



SUMMARY OF LEADING SINGLE EMPLOYER FUNDING RELIEF PROPOSALS

On June 24, 2009, the House Education and Labor Committee approved H.R. 2989 (as amended), the 401(k) Fair Disclosure and Pension Security Act of 2009, which was introduced by Representative George Miller (D-CA), Chairman of the Committee. The bill included provisions affecting defined benefit plan funding. On August 27, 2009, Congressman Earl Pomeroy (D-ND), a Member of the Ways and Means Committee, released a discussion draft of funding proposals in the form of statutory language. On April 22, 2009, House Minority Leader John Boehner (R-OH) introduced H.R. 2021, which included funding proposals. This chart summarizes the single-employer funding proposals in the bills and the discussion draft.

OVERVIEW

EDUCATION AND LABOR COMMITTEE BILL	CONG. POMEROY'S DISCUSSION DRAFT	MINORITY LEADER BOEHNER'S BILL
<p>Amortization relief. Generally, the bill permits employers to apply the "2 and 7" rule to the 2009 and 2010 shortfalls. Under the 2 and 7 rule, seven-year amortization of the 2009 and 2010 shortfalls is delayed by two years; during that two-year period, the employer only owes interest on the shortfall. For more details, please see the discussion starting on page 7 of this chart.</p> <p>Asset smoothing corridor. No provision.</p> <p>Interest rate elections. The bill allows employers that use the spot yield curve for 2009 to use the segment rates for 2010. Please see page 6.</p>	<p>Amortization relief. Generally, the discussion draft permits employers to choose between (1) applying the "2 and 7" rule to the 2009 and 2010 shortfalls, or (2) amortizing those shortfalls over 15 years. Under the 2 and 7 rule, seven-year amortization of the 2009 and 2010 shortfalls is delayed by two years; during that two-year period, the employer only owes interest on the shortfall. If the employer chooses the 2 and 7 rule, the minimum contribution for 2009, 2010, and 2011 must be at least 105%, 110%, and 115% of the 2008 minimum contribution, respectively. For more details, please see the discussion starting on page 7 of this chart.</p> <p>Asset smoothing corridor. The discussion draft generally expands the asset smoothing corridor to 20% for 2009 and 2010. Please see page 20.</p> <p>Interest rate elections. Same as the Education and Labor Committee bill.</p>	<p>Amortization relief. Generally, the same as the Education and Labor Committee bill.</p> <p>Asset smoothing corridor. Generally, the same as Congressman Pomeroy's discussion draft.</p> <p>No additional provisions.</p>

Prepared for the Council by



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EDUCATION AND LABOR COMMITTEE BILL	CONG. POMEROY'S DISCUSSION DRAFT	MINORITY LEADER BOEHNER'S BILL
<p>Plan investment expenses. The bill clarifies that plan investment expenses are not included in target normal cost. Please see page 23.</p> <p>Section 4010 reporting. The bill modifies the section 4010 reporting rules by requiring reporting if (1) an employer (or any member of its controlled group) has a plan that is less than 80% funded, or (2) the aggregate unfunded vested benefits of the controlled group is more than \$50 million, disregarding plans with no unfunded vested benefits. Please see page 25.</p> <p>Effective date of funding regulations. The bill directs Treasury to make the funding and benefit restriction regulations effective no earlier than plan years beginning after December 31, 2009. Please see page 27.</p> <p>No additional provisions.</p>	<p>Plan investment expenses. Same as the Education and Labor Committee bill.</p> <p>Section 4010 reporting. The discussion draft modifies the section 4010 reporting rules in two ways. First, it repeals the PPA rule requiring reporting with respect to plans that are less than 80% funded. Instead, the trigger for reporting would be aggregate unfunded vested benefits of more than \$100 million, disregarding plans that are at least 90% funded (without subtracting credit balances). Second, the discussion draft imposes more rigorous rules regarding the confidentiality of the reported information. Please see page 25.</p> <p>Effective date of regulations. No provision.</p> <p>Maintenance of effort. In order to use the amortization relief described above (i.e., the choice between the 2 and 7 rule and the 15-year rule), the employer must satisfy a maintenance of effort rule. (Please note that this is the only provision in the discussion draft that triggers the maintenance of effort rule, other than the provision that provides amortization relief for plans subject to the pre-Pension Protection Act ("PPA") funding rules.) There are three alternative ways to satisfy the maintenance of effort rule. First, the employer can provide minimum accruals under the DB plan. Very generally, there are two ways to satisfy the minimum accrual rule: (1) continue the same level of accruals in effect before any applicable freeze, or (2) provide accruals such that the plan's target normal cost (determined using certain simplified assumptions, such as a 5% discount rate) is at least 3% of the participants'</p>	

EDUCATION AND LABOR COMMITTEE BILL	CONG. POMEROY'S DISCUSSION DRAFT	MINORITY LEADER BOEHNER'S BILL
	<p>aggregate compensation.</p> <p>Second, under certain circumstances, the employer can satisfy the maintenance of effort rule by providing a 3% nonelective contribution on behalf of all employees that have been frozen out of the DB plan.</p> <p>Third, the employer can satisfy the maintenance of effort rule by freezing all of its nonqualified deferred compensation plans, subjecting such plans to the defined benefit plan benefit restrictions, and requiring the use in such plans of actuarial assumptions that are not more favorable than those used in the defined benefit plan. The maintenance of effort requirement applies for a specified number of years that varies based on whether the employer chooses the 2 and 7 rule or the 15-year amortization requirement, and based on how much the employer is willing to contribute in the future. For more details, please see page 9.</p> <p>Benefit restrictions. Under this provision, the benefit restriction that freezes benefit accruals for plans that are less than 60% funded will apply in 2009 and 2010 based on the plan's 2008 funded status. Also, social security level-income options are excluded from the benefit restriction limiting lump sums and other prohibited payments; this exclusion applies on an ongoing basis, not just temporarily. Please see page 20.</p> <p>Credit balance restrictions. Under this provision, a plan's 2008 funded status will apply in 2009 and 2010 for purposes of the rule prohibiting the use of credit balances with respect to a plan that was under 80% funded in the prior year. Please see page 22.</p>	

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	<p>Effective date of benefit restrictions for collectively bargained plans. Generally, with respect to collectively bargained plans, the discussion draft delays the application of the benefit restrictions (other than the plan amendment benefit restriction) until plan years beginning after December 31, 2011. Please see page 26.</p> <p>Determination of PBGC guarantee. Under this provision, the determination of the amount of the PBGC guarantee is determined as of the date of plan termination, rather than as of the date that a contributing sponsor enters bankruptcy. Thus, this provision would reverse a change made by the PPA. Please see page 28.</p> <p>Plans with a delayed PPA effective date. This provision provides funding relief -- comparable in a general way to the 2 and 7 rule or the 15-year amortization rule -- to plans not yet subject to the PPA rules, e.g., rural electric cooperatives, rural telephone cooperatives, agricultural cooperatives, certain plans with settlement agreements with the PBGC, and certain government contractors. The relief is limited to the deficit reduction contribution ("DRC") rules under the pre-PPA funding regime. As noted, the relief is subject to the maintenance of effort rule. Please see page 29.</p> <p>Restriction on early retirement window benefits. The discussion draft prohibits the adoption of early retirement window arrangements under which benefits are payable in a lump sum unless (1) the plan is at least 120% funded taking into account the additional benefits, or (2) the company funds the full cost of the additional benefits or funds the plan up to 120% funded. If such an amendment does take effect, all benefits under the plan would be required to be 100% vested. Please see page 23.</p>	

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	<p>Reportable events. Under this provision, a PBGC reportable event based on a specified reduction in the number of active participants in a plan would not be treated as occurring if: (1) there has not been the statutorily specified reduction in the number of active employees of the employer, (2) the plan was at least 80% funded for the 2008 plan year, and (3) the plan sponsor notifies the PBGC that it is using this special rule. Please see page 31.</p>	

DETAILED DESCRIPTION

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<p>INTEREST RATE ELECTIONS</p>	<p>In determining the value of pension plan liabilities, an employer may elect whether to use the spot corporate bond yield curve or the segment rates (under which generally the corporate bond yield curve is averaged over two years and divided into segments). Generally, under IRS proposed regulations, such an election, once made, may only be modified with the consent of the IRS.</p> <p>The IRS announced earlier this year, however, that employers may make a new election for 2009 without IRS consent. This permits employers to use the spot yield curve for 2009. Since the spot yield curve rates for 2009 were very high for plans with a calendar year plan year, this enables employers with such plans to reduce their large 2009 funding obligations to manageable levels in many cases.</p> <p>However, due to the spot yield curve's volatility and unpredictability, very few employers want to be locked into using the spot yield curve indefinitely, as they would be if they use the spot yield curve for 2009 and the proposed IRS regulations are finalized as is. In fact, because of this concern, some employers are hesitant to commit to</p>	<p>Permits employers that elect the spot yield curve for 2009 to switch to the smoothed segment rates for 2010.</p>	<p>Same as the Education and Labor Committee bill.</p>	<p>No provision.</p>

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	<p>using the spot yield curve for 2009. It is possible that the IRS will, in its final regulations (expected to be issued soon), allow employers that elect the spot yield curve for 2009 to elect to use the smoothed segment rates for 2010.</p>			
<p>AMORTIZATION OF 2008 ASSET LOSSES</p>	<p>Under current law, a plan's "shortfall amortization base" is amortized over seven years. In 2008, a plan's shortfall amortization base was the excess of 92% of total plan liabilities over the value of plan assets. In 2009 and 2010, the 92% figure becomes 94% and 96%, respectively; in 2011 and thereafter, the figure will be 100%.</p> <p>In 2009 and later years, a plan's shortfall amortization base is determined in the same way, except that plan assets are deemed to include the present value of the remaining amortization payments attributable to a shortfall amortization base in a prior year. Adding back the present value of the amortization payments prevents an employer from having to amortize the same shortfall twice.</p> <p>So, the shortfall amortization base for 2009 or any later year reflects several things, including <u>asset losses during the prior year</u>, contributions made for the prior year, distributions in the prior year, the increase in the phase-in</p>	<p>Permits employers to use the "2 and 7" rule. Under the bill's version of the 2 and 7 rule, the 2009 and 2010 shortfall amortization bases would be amortized over seven years, starting two years late—i.e., 2011 with respect to the 2009 shortfall amortization base and 2012 with respect to the 2010 shortfall amortization base. For the two-year delay period (2009 and 2010 for the 2009 shortfall amortization base, and 2010 and 2011 for the 2010 shortfall amortization base), only interest would be owed on the shortfall amortization base.</p> <p><i>Comment:</i> For certain plans, the 2 and 7 rule needs to apply to the shortfall amortization bases for the plan years starting in 2008 and 2009, rather than in 2009 and 2010. The plans needing this special rule are (1) plans with a plan year beginning after October 31 and before January 1, and (2) plans with an end-of-the-year valuation date. For these plans, the 2008 asset losses were recognized a year earlier. The bill does</p>	<p>The Pomeroy draft includes the 2 and 7 rule, which would work in the same way as the Education and Labor Committee bill, subject to three special rules.</p> <p>Under the first special rule, if a company uses the 2 and 7 rule with respect to the 2009 shortfall amortization base, its minimum required contributions for 2009 and 2010 must be at least 105% and 110%, respectively, of the minimum required contribution for 2008. If a company uses the 2 and 7 rule with respect to the 2010 shortfall amortization base, the minimum required contributions for 2010 and 2011 must be at least 110% and 115%, respectively, of the minimum required contribution for 2008. Generally, shortfall amortization installments with respect to the applicable plan years would be adjusted to take into account such increased contribution, pursuant to rules issued by the Secretary of the Treasury.</p> <p>Under the second special rule,</p>	<p>Same as Education and Labor Committee bill, except that the bill contains a parallel amendment to the Internal Revenue Code.</p>

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	<p>percentage (from 92% to 94%, etc.), changes in plan liability due to, for example, plan amendments or interest rate changes, and changes in the present value of the amortization payments (due to interest rate changes).</p> <p>Thus, normally, 2008 plan asset losses would show up in the 2009 shortfall amortization base. However, because of the use of the high spot yield curve for 2009, the 2008 plan asset losses will show up in the 2010 shortfall amortization base for many employers. This is true because the 2009 decrease in liability attributable to the high spot yield curve can offset much of the 2009 decrease in assets due to the market downturn. In such cases, a large shortfall can arise in 2010 when plans can no longer use the high spot yield curve.</p> <p>Thus, plans may need funding relief for the 2009 shortfall amortization base and/or the 2010 shortfall amortization base, since 2008 asset losses can show up in one or the other or partially in both. See, however, the discussion of the "Special Plan Year Rule" in the discussion draft column for circumstances in which the 2008 asset losses can show up in the 2008 and/or 2009 shortfall amortization bases.</p>	<p>not contain this special rule.</p> <p><i>Comment:</i> The bill amends ERISA to permit use of the 2 and 7 rule but does not make a parallel amendment to the Internal Revenue Code. This appears to be a glitch since employers may not use the 2 and 7 rule unless it is permitted under both ERISA and the Internal Revenue Code.</p>	<p>employers may elect, in lieu of the 2 and 7 rule, to amortize the 2009 and 2010 shortfall amortization bases over 15 years. Although this would require somewhat higher funding amounts initially, this approach would avoid the significant increase in funding that could occur in the third year under the 2 and 7 rule, absent a market recovery or an increase in interest rates. An employer may also elect not to apply either the 2 and 7 rule or the 15-year amortization rule.</p> <p>Under the third special rule, the Pomeroy draft would apply the 2 and 7 rule and the 15-year amortization rule to plan years starting in 2008 and 2009 in the case of (1) plan years starting after October 31 and before January 1, and (2) plans with end-of-the-year valuation dates. (This rule is referred to below as the "Special Plan Year Rule".) Thus, for these plans, all references above to a year would be modified to be to a year earlier. This reflects the fact that such plans recognized the 2008 losses in an earlier plan year.</p>	

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MAINTENANCE OF EFFORT	Not applicable.	No provision.	<p>The maintenance of effort issue is probably the most controversial and complicated issue related to funding relief.</p> <p>Some participant groups believe that funding relief should not be provided with respect to any frozen defined benefit plan; to be eligible for funding relief, these groups believe that the plan sponsor must commit not to freeze the plan for five years. One argument for this position is as follows: if employers are asking for funding relief in order to avoid having to freeze their plan, an employer should not be able to accept the relief and then freeze its plan anyway.</p> <p>Employer groups generally oppose maintenance of effort rules as inconsistent with the voluntary nature of the private retirement system. Employers also point out that for many employers, the choice is between jobs and pension contributions. So if the cost of funding relief is unrealistically high, and employers feel compelled to forego the relief, the result will be very significant job loss. Or if employers accept the relief by providing ongoing benefits, this could also cost jobs in some cases.</p> <p>The Pomeroy discussion draft attempts</p>	No provision.

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			<p>to find a middle ground here. Very generally, under the discussion draft, the maintenance of effort rule would apply if an employer elects to use the 2 and 7 rule or the 15-year amortization rule. There would be three alternative ways to satisfy the maintenance of effort rule: maintain accruals under the defined benefit plan, provide nonelective contributions under a defined contribution plan, or restrict nonqualified deferred compensation in specified ways. A plan sponsor may use a different alternative in different years and with respect to different plans. Each of these means of satisfying the rule is discussed further below.</p> <p>Frozen plans using the commercial airline funding relief provided in the Pension Protection Act of 2006 ("PPA") would be ineligible for the 2 and 7 rule and the 15-year amortization rule. And the Secretary of the Treasury would be authorized to prescribe anti-abuse rules preventing, for example, dividing a plan into multiple plans to minimize the effect of the maintenance of effort rules.</p> <p>Defined benefit plan. In order to satisfy the maintenance of effort rule by using the defined benefit plan approach, the employer must not freeze the plan in whole or in part. Thus, a</p>	

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			<p>“soft freeze” with respect to new hires would cause the plan not to satisfy the maintenance of effort rule. See, however, a special rule below under the defined contribution plan approach that addresses the soft freeze situation. The following issues are addressed in the draft:</p> <ul style="list-style-type: none"> • Which employees have to earn an accrual? Accruals must be earned by all employees in the classification of employees who, but for a freeze amendment, would earn accruals (“DB plan employee classification”). Thus, for example, if the defined benefit has always covered Subsidiary A employees but not Subsidiary B employees, all Subsidiary A employees who have satisfied the plan’s age and service requirements would be required to earn an accrual, but Subsidiary B employees would not be required to earn accruals under the plan. • Would it be permissible to reduce the accruals, but not freeze the plan? The answer is yes, as long as (1) all employees in the DB plan employee classification described above earn an accrual, and (2) the benefit satisfies the following test. 	

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			<p>The rate of benefit accrual for an employee must be at least equal to the lesser of (a) the greater of (i) the rate of benefit accrual that would have applied to the employee under the benefit formula in effect on July 1, 2009 (disregarding any plan amendments after June 30, 2009), or (ii) the rate of benefit accrual that would have applied to the employee under the benefit formula in effect as of the last date prior to the effective date of any plan amendment adopted prior to July 1, 2009 that ceased benefit accruals based on additional service credit with respect to such employee, or (b) the rate of benefit accrual under a plan formula that produces a target normal cost for the plan of at least 3% of the aggregate compensation of the employees in the DB plan employee classification. In order to avoid fluctuations in actuarial assumptions causing a plan to fail the target normal cost test, the test would apply based on a fixed interest rate of 5% and the generally applicable mortality assumptions (as opposed to any applicable substitute mortality table).</p> <p>The purpose of the above minimum</p>	

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			<p>accrual test is as follows. Very generally, an employer may satisfy the test by continuing to provide the July 1, 2009 level of accruals, or, if the plan was previously frozen, the pre-freeze level of accruals. However, in order not to penalize generous employers with high existing accrual rates, the draft establishes a reasonable minimum level of benefits that employers can provide and still satisfy the defined benefit plan means of satisfying the maintenance of effort rule.</p> <p>Defined contribution plans. Under the discussion draft, in order to satisfy the maintenance of effort rule through the defined contribution approach, generally, an employer must provide a 3% nonelective contribution (and/or forfeiture allocation) on behalf of all nonhighly compensated employees in the DB plan employee classification. However, if some employees continue to earn accruals under the defined benefit plan, the employer can satisfy the maintenance of effort rule by (1) satisfying the defined benefit plan rule with respect to all employees in the DB plan employee classification other than employees who were frozen out of the defined benefit plan by a plan amendment adopted prior to July 1, 2009, and (2) satisfying the 3%</p>	

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			<p>nonelective contribution rule with respect to all other nonhighly compensated employees in the DB plan employee classification. Thus, for example, if a soft freeze were to have been adopted prior to July 1, 2009, the maintenance of effort rule would be satisfied if (1) the defined benefit plan satisfied the defined benefit rule described above, disregarding the employees excluded by the soft freeze, and (2) the defined contribution plan satisfied the defined contribution rule with respect to such excluded employees.</p> <p>For the first plan year ending after June 30, 2009, an employer may also take matching contributions into account in satisfying the 3% contribution requirement.</p> <p><u>Nonqualified deferred compensation.</u> Here is the theory underlying this part of the maintenance of effort rule. Some employers are having such difficult times that the cost of providing benefits under the defined benefit plan or the defined contribution plan would simply translate into lost jobs. Since no one wants that result, the Pomeroy draft would allow employers a way out of providing benefits under those plans: freezing nonqualified deferred</p>	

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			<p>compensation benefits for executives. The theory is that if an employer cannot afford to provide benefits to rank and file employees under a qualified plan, the employer cannot afford to provide ongoing accruals to executives under nonqualified plans.</p> <p>The Pomeroy draft would require that three restrictions be applied in order to satisfy the maintenance of effort rule through the nonqualified approach. First, all nonqualified plans maintained by the employer <u>or any member of the employer's controlled group</u> must be frozen with respect to all "top hat employees" (as described in ERISA). Second, the defined benefit plan benefit restrictions regarding lump sum distributions (and other prohibited payments) would have to be applied (without the asset smoothing corridor relief described below) to nonqualified plans maintained by the employer. See page 20 below for a summary of those restrictions. For example, if the defined benefit plan is at least 60% funded but less than 80% funded (determined without the relief with respect to the asset smoothing corridor described below), no more than half of an employee's nonqualified benefit may be paid out in the form of a lump sum.</p>	

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			<p>Third, actuarial assumptions under any nonqualified plan may not be more generous than the assumptions used in the defined benefit plan in the controlled group with the least favorable assumptions. For example, if lump sums are determined under the defined benefit plan based on the segment rates, any defined benefit SERP must use an interest rate at least as high as the segment rates to calculate lump sums; for SERPs that still use the 30-year Treasury rate to calculate lump sums, this could result in a significant reduction in benefits.</p> <p>The second and third restrictions described above would be enforced through Code section 409A. The draft provides relief under section 409A with respect to modifications of distribution options in connection with the application of the restrictions. Also, the IRS is directed to permit deferral elections to be revoked if such elections could cause compensation otherwise payable as current compensation to be subject to the freeze. For example, if an employee elects to defer an incentive payment earned over three years, the employee could lose such payment entirely under the required freeze unless the employee is allowed to</p>	

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			<p>revoke his or her deferral election.</p> <p>How long? How long would the maintenance of effort rule apply? The period depends on which rule is used: the 2 and 7 rule or the 15-year amortization rule. If the 2 and 7 rule is used, the maintenance of effort rule applies for the two interest-only years and the next two years. If an employer fails to comply with the maintenance of effort rule in the first year, the 2 and 7 rule does not apply. If an employer fails to comply with the maintenance of effort rule in any of the next three years, then, in the first year of failure, the employer must make up for all contributions that would have been made but for use of the 2 and 7 rule (plus interest at the plan's effective rate of interest). Such make-up contributions shall not be required, however, to the extent they would cause the value of plan assets to exceed the plan's funding target. Generally, shortfall amortization installments with respect to the applicable plan years would be adjusted to take into account such make-up contributions, pursuant to rules issued by the Secretary of the Treasury.</p> <p>If the 15-year amortization rule is used, the maintenance of effort rule applies</p>	

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			<p>for the 15-year period. However, the cost of electing out of the 15-year amortization rule is not as severe as the cost of electing out of the 2 and 7 rule, so that the 15-year requirement is not as daunting as it initially appears. If the employer fails to comply with the maintenance of effort rule in the first year, the 15-year amortization rule does not apply. If the employer fails to comply with the maintenance of effort rule in any subsequent year, the remaining unamortized principal of the shortfall amortization base must be amortized over the shorter of (1) seven years, or (2) the remaining number of years in the original 15-year amortization period.</p> <p>The draft provides a mechanism for applying the maintenance of effort rule to a multiple employer plan to which the funding rules apply on a plan-wide basis. Under the rule, such a multiple employer plan is treated as satisfying the maintenance of effort rule if at least 85% of the participating employers satisfy such rule, provided that different employers may satisfy the rule in different ways (i.e., using the defined benefit, defined contribution, or nonqualified plan approaches).</p> <p>Finally, the draft applies a special rule</p>	

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			to plans receiving relief for a plan year that ends before July 1, 2009. Under the special rule, the employer may elect to have the maintenance of effort rule applied in a modified manner, generally by having the rule begin and end a year later.	
TARGETING	<p>No provision under current law. However, some have raised the possibility of adding a "targeting" provision to any funding bill, probably as a condition of using any amortization relief.</p> <p>The targeting provision would be intended to prevent very healthy and profitable companies from using the relief. There has not been an indication as to how this idea would be implemented. One approach used in an analogous area by Treasury would be to require that employers using the relief have a "substantial business hardship". This concept applies for purposes of funding waivers and generally requires consideration of factors such as whether:</p> <ul style="list-style-type: none"> • the plan sponsor is operating at an economic loss; • there is substantial unemployment or underemployment in the business and in the industry 	No provision.	No provision.	No provision.

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	<p>concerned; and</p> <ul style="list-style-type: none"> the sales and profits of the industry concerned are depressed or declining. <p>Query whether the maintenance of effort rule would itself serve as an effective proxy to eliminate use of funding relief by healthy and profitable companies.</p>			
ASSET SMOOTHING CORRIDOR	<p>Under current law, unexpected gains and losses with respect to defined benefit plan assets may be smoothed, i.e., recognized over a 24-month period. However, the smoothed value of assets must be within 10% of the fair market value of the assets. This 10% limit, which was 20% prior to the PPA, eliminates most smoothing of the recent losses, since such losses generally far exceeded 10%.</p>	No provision.	The discussion draft would increase the 10% figure to 20% for 2009 and 2010 subject to the Special Plan Year Rule described above.	Same as Congressman Pomeroy's discussion draft, except that it does not contain the Special Plan Year Rule.
BENEFIT RESTRICTIONS	<p>In general, under current law, if a plan is under 60% funded for a plan year, the following rules apply: (1) no new accruals are permitted ("no new accrual rule"), (2) no benefits may be paid in the form of a "prohibited payment" (defined below), (3) plant shutdowns (or similar events) occurring during that year may not trigger additional benefit payments, and (4) plan amendments increasing benefits may not take effect</p>	No provision.	<p>The discussion draft would extend the 2008 lookback rule for another year, so that generally a plan's 2008 funded status would apply for both 2009 and 2010 (subject to the Special Plan Year Rule described above) for purposes of the "no new accrual rule", but not for purposes of the other benefit restrictions.</p> <p>The discussion draft would exclude social security level-income options</p>	No provision

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	<p>(subject to certain exceptions).</p> <p>Under the 2008 legislation, the “no new accrual rule” may be applied to the first plan year beginning after September 30, 2008 based on the plan’s funded status for the prior year (“2008 lookback rule”). Generally, the 2008 lookback rule prevents plans from having to freeze solely because of the market downturn. Finally, if a plan is at least 60% funded but less than 80% funded, (1) the above plan amendment rule applies, and (2) at most, only half of any benefit may be paid in the form of a prohibited payment such as a lump sum.</p> <p>For purposes of the benefit restrictions, a prohibited payment is generally defined as any payment in excess of the monthly amount paid under a single life annuity, plus any “social security supplement” (generally, a supplemental monthly benefit provided to early retirees to provide a bridge to the date that Social Security benefits begin). The prohibited payment benefit restriction was targeted at lump sum distributions and similar payments. It has, however, been interpreted in proposed regulations to include other forms of payment, including social security level-income options. Social security</p>		<p>from the definition of “prohibited payment”, just as the economically identical social security supplements are currently excluded. This amendment would be retroactive to the original effective date of the benefit restrictions, subject to a permissive delayed effective date for plans that are or have been subject to prohibited payment restrictions.</p>	

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	<p>level-income options are economically the equivalent of social security supplements; the only difference is that plans can be amended to eliminate earned social security supplements, but earned social security level-income options are protected from elimination.</p> <p>Some have raised the possibility of applying the 2008 lookback rule to all of the benefit restrictions and applying it to 2010 in addition to 2009. One theory underlying such a possible provision is that employees, who have already suffered dramatic declines in their 401(k) plan savings, should not be subject to the additional adverse effects of a legal ban on benefit accruals and benefit payments.</p>			
CREDIT BALANCE RESTRICTIONS	<p>Under current law, a plan sponsor may not use its credit balances to offset minimum required contributions if the plan was less than 80% funded in the prior year.</p>	No provision.	<p>The discussion draft would create a lookback rule, so that, subject to the Special Plan Year Rule described above, a plan's funded status for 2008 may be used for 2009 and 2010 in applying the rule prohibiting the use of credit balances if a plan was less than 80% funded in the prior year. This proposal is based on the fact that many employers have little access to cash or credit. If suddenly employers cannot use the credit balances they built up by prepaying funding obligations, employers will in many cases be forced</p>	No provision.

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			to lay off employees to come up with the needed cash.	
TREATMENT OF PLAN INVESTMENT EXPENSES	<p>Under pre-PPA law, plan administrative expenses were often treated as part of normal cost and thus required to be funded immediately, rather than amortized over several years. When PPA was drafted, target normal cost was inadvertently defined to exclude such plan administrative expenses. Accordingly, in the 2008 technical correction legislation, "plan expenses" were added to target normal cost. However, informal indications are that Treasury may interpret this reference to "plan expenses" to include plan investment expenses. This would be a major policy change—and result in an immediate increase in employer's short-term costs—based on a technical correction. Such an interpretation would require employers to treat investment expenses differently from investment losses by funding them immediately, rather than over seven years.</p> <p>For large plans, in 2007, investment expenses averaged 44 basis points. The average for smaller plans is likely higher.</p>	Clarifies that only plan <u>administrative</u> expenses are part of target normal cost, effective as though this change were part of the 2008 technical correction legislation.	Same as the Education and Labor Committee bill.	No provision.
EARLY RETIREMENT	Under current law, defined benefit plans may be used to help an employer	No provision.	Under the discussion draft, special rules would apply to defined benefit plan	No provision.

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WINDOW BENEFITS	<p>manage its workforce by providing limited incentives for employees to either remain employed (through, for example, a final pay benefit formula), or terminate employment (through, for example, early retirement benefits). The ability of employers to use a defined benefit plan in this manner has historically been one of numerous reasons for employers' maintenance of defined benefit plans.</p> <p>It has been common for employers to offer early retirement window benefits, whereby certain older employees are offered enhanced benefits under the defined benefit plan if they retire during a specified period. Such benefits must be available in the form of an annuity, but employees may be given the option of receiving such benefits in a lump sum.</p>		<p>amendments that (1) increase vested benefits for one or more participants, (2) only apply to employees who terminate employment during a limited period of time, (3) only apply to a subset of all employees otherwise eligible for an accrual under the plan, and (4) offer additional benefits to such participants in the form of a lump sum or other prohibited payment, provided that such special rules would not apply to collectively bargained plans. A prime example of such an amendment is an early retirement incentive plan that (1) is only offered to a discrete group of older employees, (2) provides benefits only to those in the group that retire during a specified period, and (3) offers benefits in the form of either an annuity or a lump sum.</p> <p>Under the draft, if a plan is less than 120% funded (after taking the amendment into account), the plan amendment benefit restriction would apply so that an amendment of the type described above may not take effect unless the full cost of the amendment is funded or the plan is funded up to 120%. If such an amendment is permitted to take effect, 100% vesting of all defined benefit plan benefits would be required.</p>	

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			<p>The theory underlying this proposal is that the use of defined benefit plan assets to pay for lump sum early retirement incentive payments is effectively a diversion of plan assets to pay for severance benefits. Under the theory, no such diversion should be permitted unless a plan is extremely well funded.</p>	
<p>SECTION 4010 REPORTING</p>	<p>Under current law, under certain circumstances, plan sponsors maintaining underfunded plans must annually report to the PBGC certain detailed information regarding their plans' assets and liabilities and certain financial information regarding the plan sponsor. PBGC can use this information in connection with its "Early Warning Program," under which the PBGC becomes involved in the negotiations regarding certain business transactions.</p> <p>Prior to the PPA, this reporting obligation would be triggered if the aggregate unfunded vested benefits of plans maintained by the plan sponsor and all of its affiliates exceeded \$50 million (disregarding plans with no unfunded vested benefits). This rule was criticized because, in the context of a large plan, it could require reporting by plans that are over 99% funded.</p>	<p>Effective for years beginning after 2009, the bill would retain the current-law 80% trigger for reporting and would also restore the \$50 million trigger. So a plan sponsor would be required to report to the PBGC if (1) any plan maintained by such sponsor or any affiliate is less than 80% funded, <u>or</u> (2) the aggregate unfunded vested benefits of plans maintained by the plan sponsor or any affiliate exceed \$50 million (disregarding plans with no unfunded vested benefits).</p>	<p>Effective for years beginning after 2009, the draft would replace the 80% trigger with a rule under which reporting would be required if the aggregate unfunded vested benefits of plans maintained by the employer and all of its affiliates exceed \$100 million, disregarding plans with a funding target attainment percentage of at least 90%. For this purpose, credit balances are not subtracted in determining a plan's funding target attainment percentage.</p> <p>In addition, the draft would apply new rules regarding the confidentiality of information submitted under ERISA section 4010. Generally, non-public information would be required (1) to be kept confidential, (2) to be used only for the purpose for which it was requested, and (3) to not be further disclosed unless the submitter of the information agrees to such disclosure. In the case of</p>	<p>No provision.</p>

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	<p>Accordingly, PPA changed the rule so that the reporting obligation is triggered if any plan maintained by the plan sponsor or any affiliate is under 80% funded (determined after subtracting credit balances).</p> <p>PBGC has expressed concern about the PPA rule. PBGC's perspective is that it has exposure based on the gross amount of underfunding, even if that underfunding is a small percentage of the plan's total liability.</p> <p>ERISA prohibits PBGC from making these reports public, except that (1) PBGC may provide information relevant to any administrative or judicial proceeding, and (2) PBGC may disclose the information to Congress.</p>		<p>an unauthorized disclosure—other than one based on good faith, but erroneous, interpretations of the law—the submitter of the information can sue the person making the disclosure for up to \$100,000 plus reasonable attorney's fees.</p>	
<p>EFFECTIVE DATE OF BENEFIT RESTRICTIONS FOR COLLECTIVELY BARGAINED PLANS</p>	<p>Generally, the benefit restrictions described above are effective for plan years beginning after December 31, 2007. However, in the case of a plan maintained pursuant to a collective bargaining agreement ratified before January 1, 2008, the benefit restrictions do not apply until the first plan year beginning on or after the earlier of:</p> <p>(1) the later of:</p> <p>(a) the termination of the collective bargaining agreement (determined without regard to any extensions</p>	<p>No provision.</p>	<p>In the case of collectively bargained plans, the draft would delay the effective date of three of the four benefit restrictions until plan years beginning after December 31, 2011. This would apply to the no-accrual rule, the prohibited payment rule, and the "shutdown benefit" rule. The current-law effective date rules would apply to the benefit restriction regarding plan amendments.</p> <p>The delay provided by the draft is intended to ensure that in the short</p>	<p>No provision.</p>

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	<p>agreed to after August 17, 2006), or (b) January 1, 2008, or (2) January 1, 2010.</p>		<p>term, collective bargaining agreements can focus on job-retention and wage levels, rather than on avoiding the application of benefit restrictions through increased funding of plan liabilities that will not be due for many years.</p> <p>This delay would be retroactively effective, subject to a permissive delayed effective date for plans that are or have been subject to the benefit restrictions.</p>	
<p>EFFECTIVE DATE OF FUNDING REGULATIONS</p>	<p>The PPA funding and benefit restriction rules generally went into effect as of the first day of the first plan year beginning in 2008. However, the regulations interpreting those rules have not been issued in the final form. The IRS has announced that (1) such regulations will not be effective for plan years beginning before they are issued, and (2) until the effective date of the regulations, employers may rely on a reasonable interpretation of the PPA. Thus, conceivably, the funding and benefit restriction regulations could be issued in September and be effective for plan years beginning on or after October 1, 2009, leaving employers very little time to prepare for the application of the regulations.</p>	<p>Directs Treasury not to make the funding and benefit restriction regulations effective earlier than plan years beginning after December 31, 2009. The bill also directs Treasury to continue permitting employers to rely on a reasonable interpretation of the PPA until the effective date of the regulations.</p>	<p>No provision.</p>	<p>No provision.</p>

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DETERMINATION OF PBGC GUARANTEE	<p>When an underfunded plan is turned over to the PBGC, the determination of the amount of each participant's benefits that the PBGC guarantees can be affected by the date as of which guaranteed benefits are determined. For example, the maximum level of guaranteed benefits is indexed annually, so a determination as of a date in 2009 is subject to a higher maximum than a determination as of a date in 2008. Also, any increase in benefits by reason of a plan adoption or amendment is subject to a five-year phase-in of the PBGC guarantee, so the date as of which the guarantee is determined can affect the application of the phase-in. In addition, contingent benefits, such as early retirement subsidies, are only guaranteed if the contingency (e.g., retirement) occurs before the guarantee is determined. Furthermore, employees' additional service and compensation after the date of determination are disregarded.</p> <p>Before the PPA, the date as of which PBGC guarantees were determined was the date of plan termination. The PPA changed the rule so that the guaranteed amount is frozen as of the date a contributing sponsor enters bankruptcy or a similar proceeding.</p>	<p>No provision.</p>	<p>The discussion draft would repeal the PPA change, so that the PBGC guarantee is determined as of the date of plan termination, effective with respect to bankruptcy proceedings initiated after the date of enactment.</p>	<p>No provision.</p>

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PLANS WITH DELAYED PPA EFFECTIVE DATE	<p>Under PPA sections 104-106, the effective date of the PPA funding changes was delayed with respect to certain categories of employers: (1) multiple employer plans maintained by rural electric cooperatives, rural telephone cooperatives, or agricultural cooperatives, (2) companies sponsoring plans with respect to which there had been a settlement agreement with the PBGC, and (3) certain government contractors. The extent of the delay differed among the three groups, reflecting the different reasons each group needed the delay.</p> <p>Accordingly, each of the three groups is currently subject to the pre-PPA funding rules. The pre-PPA funding rules are divided into two parts: the "ERISA funding rules" and the "deficit reduction contribution" ("DRC") rules. The DRC rules only apply to underfunded plans. For this purpose, in general, a plan is underfunded if it is below 80% funded or has been repeatedly below 90% funded.</p> <p>The DRC rules are in many cases more demanding than the PPA rules. For example, for a "DRC plan" that is 79% funded, the DRC rules require an amortization contribution that, for 2009, is approximately 84% higher than the</p>	<p>No provision.</p>	<p>Generally, with respect to plans subject to the pre-PPA rules, the draft would permit the employer to elect either the 2 and 7 rule or the 15-year amortization rule, subject to the maintenance of effort rule. However, the funding relief would only apply with respect to the DRC rules.</p> <p>Since the PPA funding rules and the DRC rules are structurally different, the application of the funding relief is adjusted to reflect the DRC structure. If the 2 and 7 rule is elected, the determination of whether the DRC applies in 2010 and 2011 is based on the plan's 2008 funded status (subject to the Special Plan Year Rule). If the DRC does apply, then a special rule applies to the portion of the funding deficit for 2010 and 2011 attributable to the decrease in funded status from 2008 (again, subject to the Special Plan Year Rule). Under that special rule, only interest at the third segment rate is owed on that portion of the funding deficit. The remainder of the funding deficit is subject to the normal DRC rules.</p> <p>If the 15-year amortization rule is elected, then the same portion of the funding deficit described above is subject to a different special rule for</p>	<p>No provision.</p>

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	<p>amortization contribution required under the PPA rules for a "PPA plan" that is 79% funded. (Funded status is determined differently under the DRC rules, but such differences clearly do not make up for the 84% increase.) This 84% increase occurs because (1) the amortization period is shorter (effectively 5 years for a 79% funded plan), and (2) the "funding target" is 100%, not 94%.</p> <p>Accordingly, it has been suggested that it would not be appropriate to provide funding relief only to companies subject to the PPA funding rules, without providing similar relief to companies subject to funding rules that can be more rigorous, i.e., the DRC rules.</p> <p>Also, for companies subject to the pre-PPA funding rules, the adverse effects of the 2008 losses will generally be recognized in 2010 and 2011 due to the availability of 48-month asset smoothing, as opposed to 24-month smoothing under PPA. Thus, it may be appropriate to provide relief for such companies for losses recognized a year later, i.e., generally for losses recognized in 2010 and 2011, not 2009 and 2010 as is generally appropriate for companies subject to the PPA funding rules.</p>		<p>2010 and 2011 (subject to the Special Plan Year Rule). Under that special rule, the required contribution is the amount payable under a 15-year amortization schedule, using the third segment rate as the interest rate. The remainder of the funding deficit would be subject to the normal DRC rules.</p> <p>The same maintenance of effort rule applicable to the 2 and 7 rule would apply if the employer elects to use either the 2 and 7 rule or the 15-year amortization rule. Due to the different structure of the corresponding 15-year amortization rule, that maintenance of effort rule would not fit the DRC structure.</p>	

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REPORTABLE EVENT RULE	<p>Reportable events.—Reportable events are designed to notify the PBGC of certain specific developments or changes in circumstances that might indicate deterioration in the financial condition of a pension plan or plan sponsor. Such events might portend a plan termination which could potentially result in the PBGC having to assume additional liabilities. Plan administrators and contributing sponsors are generally required to notify the PBGC within 30 days after they know or have reason to know that a reportable event has occurred unless a waiver applies. Such waivers may be applicable, for example, if a pension plan is reasonably well funded and represents little risk to the PBGC.</p> <p>Active participant reduction.—One such reportable event, a reduction in the active participant headcount below specified levels, has become outdated and potentially damaging to financially viable companies. (Very generally, the rule is triggered if there is a 20% reduction in the headcount over one year or a 25% reduction over two years.) The headcount reduction notification was originally designed to indicate that a company's workforce may have shrunk so that it is no longer of</p>	<p>No provision.</p>	<p>Under the discussion draft, a reduction in the number of active plan participants would not constitute a reportable event with respect to the 2010 or 2011 plan years (subject to the Special Plan Year Rule) if the following conditions are met.</p> <ul style="list-style-type: none"> • There is not a significant reduction in the actual workforce below the current-law specified levels. Where a plan is frozen or closed, the active participant headcount can fall even though the business size and workforce have not been significantly reduced. Where the workforce has not been significantly reduced, there is no policy reason for a reportable event. Thus, this part of the proposal simply updates the reportable event rule to reflect current conditions. • The plan was at least 80% funded for the 2008 plan year. This part of the proposal ensures that the relief is targeted at companies that, but for the market downturn, would not have had a reportable event. • The plan sponsor notifies the PBGC that it is using this special rule. Thus, PBGC receives up-to-date information, but there is no reportable event and thus no inappropriate loan default. 	<p>No provision.</p>

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	<p>sufficient size to sustain the business or the plan. However, the actual statutory text is based on a decline in active plan participation, which can be very different from a decline in the workforce. As companies adjust to continue to be competitive, many are freezing pension plans with respect to all employees or closing the plans to new hires. Consequently, since no new active participants are entering such plans, the active participant reduction reportable event is being triggered through the normal course of events, such as employees quitting and retiring. Thus, a reportable event can occur despite the fact that the employer has not experienced economic problems. In this way, the reportable event rules have not been updated to reflect the current situation.</p> <p>The PBGC waives the reporting requirement with respect to an active participant headcount reduction if a pension plan was 80% or better funded in the prior year. This 80% threshold has been relatively easy to meet in the past and has allowed plan sponsors to avoid the harsh application of the outdated rule described above. But because of the severe market downturn, many plans have fallen below 80%</p>			

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	<p>funded for the 2009 plan year (which will prevent use of the 80% rule for the 2010 plan year), and this has transformed the outdated reportable event rule into an enormous problem.</p> <p>Company debt/loans.—Lenders in general require conditions to ensure repayment of the loans. For companies with pension plans, one set of required conditions is that those pension plans must remain ERISA compliant. Beyond the general ERISA compliance requirement, loan agreements generally require that certain ERISA-related events will cause a loan default whereby the continued advancement of credit could be terminated and outstanding payments become due and payable. The reportable event described above is generally one of those events. In some circumstances, a lender may waive such default. However, in the current economic situation, lenders are far less inclined to waive, but will instead use the technical default to call the loan or modify the terms significantly in their favor. The effect of such lender action can be catastrophic for a business that is trying to recover and that does not have reasonable access to other credit. The loans enable otherwise viable</p>			

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	companies to stay in business; without the loans, bankruptcy is a real possibility.			

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Prepared for the Council by



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