solved better by not creating the problem: simply have the employer continue to fund until the job is done." Unpublished comments of H. Givens presented at the DUKE LAW JOURNAL's symposium entitled "Pension and Profitsharing Plans: Further Considerations," Washington, D.C. (Oct. 27, 1978) (on file at DUKE LAW JOURNAL).

45. The panel considered the net worth limitation unnecessary under its proposal. Because the limitation is a means of avoiding what might be a difficult single sum liability to pay at the time of plan termination, the provision for amortization of the liability would eliminate that impact. REPORT TO PBGC ADVISORY COMM. app. B, reprinted in CELI REPORT app. II, at xviii. However, the panel conceded that a continuance of the 30% net worth limitation "is a logical consequence of replacing the requirement of a single sum payment with a continued annual funding, since . . . [the continuation of the limitation on liability] provides an equivalent reinsurance to credit sources," who might otherwise be unwilling to lend to a corporation with a significant contingent liability for termination. REPORT TO PBGC ADVISORY COMM. app. C, reprinted in CELI REPORT app. II, at xix.

of net worth determinations and would correspondingly reduce a complex and costly administrative workload element of the present basic benefits program at the time of voluntary plan termination.⁴⁶

To provide additional relief for financially troubled sponsors who have terminated their plans, businesses that have suffered three consecutive years of operating losses exceeding one-half of the cumulated earnings of the three years preceding the loss years would receive a waiver of \$10,000 of the next annual payment under the CELI Panel's proposal.⁴⁷ In addition, the proposal would waive up to \$1 million per annual payment during any year in which the employer is undergoing a court-supervised reorganization under the Bankruptcy Act.⁴⁸

B. *The PBGC Staff Proposal: Alternative B.*

The staff proposal (Alternative B) would essentially tie PBGC termination insurance to employer insolvency or bankruptcy. This would be accomplished by making the accumulated liabilities of the pension plan a legal liability of the employer.⁴⁹ As such, plan termination could occur only in the context of bankruptcy, business termination or when plan liabilities were fully liquidated or discharged as, for example, through lump sum distributions or annuity purchases for plan benefits. Under this concept, at a minimum, continuing employers would be permitted to eliminate future accruals, but would be required to continue their plans and to credit future service for vesting purposes.⁵⁰ As is now required in the case of a frozen plan,⁵¹ funding would be required to cover such future service for vesting purposes.

If an employer terminated its business and underwent liquidation, the pension plan would be treated like any other creditor and share in the liquidated assets. If the plan's share of the assets could not provide guaranteed benefits, the PBGC would make up the difference with premium monies.⁵² If an employer was undergoing reorganization or a rearrangement of debt under new Chapter 11 of the Bankruptcy Act,⁵³ settlement of the plan's claim would be a component of such reorgani-

46. CELI REPORT 36.

47. *Id.* 36, 40.

48. *Id.* 36, 39. This proposal reflects the belief that the bankruptcy courts are an appropriate arena in which to recognize business hardship. "The \$1 million ceiling on waivers would provide full coverage for over 99% of the sponsors of covered plans but still protect the insurance program from the possibility of a single destructive claim." *Id.* 39.

49. *See id.* 42. This approach raised questions as to how it might affect the treatment of pension liabilities on the balance sheet.

50. *See id.* 44.

51. *Id.*

52. *Id.* 47.

53. Pub. L. No. 95-598, 92 Stat. 2549 (1978), to be codified at 11 U.S.C. §§ 1101-1174.

zation.⁵⁴ The pension plan's claim on behalf of participants would be filed along with those of the employer's other creditors by an independent trustee⁵⁵ appointed to protect the plan's claim during the bankruptcy proceedings.

If the court-approved plan of business reorganization resulted in satisfaction of the plan's claim in an amount sufficient to pay benefits on a level that would be guaranteed by the PBGC but less than that promised by the plan, the plan would be restructured to reflect the lower benefit level as provided by the reorganization plan.⁵⁶ The employer would be required to meet the funding standards for the plan at the new benefit levels and would retain responsibility for its administration. The PBGC would become involved only if the business subsequently terminated at a time when plan assets were not sufficient to pay guaranteed benefits.

If the confirmed plan of reorganization reduced the employer's obligation to the plan to an extent that required the restructuring of benefit levels below guaranteed benefits, then an insurable event would occur.⁵⁷ The PBGC would: first, become permanent trustee of the plan; second, assume the obligation to pay guaranteed benefits; and finally, take over the plan's assets, including the plan's reduced claim against the employer as determined under the plan of reorganization and as confirmed by the court. The employer's liability would be limited to this court-determined amount and PBGC premium revenue would fund the difference necessary to pay guaranteed benefits.⁵⁸ To the extent that the proposed plan of reorganization would thus require termination insurance, the PBGC would expect to play a role in the bankruptcy process to ensure that the proposed bankruptcy reorganization plan was fair to the PBGC.⁵⁹

In both situations (bankruptcy and business termination) in which PBGC premium dollars would be involved, there would be no direct assessment of employer liability by the PBGC. Rather, the employer's obligation would be transformed into a direct liability to its pension plan. Any relief from an employer's liability to the plan would occur in the context of bankruptcy proceedings.

Alternative B would eliminate the thirty percent net worth limitation on liability for insufficient funding and make an ongoing sponsor

54. See CELI REPORT 45.

55. The trustee would probably be the PBGC as an interim trustee under ERISA § 4041(g).

56. See CELI REPORT 44-45.

57. *Id.* 47.

58. *Id.*

59. *Id.*

liable to the plan for unfunded benefits, as opposed to liability to the PBGC for insufficient funding of guaranteed benefits as now provided for by ERISA.⁶⁰ This liability under Alternative B would be tempered by the fact that the pension plan would be on par with other general creditors in bankruptcy liquidation or reorganization proceedings for its share of the assets or place in the priority of debts owed. Only if the respective bankruptcy proceeding failed to provide assets sufficient to fund guaranteed benefits, would the PBGC have to step in to make up the difference.⁶¹

C. *The Evolution of Insolvency Insurance: Alternative C.*

After submitting to Congress the CELI report, which contained both Alternatives A and B, the CELI Panel and the PBGC staff met and formulated another possible substitute for termination and contingent liability insurance—Alternative C. This approach responds to a key criticism of Alternative B—the prevention of any access to voluntary termination by an ongoing sponsor.⁶²

As its central feature, Alternative C preserves from Alternatives A and B a separation of the concepts of voluntary termination and of an insurable event. Although the two might occur simultaneously, they are treated as distinct. Voluntary termination under Alternative C would have different consequences than those that occur when a plan terminates under the present Act. When a plan terminates under the current provisions of Title IV, the employer is relieved of all future funding obligations, even though the employer continues as an ongoing business. All future benefit accruals cease, and there is no future service credit for vesting purposes. If the terminated plan's assets are not sufficient to pay the vested benefits that are guaranteed under Title IV, the PBGC becomes trustee of the plan. To the extent that employer liability does not make up the funding insufficiency, the PBGC uses premium dollars to satisfy its benefit guarantees.

Under Alternative C, an employer would still be permitted to terminate a plan voluntarily, but if the employer remains in business the obligation of the employer to make contributions for unfunded vested benefits would continue.⁶³ A termination would occur when the plan

60. ERISA § 4062(b).

61. Alternative B would also significantly reduce the administrative expense presently incurred by the PBGC. For instance, the need for determining the net worth of an ongoing corporation would be eliminated.

62. "The main trouble with Alternative B is that there is now no way to terminate a plan—which is a matter not just of form, but of substance: there is no way to stop the vesting clock until vested benefits are fully funded." Comments of H. Givens, *supra* note 44, at 4.

63. The PBGC would not become trustee of the plan and there would be no need to call

was amended to provide that future service will no longer be credited for either benefit accrual or for vesting purposes. The sponsor would thus be able to limit the benefits to be provided by the plan at their then vested levels. However, several other results would also stem from termination.

First, the plan's schedule for funding vested benefits would be accelerated to require funding within a reduced period, for instance ten years.⁶⁴ When the plan's assets were sufficient to liquidate its obligations,⁶⁵ a distribution could occur and the employer would have no further obligation to the plan or to the PBGC. Until that time, the sponsor would be required to continue funding the plan on the accelerated schedule.⁶⁶

Second, certain other technical adjustments would have to be made. The plan would also have to be amended to provide for the cessation of benefit accruals attributable to future salary increases for employees whose interests are already vested. The sponsor would have to eliminate supplemental and ancillary benefits, such as death and disability benefits, for which the conditions precedent to entitlement had not yet been fulfilled.

Following a voluntary termination, employers ceasing business operations would be expected to discharge their pension obligations as they would those of any other creditor. If the obligations could be met from the plan's or the employer's assets, the liquidating sponsor would have no further liability. If the business was liquidating, the pension plan claim would share in the liquidated assets of the business as a general creditor. If the plan's claim could not be satisfied in an amount sufficient to provide for guaranteed benefits, an insurable event would occur. The PBGC would become trustee and provide the guaranteed benefits.

Thus, under Alternative C, an insurable event occurs, with attendant PBGC involvement, only when the sponsor is financially unable to provide guaranteed benefits that participants are entitled to receive

upon premium dollars for benefit payments or administrative expense until the employer either became insolvent or went out of business.

64. "The essence of Alternative C is to allow the vesting clock to stop if the sponsor wants it badly enough to pay for it by a faster pace of funding." Comments of H. Givens, *supra* note 44, at 4.

65. The obligations could be liquidated through a purchase of annuities or through payment of lump sums, if permitted by the plan.

66. Following voluntary termination, if a plan sponsor found itself unable to meet its funding obligations under the alternative funding schedule, the sponsor could seek partial funding waivers. If the partial funding waivers proved to be inadequate relief, the distressed sponsor could only resort to bankruptcy reorganization. See text accompanying notes 53-59 *supra*.

under the plan. Normally, this inability will occur in the bankruptcy court in a reorganization or an insolvency proceeding. Direct PBGC involvement would then be limited to situations in which the sponsor is undergoing reorganization or liquidation and would not occur automatically on voluntary termination.

D. *The Comparative Merits of Alternatives A, B and C.*

The alternatives to CELI all possess a certain common theme, namely, the deferral of some (or all) of the present consequences of voluntary termination. In the case of Alternative A, employer liability is deferred from the date of plan termination to a schedule of yearly payments, and all other consequences of plan termination remain the same.⁶⁷ If, during the period of deferred payment, business hardship (primarily in the form of bankruptcy proceedings) should occur, additional relief would become available. In the case of Alternative B, benefit reductions or plan termination would be permitted only during bankruptcy reorganization, and thus, access to termination would be related to business hardship or plan sufficiency. Alternative C is an intermediate approach that permits the elimination or reduction of certain plan benefits prior to business hardship, but limits PBGC involvement to an insurable event that may occur at a later date.

Although Alternative A shifts the focus of the PBGC's financial assistance away from plan termination to business hardship, as evidenced by bankruptcy or insolvency, the proposal raises two concerns. First, readily available time payments for employer liability may induce terminations by strong employers in plant shutdown and liquidation situations, particularly where there is a substantial difference between vested liabilities (as in a frozen plan) and guaranteed liabilities (as in a terminated plan).⁶⁸ Such induced terminations could bring with them unnecessary benefit losses for plan participants. Second, the Panel's approach would have little impact on the cost of PBGC's case processing operations and of the ongoing administration of plan assets and benefits.⁶⁹

67. For instance, the present restriction to *guaranteed* benefits for participants and the provisions for PBGC trusteeship and benefits administration would remain applicable.

68. In other words, by terminating under Alternative A, a sponsor could reduce its obligations under the plan from the promised level of benefits to the guaranteed level of benefits without incurring any special penalty, since the sponsor's annual obligation to the plan would be approximately the same before and after the termination. See notes 39-40 *supra* and accompanying text.

69. The administrative burden that plan terminations have placed upon the PBGC is significant. Between July 1, 1978 and September 30, 1978, the PBGC opened 1,002 plan termination cases while closing 1,284 plan termination cases. At the end of that period, the PBGC was serving

Alternative B builds upon the Panel's proposals. It attempts to reduce unnecessary benefit losses to participants and to delay the administrative involvement of the PBGC in situations in which the employer is financially capable of meeting its minimal responsibilities to the plan. Alternative B could be expected to have a significant impact on both the private pension system and the termination insurance program.⁷⁰ However, Alternative B has been viewed to possess certain disadvantages. Probably the most significant is Alternative B's impact on an employer's finances and accounting procedures. Making pension liabilities the equivalent of an employer's legal obligations might aggravate the issue of whether such liabilities should be disclosed as "full fledged" corporate liabilities on the balance sheet or be reflected in the footnotes.⁷¹

There is some apprehension that requiring the inclusion of pension liabilities on the balance sheet as a liability could create unforeseen disruptions in the financial affairs of many companies by, among other things, placing them in violation of existing indenture agreements and loan covenants. Depending on the treatment of such liabilities on the income statement, significant reductions in reported income might also result. Beyond these concerns lies the broader question as to the impact of such "new" balance sheet liabilities on the availability and cost of capital. While lenders and securities analysts are already paying more careful attention to currently footnoted pension liabilities, it is unclear whether elevating such liabilities will affect their evaluation of a business.

Other areas that raise concerns include, for example, the impact of the alternative proposals on plan formation and benefit improvements, especially for small employers and smaller plans. These alternatives may not make defined benefit plans more attractive to small employers, and thus may not bring defined benefit coverage to workers not currently covered under such private plans.⁷²

as trustee for 266 terminated plans. PBGC Fourth Quarter Bulletin, *reported in* [1975-1979 Transfer Binder] PENS. PLAN GUIDE (CCH) ¶25,267.

70. Fewer plan terminations would mean fewer claims against the insurance system and lower administrative costs to the PBGC. This, in turn, would help to keep premium rates down.

71. The proper disclosure of pension liabilities under the current law is presently a major issue within the private sector. Recent decisions on related issues and disclosure drafts issued by the Financial Accounting Standards Board suggests that the accounting profession itself may conclude that pension liabilities should be reported as real corporate liabilities. This issue may very well be decided without considering the potential effects of adopting alternatives A, B or C.

72. For example, the elimination of voluntary termination for the ongoing sponsor in Alternative B has provoked the following criticism:

Plans are terminated for many reasons, none of which, fortunately, has yet to require justification to the PBGC or other governmental agency. The day when such justifica-

The main difference in the various formulations of employer liability under Alternatives A, B and C concerns the amount of freedom given solvent employers in dealing with benefit problems. Alternative C maintains the flexibility presently available to employers under ERISA (for instance, the ability to eliminate non-vested benefits by terminating under the current statute) but takes away the freedom to transfer to a government agency the responsibility for administering plan benefits and for assuming investment risks. Alternative C also attempts to respond to the financial and accounting concerns raised by Alternative B by defining the events that trigger "legal" liability in terms of business termination, voluntary plan termination, filing for bankruptcy, or some other critical event, rather than at the dates the benefits accrue.

E. *The Feasibility of Insolvency Insurance: The Foreign Experience.*

Insolvency insurance may be a practical alternative to the present combination of plan termination insurance, imposition of employer liability and the originally proposed program of contingent employer liability insurance. Several foreign countries, notably West Germany and Sweden, have insolvency insurance programs in effect at the present time.⁷³ The experience of these two countries, thus far, demonstrates not only that insolvency insurance may be a feasible method of providing protection to plan participants, but also that such protection can be maintained largely through the efforts of the private sector.

In both West Germany and Sweden, under enabling legislation, private industry formulated and now administers their pension insurance programs.⁷⁴ The method of funding pension plans, the approach

tion will be required will be the day when no more plans are created and no more benefits are liberalized. In a free market, economic resources are allocated to what is perceived, rightly or wrongly, to be the most effective use; if an employer concludes that the game is no longer worth the candle, he must be free to bring his plan to an end. What you cannot get out of, you will never voluntarily enter into.

Comments of H. Givens, *supra* note 44, at 9.

On the other hand, all three alternatives eliminate the threat of immediate imposition of employer liability upon termination. ERISA § 4062. In one survey, 38.3% of the terminating employers responding reported that this potential liability had a "very large" effect on the decision to terminate, 19.6% reported a "moderate" effect on the decision and 30.1% reported "little or no" effect on the decision. A large percentage of the responding sponsors were small employers with relatively small plans. SUBCOMM. ON SBA AND SBIC LEGISLATION AND GENERAL SMALL BUSINESS PROBLEMS OF THE HOUSE COMM. ON SMALL BUSINESS, ERISA QUESTIONNAIRE RESULTS (1977), reprinted in [1975-1979 Transfer Binder] PENS. PLAN GUIDE (CCH) ¶ 25,194. To the extent the alternatives eliminate the "one-shot" liability, the attractiveness of pension plans may be enhanced.

73. See Röper, *Germany—New Legislation on Employee Benefits*, BENEFITS INT'L, Mar. 1975, at 10, 11; *Book Reserve Or Insurance Is Permitted For Financing Swedish Pension Benefits*, EMPLOYEE BENEFIT PLAN REV., Feb. 1979, at 44.

74. See Röper, *supra* note 73, at 10; *Swedish Pension Benefits*, *supra* note 73, at 44.

to plan termination and the method of providing termination insurance for plan participants are quite different from the methods under ER-ISA but may be worthy of consideration as alternatives to present practices in the United States.

Most employers in West Germany and Sweden are permitted to finance their pension promises through the "book reserve" method of funding.⁷⁵ This method of funding involves annual transfers on a company's income statement and balance sheet to reflect amounts set aside to cover past accrued and currently accruing benefits. These transfers are tax deductible by the employer at the time they are made under regulations specifying the method of calculating the transfers.⁷⁶ Although the tax advantages accrue to the employer at the time the reserves are created, actual payment of benefits to retirees is deferred until the benefits become due.⁷⁷

The book reserve method enables an employer to retain the monies necessary to fund its pension obligations and to use them to finance its own growth and development. Book reserves were originally introduced in West Germany as a means of easing the cash flow and capital problems of private industry following the devastation of World War II.⁷⁸ Similarly, Sweden permits book reserve funding, under more stringent requirements than West Germany,⁷⁹ as a catalyst for the formation of private pension plans and as a retained source of capital for private industry development.⁸⁰

Book reserve funding consists of an adjustment on the books of an employer, and the integrity of any particular book funded plan may ultimately depend upon the business fortunes of the employer. However, it does comprise prefunding of the plan to the extent that the employer's assets are earmarked for satisfaction of pension plan obligations. The difference between book reserve funding and the present system of funding used in the United States is that under book reserve funding the pension plan assets are invested in the employer's own business, rather than diversified by investment in a variety of other businesses. Obviously, there are hazards in the lack of diversification

75. Not all employers in countries that permit book reserving have unrestricted access to such methods of funding. For instance, in Sweden an employer must undergo an initial credit check and subsequent reviews every five years in order to finance its plan through book reserves and be eligible for insolvency insurance. See *Swedish Pension Benefits*, *supra* note 73, at 44-45.

76. See Irons, *Book Reserving in Germany—The Use of Insurance*, *BENEFITS INT'L*, Apr. 1977, at 6, 7.

77. *Id.* See also, Fürer & Rössler, *Profile on Germany*, *BENEFITS INT'L*, Nov. 1976, at 7,11.

78. Fürer & Rössler, *supra* note 77, at 11.

79. See note 75 *supra*.

80. See *Swedish Pension Benefits*, *supra* note 73, at 46.

of such investment risk.⁸¹

To protect employees against exposure to loss of benefits under a book reserve system, the German and Swedish systems provide insolvency insurance for employees. Unlike the present system of plan termination insurance under ERISA, these continental insolvency insurance systems are administered by nongovernmental insurance companies. A pool of private insurers offers single premium annuities for entitled employees whose employers become insolvent. All employers maintaining plans in those countries and who use the book reserve system pay premiums that are available to purchase the annuities for employees whose insolvent employers are unable to continue their plans.⁸²

Concomitant with allowing book reserve funding and providing private insolvency insurance under the Swedish and West German pension plan systems, employers are expected to continue their private pension plans once instituted. Contrary to the freedom under Title IV that American employers now have to terminate or cease future benefit accruals under plans that they sponsor,⁸³ the foreign employers must continue accruals under their plans until they become insolvent and go out of business.

There are differences between the German and Swedish programs. For example, in Germany, all plans using the book reserve method are obligated to pay premiums for insolvency insurance and their employees become automatically covered by annuities furnished by a consortium of private insurers if their employer becomes insolvent.⁸⁴ On the other hand, in Sweden, an employer may use the book reserve method if the private insurance pool decides, on a risk assessment basis, to make insolvency insurance available to that employer.

For purposes of exploring the feasibility and desirability of an insolvency approach to plan termination insurance in this country, it is

81. It has been noted that

[i]f booking were the mandatory practice here, it would clearly lead to a less effective use of funds overall, since not every plan sponsor has equal economic use for them. If book reserving were optional here, it could in some instances reduce the cost of acquiring capital for sound business expansion, but at the risk of making too easy in other circumstances the use of funds in ventures that are either less rewarding or less sure. This "Balkanization" of the sources of investment capital can only impair markedly the efficiency of the present deep capital markets of the United States, which are unique in the world, with no prospect of anything but overall impairment of the investment return on pension funds, and on all other funds as well.

Comments of H. Givens, *supra* note 44, at 7-8.

82. See Röper, *supra* note 73, at 11; *Swedish Pension Benefits*, *supra* note 73, at 44.

83. See ERISA § 4041. Of course, collective bargaining agreements may restrict this freedom.

84. See Fürer & Rössler, *supra* note 77, at 11.

only pertinent to note that some form of book reserve funding by employers might be appropriate if termination insurance under ERISA was primarily available only in insolvency situations. With termination insurance accessibility so restricted, some greater flexibility in retention of pension assets for internal use and development than that now permitted under ERISA⁸⁵ might compensate employers, to some extent, for surrender of their present easy access to termination. A partial book reserve system or increased allowable investment in employer securities or assets might be acceptable in such a context. Controls, other than those currently imposed by funding and fiduciary standards under the present provisions of ERISA, could be devised for such relaxation of the current restrictions on self-investment of plan funding.

Such an alteration in present funding requirements would not divert pension assets from the private investment sector. To the extent that book reserve funding would be available, a percentage of a plan's assets would not be available for diversified placement in the entire spectrum of investment opportunities, but the assets would remain in the private sector as additional retained capital for the particular employer sponsoring the plan. This approach might serve as an incentive for responsible employers to institute plans or improve benefits in existing plans.

III. THE FUTURE OF PLAN TERMINATION INSURANCE

The possible legislative modifications of Title IV presently under study by the PBGC may be vital to the continuance of the private pension system. Plan termination insurance for employees, in one form or another, is here to stay.⁸⁶ The private pension system could become part of an overall governmental program akin to social security, or it could remain within the discipline and control of the private pension community. The interests of employees, employers and the entire business community suggest that a common effort is essential to the preservation of the private system.

The PBGC would welcome participation, or even preemption, by private carriers of the responsibility for the termination insurance program. Private insurer participation in an insolvency insurance program could return the defined pension plan termination insurance program, in large part, to the private sector where the program belongs. With the sanctions imposed by Titles I and II of the Act, most ongoing plans

85. See ERISA § 407.

86. Although Congress is considering several legislative proposals concerning ERISA, none of them would alter the concept of plan termination insurance under Title IV.

should, in the long run, maintain the financial integrity necessary to provide their promised pension benefits and thus make the insurance risk acceptable to private underwriters. It is conceivable that the PBGC, which is now a self-financed government corporation, could eventually be transformed into a nonprofit membership corporation⁸⁷ and become a major insuring or reinsuring vehicle for furnishing such coverage in conjunction with other private insurers.

In order for the insolvency insurance approach to plan termination insurance to work, employers must regard their pension commitments as part of their total wage package and treat them as they would all other ongoing business obligations. The pension commitments should be met so long as the employer can do so financially. Employees must be prepared to accept a scaling-down of their defined benefit expectations to lower levels as a trade-off for continued employment when their jobs are jeopardized by their employer's financial difficulties. The business community in general must recognize the potential loss of private investment capital that would result from the replacement of the private pension system with a government program confined to Treasury investments and financed through tax revenues.

While the insolvency approach and its accompanying commitment to the plan by ongoing employers may initially seem radical and may possibly make defined benefit plans less attractive to smaller employers, there may be compensating advantages to the greater body of employers in such a proposal. By enforcing pension obligations of ongoing employers, either on a full or curtailed basis, the program would encourage greater discipline on the part of employers in making and funding pension promises. Employers would have to appraise realistically their current and prospective business posture when they institute or improve defined benefit plans. While this may result in some temporary abatement in the rate of new plan formations and of benefit improvements in existing plans, the integrity and reliability of all plans will be strengthened, and in the case of ongoing employers, the number of plan terminations should decrease substantially. The risk of abuse of the program through unnecessary or unwarranted terminations should diminish markedly. Fewer terminations will inevitably reduce claims against the termination insurance program, and the decreased case load will lower administrative costs for the program. This should result in lower insurance premiums for responsible employers and a strengthened private defined pension benefit system.

87. A similar corporation is the Securities Investment Protection Corporation (SIPC) that insures customers of financially troubled brokerage houses. See 15 U.S.C. §§ 78aaa-III (1976).

For employees, such reenforced commitment of employers to their plans enhances the prospect of continuing plans at their present or perhaps curtailed levels instead of complete termination and possible loss of all vested benefits not guaranteed by the PBGC. The increased likelihood of continued employment by ongoing employers should more than counterbalance the possible diminution in benefit expectations for employees of such employers.⁸⁸ If the plan is insufficient and must ultimately be taken over by the PBGC, the employee would still be assured of receiving guaranteed benefits and might receive more under a curtailed, frozen or "voluntarily terminated" plan under Alternative C than from a terminated plan under the present program.

Apart from its role as a sponsor of pension plans, the business world has another interest in the preservation of a privately managed pension system in the United States. Both trustee and insurance-funded plans control assets in the ever mounting hundreds of billions of dollars and have provided an essential source of investment capital for industry.⁸⁹ A change in the present program that would serve to strengthen the integrity of the private pension system and to continue the presence of that vast pool of investment dollars in the private sector deserves serious consideration by the business community. A switch to a government-administered retirement system would remove most, if not all, of those dollars from the private investment arena and relegate them to the coffers of the United States Treasury in one form or another.⁹⁰ If the performance of government-controlled retirement systems to date is any guide, there have been very few pre-funded assets in such plans that would be available for any form of investment prior to their required utilization for the payment of benefits. Finally, governmental administration and control of all retirement programs would inevitably increase regulatory intrusion into the business operations of the private sector.

88. In the case of some marginal employers, business shutdowns may occur if the employer must continue contributions and cannot scale down or discontinue pension accruals to lower contribution costs.

89. See *Assets of P & I 1,000 Exceed \$353 Billion*, *Pensions & Investments*, Jan. 1, 1979, at 1, col. 1.

90. Under the existing statute, which would not be altered in this regard by the proposed modifications, premiums payable under the program must be deposited in revolving funds in the Treasury Department and may not be invested in anything but Treasury floated or Treasury guaranteed issues. ERISA § 4005(b)(3). It can be anticipated that under an overall government retirement program such a policy would inevitably be applied to all funds necessary to sustain the system.

IV. CONCLUSION

The PBGC has from its inception considered one of its most important functions to be the administration of Title IV in a manner that would best serve to strengthen the private pension system. The Corporation has maintained an "open-door policy" of consulting with representatives of the private sector concerning major policy questions and specific case problems. At a time when the workability and desirability of a domestic private pension system is being seriously questioned, the PBGC and the private pension community should intensify the exchange of ideas and ultimately coalesce them into proposals to the Congress that will best serve "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants."⁹¹ As the single most important source of capital in the investment market, a strong private pension system can effectively create jobs and fight inflation. It is essential to the interests of both employers and employees that ERISA work as intended by Congress.⁹²

91. ERISA § 4002(a).

92. The foregoing observations are not intended to represent an official position of the PBGC. They have been expounded primarily for the purpose of eliciting from the private pension community its views, positive or negative, and, more importantly, its suggestions for other possible legislative modifications or perhaps its preference for maintenance of the status quo of the present program.

APPENDIX I
COMPARISON OF VARIOUS FEATURES OF PRESENT STATUTE WITH ALTERNATIVES A, B AND C

	PRESENT STATUTE	ALTERNATIVE A	ALTERNATIVE B	ALTERNATIVE C
INSURED EVENTS	All terminations - such terminations could occur at the volition of the employer without regard to the employer's or the plan's financial condition.	All terminations - such terminations could occur at the volition of the employer without regard to the employer's or the plan's financial condition.	All terminations - such terminations could occur only as a result of business termination, bankruptcy reorganization proceedings, or if the plan were fully funded.	Not in "voluntary termination" situations, only when business terminated in bankruptcy or for other financial difficulties.
EMPLOYER LIABILITY	Lesser of: (1) Plan asset insufficiency for guaranteed benefits, or (2) 30% of net worth.	Generally, full plan asset insufficiency for guaranteed benefits.	Generally, full liability for all plan benefits.	For ongoing employers, to continue funding plan for vested benefits. For financially distressed employers, the plan would have an unsecured creditor's claim against employer's assets.
RELIEF FROM EMPLOYER LIABILITY	Deferred payment terms subject to negotiation. CELI contemplated.	(1) Automatic time payments. (2) \$1 million annual forgiveness during bankruptcy reorganization. (3) \$10,000 annual forgiveness for business hardship.	Subject to bankruptcy reorganization process, relief could be up to full amount of employer liability.	Subject to bankruptcy reorganization process, relief could be up to full amount of employer liability.
PLAN TYPE APPLICABILITY	Single and multiemployer plans.	Single and multiemployer plans.	Single employer plans.	Single employer plans.
ROLE OF PBGC	Contingent creditor of employer.	Contingent creditor of employer.	Potential trustee. Plan a direct creditor of employees.	Potential trustee. Plan a direct creditor of employees.
IMPACT ON TERMINATION/PLAN FORMATION	Termination impact potentially large. May discourage formation.	Less impact on inducing termination than current law, but time payments may be termination incentive. Not clear on plan formation impact.	Lesser impact in inducing terminations. Impact on formation still needs study.	Least impact in inducing terminations and on plan formation.
LEVEL OF GOVERNMENT INVOLVEMENT	Potentially large in terms of assets under government management and trusteeships.	It is not known whether PBGC involvement would be increased or decreased from current levels.	Lesser involvement, especially as trustee under 4042, but more involvement in terms of bankruptcy interest. Fewer terminations mean fewer assets under Federal management.	Lesser involvement, especially as trustee under 4042, but more involvement in terms of bankruptcy interest. Fewer terminations mean fewer assets under Federal management.
ADMINISTRATIVE COSTS	Potentially high - net worth determinations, guaranteed benefit levels, trusteeships, etc.	Probably less than under current law. No net worth determinations, but still will be involved with, benefit administration, asset allocation, and trusteeships.	Lesser costs. Low number of trusteeships, no net worth determinations. Participation in bankruptcy proceedings would still be required.	Lesser costs. Low number of trusteeships, no net worth determinations. Participation in bankruptcy proceedings would still be required.