Title IV Basics

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I. Introduction

Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") describes the plan termination insurance program that covers defined benefit pension plans. A defined benefit pension plan covered by Title IV of ERISA can be terminated only by following the termination procedures in Title IV. Termination --

A. Stops future benefit accruals.

B. Stops future minimum funding obligations.

C. Matures PBGC's claim for unfunded benefit liabilities.

II. Plan Termination

An underfunded, defined benefit pension plan may be terminated through a "distress" termination initiated by the plan administrator or through an "involuntary" termination initiated by PBGC.

A. Distress Termination

1. A plan administrator initiates a distress termination by issuing a notice of intent to terminate to all plan participants and beneficiaries, unions, if any, and the PBGC, proposing a date of plan termination that is at least 60 but not more than 90 days after the date the notice is issued. 29 U.S.C. § 1341(c)(1)(A).

2. The plan sponsor and each member of its controlled group must meet one of four distress tests specified by statute. 29 U.S.C. § 1341(c). A distress test relevant to employers in bankruptcy requires --

a. The company is in reorganization in bankruptcy or insolvency proceedings and

b. The bankruptcy court finds that unless the plan is terminated, the company will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization.

3. Any controlled group members not in bankruptcy would have to make a similar showing to PBGC that, unless a distress termination occurs, the company will be unable to pay its debts when due and will be unable to continue in business.

4. To complete a distress termination, the plan administrator submits documents to PBGC demonstrating that the plan sponsor and its controlled group members meet one of the distress tests. PBGC reviews the information, and information concerning the assets and liabilities of the plan, and determines whether all of the conditions for a distress termination have been met. 29 U.S.C. § 1341(c)(1). If so, PBGC and the plan administrator enter into an agreement to terminate the plan as of the proposed date of plan termination and to appoint PBGC trustee of the plan. 29 U.S.C. § 1341(c)(3)(B)(iii).

5. Significantly, PBGC is not permitted to continue processing a distress termination when the agency is notified of a challenge to the termination under an existing collective bargaining agreement. 29 U.S.C. § 1341(a)(3). In that event, PBGC stops processing the termination until it is notified that the challenge has been resolved to permit the termination to proceed.

B. Involuntary Termination

1. PBGC may initiate a so-called "involuntary" termination, at its discretion, upon making one of four statutory findings.[1] Two of the findings potentially relevant here are (1) the plan has not met the minimum funding standard and (2) PBGC's possible long run loss with respect to the plan may increase unreasonably if the plan is not terminated. 29 U.S.C. § 1342(a)(1), (4).

a. In PBGC's view, a "failure to meet minimum funding" does not occur until a funding deficiency arises. In other words, missing a quarterly payment would not permit PBGC to make this finding.

b. PBGC applies the "long run loss" standard by comparing its liability risk with respect to the plan assuming a termination *before* a transaction to its liability risk with respect to the plan assuming a termination *after* the transaction. If the transaction, for example, would substantially increase plan liabilities or reduce PBGC's ability to collect termination liability, PBGC could conclude that it faces a long run loss if the plan is not terminated.

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[1] PBGC is *required* to initiate a termination if a plan does not have assets available to pay benefits currently due under the plan. 29 U.S.C. § 1342(a).

2. Upon making one of the four findings, PBGC can enter into an agreement with the plan administrator terminating the plan as of a proposed termination date and appointing PBGC trustee of the plan, thus avoiding litigation over termination. *See Jones & Laughlin Hourly Pension Plan v. LTV Corporation*, 824 F.2d 197 (2d Cir. 1987).

3. Alternatively, if the plan administrator does not agree to the termination, PBGC can ask a court to order termination of the plan based on a finding that termination is necessary to protect the interest of plan participants, or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in PBGC's liability. 29 U.S.C. § 1342(c).

4. Unlike a "distress" termination initiated by the plan administrator, an involuntary termination may proceed notwithstanding the plan sponsor's collective bargaining obligation to continue the plan. 29 U.S.C. § 1341(a)(3).

C. Date of Plan Termination

The date of plan termination is significant because it is the date as of which benefit accruals stop, contribution obligations stop, and liability to PBGC is measured.

1. In a distress termination, the date is the date chosen by the plan administrator, at least 60 but not more than 90 days before the plan administrator issues the notice of intent to terminate.

2. In an involuntary termination, the date may be set by agreement between PBGC and the plan administrator or, if they do not agree, by the court. Generally, courts have required a termination date on or after plan participants have received actual or constructive notice that the plan will be terminated.

a. PBGC is not required to provide individual, written notice to participants that it is seeking termination, but may provide notice by publishing notices in newspapers where participants live and work.

b. Where the plan already is frozen or the plan sponsor is liquidating or out of business, participants may have constructive notice that they are no longer accruing benefits under the plan.

c. In rare cases, a court will establish a retroactive date of plan termination to protect PBGC's financial interests.

III. Effect of Plan Termination

A. When an underfunded plan is terminated, PBGC is appointed trustee of the plan, takes over the assets of the plan, and pays benefits under the plan up to the amounts permitted by law.

1. The guaranty cap is $45,613.68 at age 65 for plans that terminate in 2005. This amount is actuarially reduced or increased for retirement ages below and above 65. Participants who have retired or could have retired three years before the date of plan termination may receive more, depending on the plan's funded level.

2. Participants and beneficiaries do not have claims against the plan sponsor for the difference between the benefit paid by PBGC and the benefit they would have received if the plan had been fully funded upon termination. *E.g.*, *Adams Hard Facing v. PBGC*, 129 B.R. 662 (Bankr. W.D. Okla. 1991) (disallowing participants' claims against debtor for non-guaranteed benefits because PBGC is required to collect and distribute non-guaranteed benefits); *United Steelworkers of America v. United Engineering, Inc.*, 839 F. Supp. 1279 (N.D. Ohio 1993), *aff'd*, 52 F.3d 1386 (6th Cir. 1995) (participants do not have action for non-guaranteed benefits under ERISA or section 301 of the LMRA); *In re Lineal Group, Inc.*, 226 B.R. 608 (Bankr. M.D. Tenn. 1998) (denying early retirees' estoppel claims for non-guaranteed benefits under *Adams Hard Facing* reasoning).

B. Liability to PBGC

1. When an underfunded, defined benefit plan terminates in a distress or involuntary termination, PBGC has two types of claims: (1) a claim for the difference between the value of all accrued liabilities under the plan on the date of plan termination and the value of plan assets on the date of plan termination, calculated using assumptions established in PBGC regulations ("termination liability") and (2) a claim for unpaid contributions to the plan, if any, pro-rated to the date of plan termination ("unpaid contribution").[2] 29 U.S.C. § 1362(b), (c).

2 Termination liability and unpaid contribution liability are joint and several obligations of the plan sponsor and each member of its controlled group. Generally, a controlled group is a group of trades or businesses linked by at least an 80% ownership interest (parent–subsidiary) or two or more trades or businesses at least 80% owned by five or fewer persons (brother-sister), or a combination of the two. Internal Revenue Code ("IRC") § 414(b), (c).

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[2] PBGC also may assert a claim for unpaid PBGC premiums, if any, pro-rated to the date of plan termination. 29 U.S.C. § 1307.

a. This means that PBGC may, at its option, seek payment of 100 percent of the joint and several obligation from any one or more controlled group members, but may not collect more than 100 percent of the amount owed. In bankruptcy, PBGC files its entire claim separately against each debtor in the controlled group and can pursue its claim against non-debtor controlled group members as well.

b. There is no provision in ERISA for allocating unpaid contributions or controlled group liability among controlled group members. *See PBGC v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983);

3. Amount of PBGC's termination liability claim –

a. Is determined using conservative assumptions in PBGC regulations. Generally, the assumptions are intended to produce a benefit liability value that tracks the cost of purchasing an annuity contract from an insurer to provide the benefits.

b. Two courts of appeals have found that the amount of PBGC's termination liability claim may be recalculated in bankruptcy using a "prudent investor rate" to determine the present value of plan liabilities. *In re CSC Industries, Inc.*, 232 F.3d 505 (6th Cir. 2000); *In re CF&I Fabricators of Utah*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999). *See In re Chateaugay Corp.*, 12 E.B.C. 1441, 1448-52 (S.D.N.Y. 1990) and 13 E.B.C. 1761 (S.D.N.Y. 1991) (proposed findings), *aff'd* 14 E.B.C. 1225 (S.D.N.Y. 1991), vacated, op. withdrawn, 17 E.B.C. 1102 (S.D.N.Y. 1993). The prudent investor rate is the long term rate of return a plan could expect to receive from a portfolio prudently invested in stocks, bonds and the like. The prudent investor rate can be substantially higher than the discount rate in PBGC's regulation, which can result in a substantially lower termination liability claim.

c. More recently, however, a bankruptcy court rejected the prudent investor rate theory and applied PBGC's regulation to determine the amount of PBGC's termination liability claim. *In re US Airways Group, Inc.* , 296 B.R. 734 (Bankr. E.D. Va. 2003).

4. Lien and priority status

a. If PBGC's termination liability claim is not paid upon demand, a lien arises in the amount of the lesser of the termination liability or 30 percent of the net worth of the plan sponsor and its controlled group. 29 U.S.C. § 1368(a). PBGC may perfect this lien to obtain a security interest in the assets of the plan sponsor and controlled group members if the entities are not protected by the automatic stay in bankruptcy.

b. In bankruptcy PBGC's claim for termination liability is treated as a general unsecured claim. *PBGC v. Skeen (In re Bayly)*, 163 F.3d 1205 (10th Cir. 1998).

c. Unpaid contribution claims attributable to pre-petition services generally are treated as general unsecured claims, except that contributions attributable to service during the 180 days before filing receive priority treatment under section 507(a)(4) of the Bankruptcy Code. *PBGC v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293 (10th Cir. 1998). Contributions attributed to post-petition service may receive administrative priority treatment. *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997) (limiting PBGC's administrative priority claim to the portion of the minimum funding payments that relate to benefits and expenses accruing post-petition (the so-called "normal cost" component). *But see Columbia Packing Co v. PBGC*, 81 B.R. 205 (D. Mass. 1988) (extending administrative priority to both the normal cost and the past service liability elements of the minimum funding obligation that accrued post-petition).

d. The Sixth Circuit has found that obligations under a collective bargaining agreement are entitled to priority status until the obligation has been modified in accordance with section 1113 of the Bankruptcy Code, regardless of whether the claims otherwise would meet the requirements for administrative priority status under the Bankruptcy Code. *United Steelworkers of America v. Unimet Corp.*, 842 F.2d 879, 882 (6th Cir. 1988). Accordingly, in the Sixth Circuit, an obligation under a collective bargaining agreement to contribute to a plan could give unpaid contribution claims administrative priority until the bargained obligation has been modified under section 1113.

e. Other courts that have addressed the issue, however, continue to apply the Bankruptcy Code test for administrative priority to obligations required under a collective bargaining agreement. *E.g., In re Ionosphere Clubs, Inc.*, 22 F.3d 403 (2d Cir. 1994) (claims for pre-petition vacation pay under collective bargaining agreement not entitled to administrative priority); *In re Roth American, Inc.*, 975 F.2d 949 (3d Cir. 1992) (claims for pre-petition vacation and severance pay under collective bargaining agreement not entitled to administrative priority); *Adventure Resources, Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998) (contributions to multiemployer plans attributable to pre-petition services not entitled to administrative priority).

IV. PBGC's Toolkit

PBGC's statutory authority to take action in connection with a pension plan is very limited. The agency has used this limited authority, however, to gain leverage to negotiate protection for defined benefit plans.

A. Involuntary Termination

1. PBGC can initiate an involuntary termination, but must obtain a court order terminating the plan if the plan administrator does not agree. Courts have deferred to PBGC in deciding whether the standard for termination – necessary to protect the interest of plan participants, or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in PBGC's liability -- has been met. PBGC has used its authority to seek involuntary termination sparingly.

B. Threat of Involuntary Termination

1. While not expressly authorized by statute, PBGC uses the threat of termination to attempt to coerce plan sponsors to make additional contributions to or otherwise provide protection for their pension plans under the agency's "Early Warning Program." PBGC Technical Update 00-3.

2. Using information in the financial press or obtained from "reportable event" and other filings that plans must make with PBGC, PBGC monitors companies with underfunded pension plans, looking for transactions that could undermine PBGC's status as a creditor of the company or undermine PBGC's ability to collect termination liability if the plan were terminated. This would include, for example –

a. Debt restructuring that secures previously unsecured debt

b. Sale of a valuable member of the controlled group

c. Sale of a valuable asset.

3. PBGC then threatens to seek termination of the plan prior to the transaction based on a "long run loss" finding unless protection is provided for the plan, in the form of additional contributions, security to assure contributions in the future, and the like.

4. Sometimes, PBGC's threat is just that, and the agency has no intention of seeking termination. Each situation must be judged based on the facts and circumstances and the company's willingness to risk a termination filing.

5. In the past, PBGC has used the threat of termination opportunistically, whenever it had leverage. PBGC's Executive Director recently has

indicated that the agency would pursue a more structured approach in its Early Warning Program by developing data on the riskiness of particular companies or industries and focusing on higher risk companies.

C. Facility Shutdown Liability

Under certain circumstances, a facility shutdown gives rise to potential liability to PBGC, which it uses as leverage to obtain protection for the plan.

1. PBGC is entitled to seek payment of a portion of the termination liability if, as a result of the cessation of operations at a facility, more than 20% of the active participants in a plan are separated from employment. The liability is determined by multiplying the entire termination liability by the percentage reduction in active participants caused by the cessation of operations. Rather than require payment of the liability, PBGC negotiates increased contributions to the plan or other protections, such as security for contributions.

a In past years, PBGC attempted to apply this provision to the sale of a facility, regardless of whether operations at the facility ceased. The agency has not used this aggressive approach for several years, however, and has indicated informally that it does not intend to do so.

b. Earlier this year, PBGC issued a proposed regulation that makes this liability easier to apply, which means that PBGC could become more active in this area.

D. "Evade or Avoid" Transactions

1. If a principal purpose of a business transaction was to evade liability under Title IV of ERISA, and the pension plan terminates within five years after the transaction, the transaction is ignored for purposes of assessing termination liability. ERISA § 4069.

E. Lien for minimum funding waiver.

1. The Internal Revenue Service ("IRS") is authorized to waive the minimum funding requirement for up to three years in any 15 year period or extend the amortization period for unfunded liability. IRC § 412(d), (e). Security to PBGC may be imposed as a condition of a waiver or extension.

2. PBGC negotiates a security interest in the amount of the waived contribution, which may be a second or lower position where the plan sponsor and controlled group do not have unencumbered property.

F. Lien for unpaid contributions.

1. If a required minimum funding contribution is not made when due and the balance of unpaid contributions is more than $1 million, a lien arises in the amount of the unpaid contributions on all of the property of the liable controlled group. IRC § 412(n).

2. If the plan sponsor and controlled group members are not in bankruptcy, PBGC can perfect this lien, which is treated as a federal tax lien, giving the agency a security interest in property of the plan sponsor and controlled group members. This security interest gives PBGC leverage to negotiate arrangements to contribute to the plan.

G. Reporting Requirements

Reporting requirements do not give PBGC any additional authority to act, but give the agency information that it can use for leverage in negotiations. In addition, PBGC may assess liability of up to $1,100 per day for failure to provide information required under Title IV of ERISA. 29 U.S.C. § 1371.

1. Reportable events relating to corporate or pension plan changes generally must be reported to PBGC within 30 days after occurrence. Relevant reportable events are:

a. 20% reduction in active participant count during a plan year.

b. Failure to make required contribution (must be reported within 10 days if aggregate unpaid balance of contributions is more than $1 million)

c. Change in contributing sponsor or controlled group, *e.g.*, sale of a subsidiary

d. Transfer of more than 3% of plan benefit liabilities to plan that is outside the controlled group

e. Application for minimum funding waiver

f. Loan default

g. Bankruptcy

2. Annual filing of corporate financial and plan actuarial information is required for –

a. Sponsors of plans with unfunded vested benefits greater than $50 million

b. Plan sponsors that have failed to make a required contribution that results in a lien, *i.e.*, a contribution in excess of $1 million

c. Plan sponsor with a minimum funding waiver of greater than $1 million outstanding.

H. Restoration

1. PBGC has broad authority to restore a terminated plan if the agency determines that restoration is "appropriate and consistent with its duties" under Title IV of ERISA. ERISA § 4047.

2. The agency has restored a terminated plan once in the past (LTV Steel) because LTV Steel adopted "abusive follow on plans" that were intended to make up the benefits that participants lost as a result of plan termination.

3. The agency generally has taken the position that a follow on plan may not make up benefits lost as a result of plan termination. The agency reviews follow on plans to determine the benefit replacement ratio they provide.

I. Seat on Creditors Committee

Generally, the creditors with the seven largest claims are members of the creditors committee. 11 U.S.C. § 1102. The contingent termination liability claim that PBGC generally files in bankruptcy often makes it one of the largest general unsecured creditors, and the agency is entitled to be on the creditors' committee. 11 U.S.C. §§ 101(10), (41)(B).

V. Options

A. Change in Actuarial Methods and Assumptions

1. An actuarial cost method is the technique the actuary uses to assign costs among the different periods of service worked by the plan's participants. ERISA § 3(31). The plan administrator may select from among different actuarial cost methods to measure the plan's funding obligation. Switching from one acceptable method to

another may have the effect of moving part of the pension funding cost from one year to another.

2. A plan also may use different techniques for measuring the actuarial value of assets. Rev. Proc. 200-40, §§ 3.15, 3.16. For example, a plan may use a method to smooth fair market value over periods of up to five years using different actuarial techniques. Rev. Proc 2000-40, §§ 3.15-3.16.

3. The plan's actuary also may consider whether assumptions for things like interest rate, mortality, retirement age and turnover assumptions may be changed. The actuary must determine that the assumptions used are reasonable and offer the actuary's best estimate of the anticipated experience under the plan. IRC § 412(c)(3)(A).

B. Minimum Funding Waiver and Extension of Amortization Period.

A minimum funding waiver postpones all or part of a contribution requirement otherwise due and payable with respect to a plan year, but the delayed payment must be made in the future, with interest. IRC § 412(d).

1. To obtain a waiver, the plan sponsor must demonstrate to the IRSF that the plan sponsor and the trades or businesses in its controlled group are undergoing a period of temporary and substantial business hardship, *i.e.*, the company is temporarily in financial hard times, but is likely to rebound and be able to pay back the funding waiver in the future. The IRS also must conclude that requiring full contributions would be adverse to the interest of the plan participants and beneficiaries.

2. Minimum funding obligations are computed on a plan year basis. To obtain relief from the first quarterly payment (for a calendar year plan), the plan must receive the waiver by April 15. The IRS, however, discourages waiver applications until after the plan sponsor has at least a half year of financial results to demonstrate temporary financial business hardship. Earlier applications have been accepted and acted upon by the IRS, however.

3. Extending the amortization periods for certain charges to the funding standard account achieves a result similar to a minimum funding waiver by pushing payments out into the future. IRC § 412(e). IRS may grant an extension upon a showing that failure to grant the extension would result in a substantial risk to continuation of the plan or substantial curtailment of benefit levels under the plan or employee compensation and denial of the extension request would be adverse to participants and beneficiaries in the aggregate. *Id.*

4. For both waivers and extensions, benefits may not be increased while the waiver or extension is in effect, advance notice to participants is required and a user fee is charged. IRC §§ 412(f)(1), (3); Rev. Proc. 2004-8.

5. If a waiver or extension involves $1 million or more, the IRS routinely conditions the waiver on providing collateral, which may be exercised by the PBGC for the benefit of the plan. IRC § 412(f)(3).

6. In addition, the IRS, as a condition of the waiver, may extend the restriction against amendments increasing benefits to all other plans maintained by the plan sponsor. For the same reason, the IRS recently has updated its procedure for applying for waivers, and now specifically requires the plan sponsor to provide financial information about other plans, including executive compensation plans. Rev. Proc. 2004-15.

7. Significantly, waivers and extensions of the amortization period may exacerbate the effect of the deficit reduction contribution or "DRC". If a plan receives a waiver for 2004, the DRC for 2005 could be substantially higher because, with no contributions for 2004, there may be fewer assets and the same or greater liabilities. Serial waivers may alleviate this problem and the IRS is permitted to grant up to three waivers in any consecutive 15-year period. IRC § 412(d)(1). The IRS staff has taken the position that the revenue procedure governing waivers does not permit a single application for multiple year waivers. While the IRS has indicated that it may reconsider that position, a plan sponsor cannot be assured of receiving multiple-year waivers.

C. Non-Cash Contributions

1. Section 406(a)(1)(A) of ERISA prohibits the sale or exchange of property between a plan and a party and interest. The Department of Labor and the courts have interpreted this to mean that contributing anything other than cash to a plan is a prohibited transaction. *E.g.*, *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993). There is a statutory exemption, however, for contributions of employer securities and employer real property. ERISA § 407. In addition to meeting the requirements for the statutory exemption, plan fiduciaries must assure that the contribution is consistent with the fiduciary duty of prudence and the duty to diversify plan assets. ERISA §§ 404(a)(1)(B), (C).

2. Under the exemption, employer securities must be qualifying employer securities. ERISA § 407(a). This means that immediately after the plan acquires the securities, not more than 25% of the aggregate amount of the security in the same class is held by the plan, and at least 50% of the aggregate amount of the security in that class is held by persons independent of the issuer. ERISA § 407(d)(5), (f)(1). In addition, the value of the employer securities and employer real property held by the plan

must not exceed 10% of the fair market value of plan assets, and must be acquired for adequate consideration. ERISA § 407(a). The trading price on a public exchange or the price determined by an independent appraiser would meet this requirement. ERISA § 408(e). Finally, no commission can be charged for the transfer the securities to the plan. *Id.*

3. Employer real property held by a plan under the exemption must be qualifying employer real property. ERISA § 407(a)(1). To meet this standard, the property must be leased to an employer or an affiliate of the employer that employs people in the plan. ERISA § 407(d)(2). There must be more than one parcel of property dispersed geographically and each parcel must be adaptable without excessive cost for more than one use. ERISA § 407(d)(4).

4. A plan administrator also may ask the Department of Labor for an individual prohibited transaction exemption for contributions that do not meet the statutory exemption requirements. ERISA § 408(a). To obtain an exemption, the Department of Labor must conclude that the proposed exemption is administratively feasible, in the interests of participants and beneficiaries, and protective of the rights of participants and beneficiaries. *Id.* Often, individual exemptions granted by the Department of Labor not only protect the plan from any loss in connection with the transaction, but also include an upside potential for the plan.

D. Benefit Reduction

1. ERISA and the IRC prohibit the cutback or elimination of accrued benefits, but benefits may be reduced or eliminated going forward, in accordance with section 204(h) of ERISA. ERISA § 204(g); IRC § 411(d)(6). Section 204(h) generally requires 45-day advance notice to affected participants.

2. Section 412(c)(8) of the IRC permits a reduction of accrued benefits under limited circumstances. Under this provision, a plan sponsor may amend a plan within two and a half months after the end of a plan year to eliminate accruals going back to the first day of the prior plan year with the approval of the Secretary of Treasury. IRC § 412(c)(8). The Secretary's decision is based on the minimum funding waiver standard, that is, substantial business hardship, and only in a case where a minimum-funding waiver is unavailable or inadequate.

E. Merger

1. An over-funded plan may be merged with an under-funded plan to alleviate the contribution obligation. To do this, section 414(l) of the IRC requires the funded level of benefits for each participant in the plan on a termination basis after the merger to be the same as or better than it is before the merger. This means that the 100%

funded level of benefits in over-funded plan must be preserved after the merger. If the merger otherwise would reduce the funded level of the plan below 100%, the plan may be required to maintain a special schedule of benefits to assure compliance with IRC section 414(l). Treas. Reg. § 1.414(l)-1(e)(2).

2. The decision to merge plans is a settlor, rather than a fiduciary decision. *E.g.*, *Systems Council EM-3, Int'l Bhd. of Elec. Workers v. AT&T Corp.*, 159 F.3d 1376, 1380 (D.C. Cir. 1998). Courts generally have concluded that, in implementing the merger, compliance with section 208 of ERISA, which tracks the requirements of IRC section 414(l), satisfies fiduciary requirements under ERISA. *E.g.*, *Blaw Knox Retirement Investment Plan v. White Consolidated Industries, Inc.*, 998 F.2d 185, 1190 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994).

F. Formation of a multiemployer plan.

1. Single-employer plans can combine to form a multiemployer plan. Multiemployer plans are not subject to the DRC and generally have longer amortization periods for determining minimum funding contributions. These differences permit multiemployer plans to be funded more slowly than single employer plans. To meet the definition of multiemployer plan under applicable Department of Labor regulations, the plan must, among other things, be established for "a substantial business purpose." 29 C.F.R. § 2510.3-37(c). The Department of Labor has denied multiemployer plan status to plans that appeared to be formed to obtain contribution relief.

G. Transfer of Plan to an Unrelated Entity

1. Pension plans can be transferred to another entity in a business transaction. This often occurs as a matter of course if stock and ongoing operations of a corporation are transferred to an unrelated buyer. In addition, there are commercial "matchmakers" that offer, for a price, to place plan liabilities with willing, unrelated parties.

2. Generally, the transfer of a pension plan to an unrelated entity eliminates the seller's ongoing liability for the plan going forward. This is not true, however, where a principal purpose of the transaction is to evade termination liability. ERISA § 4069. If a principal purpose of a transaction is to evade termination liability, the seller remains liable for any termination liability that may arise within five years after the transaction. *Id.*

3. Under its Early Warning Program, PBGC also may seek additional protection for the plan, such as enhanced contributions or security, if PBGC believes that the transfer would put the plan at risk of termination and adversely affect PBGC's ability to recover termination liability.

H. Termination/Restoration Funding

1. Using its broad grant of restoration authority, PBGC and the plan sponsor would agree to termination followed by restoration in a pre-agreed arrangement. ERISA §§ 4042, 4047. This, in turn, would permit the application of the special funding rules that apply to restored plans. Treas. Reg. § 412(c)(1)-3; 29 C.F.R. § 4047.3. These funding rules allow PBGC to establish a funding schedule for the restored plan that would amortize the pre-termination liabilities over a period of up to 30 years. *Id.*

2. Termination/restoration would permit participants to continue to accrue benefits and avoid benefit cutbacks that could result from PBGC's guarantee limits. PBGC also would avoid having to pay benefits under the terminated plan. The plan sponsor would benefit from an affordable level of contributions stretched over a longer period of time than otherwise would be permitted.

3. Partial restoration also could be used to avoid cutbacks to particular participant groups contingent upon agreement to concessions by employee groups. *E.g.,* PBGC will restore portion of plan covering active participants upon agreement between union and employer to concessions that would enable employer to make required contributions to fund restored portion of plan.

4. PBGC has stated that as a policy matter, it will not agree to a termination/restoration. It is possible that PBGC's policy could change given the new executive director.

I. Termination

As described above, termination of a plan eliminates future funding requirements, but matures all of plan's liabilities.

J. Bankruptcy filing

Chapter 11 filing in itself does not alter ERISA obligations, but can temporarily alleviate funding obligations, protect the debtor from liens and excise taxes, and help to accomplish plan termination.

1. Permits debtor to stop paying "pre-petition" portion of minimum funding contributions.

a. Automatic stay in bankruptcy prevents PBGC from perfecting liens for missed contributions.

b. Excise tax (10% of accumulated funding deficiency) likely to be treated as a penalty entitled to low priority in bankruptcy.

c. If plan continues through and after bankruptcy, however, contributions must be made up after emergence.

2. Provides mechanism (11 U.S.C. § 1113) and leverage to negotiate benefit plan changes otherwise required under collective bargaining agreement.

3. Permits debtor to pursue "reorganization" distress test.

4. Termination liability claims generally treated as general unsecured claims, payable at less than 100 cents on the dollar.

5. Bankruptcy court may reduce termination liability under "prudent investor rate" theory for valuing plan liabilities.

VI. Effect of Possible New Legislation

A. Proposals by the Bush Administration and legislation pending in the House and Senate, if enacted, could –

1. Accelerate funding requirements generally

2. Greatly accelerate funding requirements for "at risk" plans, *i.e.,* plans that have a lower than specified funded threshold and/or have a plan sponsor with below investment grade credit rating

3. Limit the use of credit balances to reduce contributions

4. Require use of corporate yield curve interest rate to calculate liabilities for funding purposes

5. Increase deduction limit for contributions

6. Increase PBGC premiums

7. Eliminate shut down and other "contingent event" benefits

8. Freeze benefit accruals under defined benefit plans that have a lower than specified funded threshold and/or have a plan sponsor with below investment grade credit

9. Prohibit benefit increases for plans with a lower than specified funded threshold

10. Require additional disclosures to plan participants about defined benefit plans' funded status

11. Limit funding of deferred compensation plans for top executives if plan sponsor's defined benefit plan has a lower than specified funding threshold and/or has lower than investment grade debt rating.

B. We expect Congress to make substantial changes to the proposed legislation if it eventually enacts a pension reform bill. Consideration of a comprehensive reform bill could spill over into early 2006.

1. Even if a more comprehensive bill is not enacted this year, Congress is likely to consider at least temporarily extending the use of corporate bond rates to determine the "current liability rate."

2. The proposal to increase PBGC premiums also is included in the final budget resolution this year because of its positive revenue effect, and could be enacted as part of separate budget reconciliation legislation.