

Defined Benefit Pension Reform: Reasons and Results
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I.	INTRODUCTION.....	1
II.	STRUCTURE AND FINANCES.....	2
	<i>A. Structure</i>	2
	<i>B. Finances</i>	5
III.	DESCRIBING AND EVALUATING RECENT REFORM.....	7
	<i>A. Overview of Recent Reform</i>	7
	<i>B. Reasons for and Results of Recent Reform</i>	13
IV.	CONCLUSION.....	27
	FIGURES.....	28

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Daniel B. Klaff*

In the face of corporate bankruptcies, the Pension Benefit Guaranty Corporation (“PBGC”) assures workers that their defined benefit pensions will be protected. It is this fact which has motivated recent reform of the PBGC and the overarching defined benefit plan system by Congress. This paper explores those reforms by addressing the reasons for and results of the most recent reform which had as its primary aim restoring the fiscal solvency of the PBGC. The paper challenges popular accounts of the reform process while examining the results of such reform for important stakeholders without resorting to an overly technical discussion of each provision of the reform. The paper argues that while special interests were successful in obtaining changes in the bill throughout the course of its legislative journey, focusing on such small changes obscures important structural changes to the defined benefit pension system.

I. INTRODUCTION

The recent spate of corporate bankruptcies has raised many issues around the country. Some bankruptcies, such as Enron’s, have been read as sobering tales of corporate mismanagement and ineffective government regulation.¹ Other bankruptcies, such as those in the auto and airline industries, have been read as inevitable byproducts of a new economic reality.² Whatever the reason for these recent corporate bankruptcies, workers around the country have shouldered a large portion of the consequences of these corporate decisions. In the corporate restructuring that follows the declaration of bankruptcy, workers have faced tremendous hardships. For unionized workers, many union contracts have been terminated.³ Non-unionized workers do not lose as much relative to previous contract-based entitlements but end up in the same position as unionized workers because companies have few contractual obligations to non-unionized workers. One of the few silver linings for workers faced with corporate bankruptcies comes in the form of the Pension Benefit Guaranty Corporation (“PBGC”), the federal government’s insurance program for workers’ defined benefit pensions. While

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¹ See, e.g., BRIAN CRUVER, *ANATOMY OF GREED: THE UNSHREDDED TRUTH FROM AN ENRON INSIDER* (2002).

² See, e.g., Caroline Daniel, *Stricken Airlines Seek Shelter in a Storm*, FIN. TIMES, Oct. 19, 2004, at 1 (pointing out the advantages and inevitability of Chapter 11 bankruptcy for airlines as well as companies in many other industries).

³ See Ellen Schultz, *Airlines in Trouble: Industry’s Pension Maneuvers Raising Questions about the Law*, WALL ST. J., Sept. 14, 2004, at A17 (demonstrating that bankruptcy courts have been increasingly receptive to expansive interpretations of the conditions necessary for corporate bankruptcy).

companies themselves are not required to honor pension promises in bankruptcy, the PBGC, with limited exceptions, does guarantee those promises to workers.

However, as the number and size of bankruptcies have increased the system on which workers in such circumstances rely has become increasingly unstable. It is in this context, that recent efforts at reforming the PBGC and the underlying defined benefit pension funding structure have emerged. After over three years since serious attempts at reform began, a comprehensive looking reform bill has finally been passed. This article evaluates this most recent reform of the pension system in light of the structure and finances of the federal government's pension insurance system. In this context, this analysis demonstrates that the recent round of reform should be seen as making important structural changes to the defined benefit pension system even though special interests did succeed in watering down certain provisions.

Section I of the article provides a brief overview of the contemporary structural design of the federal government's defined benefit pension regulation system with a particular focus on the PBGC. The first section also provides a detailed but brief description of the financial circumstances facing the system in the period leading up to recent reform. In contrast, Section II of the article focuses on the most recent rounds of pension reform beginning in July of 2003. This section provides a brief procedural overview of the recent reforms and then continues by describing the primary impetus for such reform and evaluating its likely consequences in the context of the key stakeholders affected by the reform process.

I. STRUCTURE AND FINANCES

In the context of an article primarily interested in the most recent round of pension reform, it is important to provide some structural and financial background. This article will not revisit previous work describing the history of the federal government's pension regulation system but will instead provide a broad overview of its relevant details.⁴ After providing structural background, this section will then continue with an explanation of the relevant accounting measures of the system as such measures (or at least the intuition they represent) become a vital part in explaining the reasons for recent pension reform.

A. Structure

In advance of describing the particulars of the structure of the pension reform, it is important to keep in mind which pensions this legal system covers and which it does not. The relevant laws in the area, as well as the PBGC, focus only on defined benefit pension plans.⁵ Before the advent of the Employee Retirement Income Security Act of 1974

⁴ See Kathryn J. Kennedy, *Pension Funding Reform: It's Time to Get the Rules Right (Part 1)*, TAX NOTES, Aug. 22, 2005 [hereinafter Kennedy Part I]; see also Kathryn J. Kennedy, *Pension Funding Reform: It's Time to Get the Rules Right (Part 2)*, TAX NOTES, Aug. 29, 2005 [hereinafter Kennedy Part II].

⁵ Defined benefit plans commit an employer to providing a specific level of monetary benefit at a particular retirement age as a life annuity for the plan participant. In contrast, defined contribution plans do not face such long-term financing problems because they are structured such that an employer makes a payment to employees' accounts after which the employee has broad discretion over the money that has been contributed.

(“ERISA”), there was no pre-funding requirement for employer pension plans.⁶ That is, once an employer established a defined benefit pension plan, it was under no obligation to make sure it had funds available to pay its employees when their pension obligations were due. In 1974, President Gerald Ford signed ERISA, thereby enacting, amongst other regulations, minimum funding standards to ensure a degree of pension plan prefunding and a federal government guarantee for workers in the event of plan insolvency.⁷

The basis for ERISA’s funding rules is the requirement that all single employer plans must hire an actuary to compute current pension plan costs.⁸ Essentially, the relevant actuarial calculations reveal the yearly costs of current obligations to retirees and any additional costs derived from past-service liabilities or previously unpaid yearly costs. Along with such estimates of obligations, ERISA requires actuaries to report a “T account” for the plan compared the yearly debits and credits associated with the plan.⁹ The initial system was very simple: if the credits (employer contributions to the plan) were equal to the debits (yearly accrued plan costs) then the plan was in compliance with the minimum funding rules.¹⁰

With minor modifications over time, these funding rules have led to a relatively simple system. All plans have a funding standard account (“FSA”) such that if plan assets equal the present value of liabilities then the FSA is 0.¹¹ The FSA for each plan changes each year based upon normal accrual of benefits, investment losses by the plan and changes to the plan’s structure that increase liabilities (debits) as well as contributions by employers, investment gains by the plan and changes to the plan’s structure that decrease liabilities (credits).¹² If the FSA is equal to or greater than 0 then no contributions are required. Deficit reduction contributions (“DRCs”) are required when the value of the assets of a plan compared to the value of its liabilities (the funding ratio) falls below 90 percent.¹³

While the previously discussed funding rules were designed to encourage companies to prefund their pension obligations, ERISA also set up a system designed to guarantee a certain level of benefits in the event of plan insolvency.¹⁴ Technically, the PBGC, the cornerstone of this system, maintains two legally distinct programs: one for single-employer plans and one for multi-employer plans.¹⁵ The PBGC spends most of its

⁶ Kennedy Part I, *supra* note 4, at 910; Cong. Budget Office, A Guide to Understanding the Pension Benefit Guaranty Corporation 2 (2005), available at <http://www.cbo.gov/ftpdocs/66xx/doc6657/09-23-GuideToPBGC.pdf> [hereinafter Guide To Understanding].

⁷ Kennedy Part I, *supra* note 4, at 911.

⁸ 26 C.F.R. § 1.412(c)(3)-1(b) (2006).

⁹ 26 U.S.C. § 302(a)(1) (2006); 29 U.S.C. § 1082(a)(1) (2006); 26 C.F.R. § 1.412(a)(1) (2006).

¹⁰ 26 U.S.C. § 302(b)(2) (2006); 29 U.S.C. § 1082(b)(2) (2006); 26 C.F.R. § 1.412(b)(2) (2006). If debits were greater than credits, the company was required to pay a 10 percent excise tax on the plan plus an additional 100 percent tax if there was not a correction made within a short period of time. 26 U.S.C. § 302(a)(2) (2006); 29 U.S.C. § 1082(a)(2) (2006); 26 C.F.R. § 1.412(a) (2006). However, if the credits were greater than the debits, the balance carried over into the next year. 26 U.S.C. § 302(b)(3) (2006); 29 U.S.C. § 1082(b)(3) (2006); 26 C.F.R. § 1.412(b)(3) (2006).

¹¹ Guide To Understanding, *supra* note 6, at 5.

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ At the time of ERISA’s creation, the PBGC was largely an afterthought which partly explains why it is not structured around sound financial principles. See Julie Kosterlitz, *Risking a Major Loss*, NAT’L J., May 27, 2006 (citing COFFI’s President, Douglas Elliott).

¹⁵ Guide To Understanding, *supra* note 6, at 8.

time on single-employer plans, which it insures, and much less time on multi-employer plans to which it provides loans when necessary.¹⁶

The first component of the PBGC system is its termination structure. Initially, ERISA allowed companies to opt-out whenever they wanted and hence transfer all of their liabilities to the PBGC.¹⁷ In 1987, Congress revised this system to create three potential mechanisms for plan termination, which are in place today. The standard termination mechanism allows companies to voluntarily terminate their plans only if plan assets exceed plan liabilities.¹⁸ The PBGC is thus not responsible for any of the companies' obligations under those plans.¹⁹ Distress termination is permitted if the company meets one of three criteria: it is petitioning for bankruptcy or insolvency; it is unable to pay its debts when due and will be unable to continue business without termination; the cost of the plan has become unreasonably burdensome because of a decline in the company's workforce.²⁰ Finally, the PBGC can force involuntary terminations in certain circumstances.²¹

In order to fund the PBGC, ERISA initially required companies to pay a \$1 per-participant per-year premium (the basic premium).²² The basic premium was increased to \$19 per participant per year in 1991.²³ The Pension Protection Act of 1987 added a second tier premium (the variable premium) for plans with unfunded vested benefits that was initially set at \$6 for each \$1,000 of unfunded vested benefits with a cap of \$50.²⁴ In 1994, Congress removed the cap and changed the variable requirement to \$9 for each \$1,000 of unfunded vested benefits.²⁵ If an employer does not meet its premium obligations to the PBGC, the PBGC can place a lien on the employer's assets.²⁶

Aside from the premiums it collects from employers, the PBGC also acquires assets from terminated plans. The premiums are on-budget revenues and must be invested in fixed-income securities.²⁷ On the other hand, terminated assets are part of the off-budget PBGC trust fund, which can be invested in a number of different areas.²⁸ The relationship between these PBGC and the federal budget can be seen in Figure 1. While the PBGC itself is not backed by the full faith and credit of the federal government, it does have a \$100 million line of credit from the United States Treasury.²⁹ Finally, it is important to note that the PBGC does not pay out all employer provided benefits. Instead,

¹⁶ *Id.*

¹⁷ 26 U.S.C. § 4041(a) (2006); 29 U.S.C. § 1341(a) (2006).

¹⁸ 26 U.S.C. § 4041(b) (2006); 29 U.S.C. § 1341(b) (2006).

¹⁹ If a company terminates voluntarily with a surplus, the law imposes a 50 percent excise tax on the surplus to prevent plan termination as a method of accessing funding surpluses. Kennedy Part I, *supra* note 4, at 915.

²⁰ 26 U.S.C. § 4041(c)(2)(B) (2006); 29 U.S.C. § 1341(c)(2)(B) (2006).

²¹ There are four such circumstances: the company does not meet minimum funding requirements; the company can not pay its benefits when due; a lump-sum is paid to a person who is a substantial owner of the company; an eventual loss to the PBGC would be unreasonable if the plan is not terminated. Guide To Understanding, *supra* note 6, at 10.

²² *Id.* at 8.

²³ *Id.*

²⁴ 26 U.S.C. § 4006(a)(3)(E)(iii)(V) (2006); 29 U.S.C. § 1306(a)(3)(E)(iii)(V) (2006).

²⁵ Guide To Understanding, *supra* note 6, at 8.

²⁶ *Id.* at 3.

²⁷ *Id.* at 11.

²⁸ *Id.*

²⁹ *Id.*

it pays out almost all pension benefits anticipated by employer plans up to a maximum amount that varies annually.³⁰

B. Finances

While there have always been PBGC funding issues lurking, these issues began to gain some degree of prominence in the early part of this decade. During the 1990s, strong equity markets inflated the value of pension plan assets around the country and thus reduced the required minimum contributions.³¹ Unfortunately, this meant that the economic problems of the early 2000s reduced plan assets while at the same time reducing the interest rates used for funding purposes causing massive underfunding in plans across the country.³² This confluence of events has been dubbed the “perfect storm”.³³ As a result, the PBGC found itself facing a large number of underfunded plans without the financial reserves necessary to provide relief should many of the plan obligations end up on the PBGC’s doorstep.

Before discussing particular measures of the PBGC’s financial health, it is important once again to note that all of these measures are based upon estimates done before the most recent round of reform in an effort to frame the upcoming legislative analysis. That is, these numbers represent what lawmakers and others were working from during the relevant period. The primary vehicle used for measuring the health of the PBGC has been cash flow accounting. The impetus for using cash flow accounting is that it is the vehicle through which the entire federal budget is viewed. A cash flow model compares the system’s annual receipts to its annual payments. In the case of the PBGC, the receipts primarily include annual premiums and terminated assets and the payments primarily include administrative expenses and benefits paid.

Past cash flow statements have indicated a recent decline in the fiscal position of the PBGC, however, these statements have only hinted at the larger problem facing the PBGC: declining revenue in the face of mounting expenses. Similar to Social Security, the question was when, not if, the PBGC will begin running consistent cash flow deficits and ultimately deplete its assets.³⁴ The CBO projected that benefits paid will grow from about \$4 billion in 2005 to about \$10 billion in 2015.³⁵ According to these projections, the PBGC would exhaust its on-budget surpluses around 2013 at which point the PBGC would have to dramatically increase the amount of benefits it pays out from its trust fund surpluses.³⁶ While plan terminations increase the trust fund surpluses in the short-term, this is a misleading indicator of the PBGC’s health because with those surpluses come

³⁰ *Id.* at 12. In 2005, the maximum PBGC award was a \$45,614 life time annuity beginning at age 65. *Id.*

³¹ Kennedy Part II, *supra* note 4, at 1040.

³² *Id.*

³³ *The Pension Underfunding Crisis: How Effective Reforms Have Been?: Hearing before the Committee on Education and the Workforce, US House of Representatives, 108th Cong., 1st Sess. (October 29, 2003), Statement of Robert D. Krinsky on behalf of American Benefits Council.*

³⁴ Estimates of these timeframes are provided by the Congressional Budget Office (“CBO”) and the Center on Federal Financial Institutions (“COFFI”). These models also correspond to on-budget and unified cash flow models.

³⁵ Guide To Understanding, *supra* note 6, at 18. The CBO model predicts the PBGC’s on-budget cash flows 10 years into the future using current law assumptions. *Id.* at 16.

³⁶ *Id.* at 17.

larger future obligations. The starkest example of the change in overall fiscal health of the PBGC's on-budget funds comes from Figure 2, which shows a shrinking and eventually non-existent surplus. In COFFI's most recent model, overall PBGC funds run out between 2020 and 2021.³⁷

Putting the CBO and COFFI models together it was reasonable to expect that under current law as of early 2006, the PBGC's on-budget funds would have been exhausted in about 2013 and that its off-budget funds would have been exhausted in about 2020, leaving the PBGC itself in bankrupt and in need of a bailout.

Accrual accounting provides an alternative way of evaluating the financial health of the PBGC.³⁸ The essence of accrual accounting is evaluating the net financial position of a system by comparing the system's assets to the present value of its liabilities.³⁹ In the PBGC context, assets include the present value of all cash, equities, bonds and other holdings in the on-budget revolving fund as well as the off-budget trust fund while liabilities include the present value of all future benefits the PBGC is obligated to pay on behalf of terminated plans, those pending termination and those likely to terminate.⁴⁰ The PBGC itself provides comprehensive accrual accounting for the entire system.⁴¹ Figure 3 reveals that the net financial position of the PBGC has declined rapidly in recent years from its historical average. This change is primarily the result of the "perfect storm" discussed above.⁴²

While in some sense accrual accounting attempts to capture the future obligations of the system, these methods do not focus primarily on mapping out the relevant future assumptions necessary to get a full picture of the system's long-term financial condition. As a result, there have been a few efforts to model the long-term net financial position of the PBGC system. The two major models in this area are the PBGC's own model as well as the CBO's model. The PBGC model predicted \$1.7 billion per year in additional claims over the next ten years, which translates into a financial deficit of 26.9 billion in

³⁷ Center on Federal Financial institutions, PBGC: Updated Cash Flow Model From COFFI (2004), available at <http://www.coffi.org/pubs/PBGC%20Updated%20Cash%20Flow%20Model%20from%20COFFI.pdf>; The COFFI model differs significantly from the CBO model in a number of respects. It uses a different notion of cash flows and focuses on both the on-budget and off-budget PBGC surplus. PBGC: When Will the Cash run out? 5 (2004), available at <http://www.coffi.org/pubs/PBGC%20When%20Will%20the%20Cash%20Run%20Out%20v8.pdf>. It also focuses on a much longer time-horizon: 75 years. *Id.* at 1. However, the model is similar to CBO's in that it assumes current law. *Id.*

³⁸ Accrual accounting has been primarily applied to Social Security in the past. See Howell E. Jackson, *Accounting for Social Security and Its Reforms*, 41 J. LEGIS. 1, 59–159 (2004).

³⁹ Guide To Understanding, *supra* note 6, at 14.

⁴⁰ *Id.*

⁴¹ Pension Benefit Guaranty Corporation, Pension Insurance Databook 2004 (2004), available at <http://www.pbgc.gov/docs/2004databook.pdf> [hereinafter Databook 2004].

⁴² In estimating its future obligations the PBGC focuses on "probable terminations" which are determined at the PBGC's discretion based upon its primary knowledge of the state of each pension plan. 2004 Annual Report 30-31 (2004), available at http://www.pbgc.gov/docs/2004_annual_report.pdf [hereinafter 2004 Annual Report]. At bottom, this measure includes the costs from already terminated plans and those probable near-term terminations, but excludes new claims likely to arise in the future. Cong. Budget Office, *The Risk Exposure of the Pension Benefit Guaranty Corporation* 4 (2005), available at <http://www.cbo.gov/ftpdocs/66xx/doc6646/09-15-PBGC.pdf> [hereinafter Risk Exposure].

2014.⁴³ Table 1 provides a summary of the CBO model's results.⁴⁴ Immediately upon observing the data, it is clear that the model predicts a much worse financial position for the PBGC than the PBGC's own model: a deficit of \$63.4 billion compared to \$26.9 billion in 2014.⁴⁵

II. Describing and Evaluating Recent Reform

This section of the article builds upon the structure and background of the pension system in providing a nuanced account of recent reform. An important aim of this article is to move beyond frequently simplistic popular understandings of the political dynamics shaping the pension reform process as well as the overly complex financial estimates of the effects of reform towards a meaningful picture of both the process and outcomes of recent reform. In pursuing this objective, this section will provide a general overview of the political process over the past three years as such an overview is necessary to understand the reasons for the final outcome as well as to evaluate the success of various participants in the reform process. The section will then add detail to this overview in addressing the reasons for reform and assessing the outcomes of reform in the context of key stakeholders.

A. Overview of Recent Reform

Partially as a result of the financial troubles illustrated above, PBGC reform began to gain momentum in 2003. This section will provide a brief narrative of the resulting round of reform, encompassed in two separate bills: the Pension Funding Equity Act of 2004 ("Equity Act") and the Pension Protection Act of 2006 ("Protection Act"). While these bills were passed as separate measures, it is possible to consider them as part of one continuous reform effort.

The passage of the Equity Act reflected a scramble on the part of Congress and the Administration to pass a stop-gap measure in the face of rising fiscal problems with the PBGC. While the debate in some ways began with discussions of efforts at complete

⁴³ 2004 Annual Report, *supra* note 42, at 12. The PBGC administration predicts the long-term financial health of the PBGC using the Pension Insurance Modeling System ("PIMS"). PIMS takes advantage of the PBGC's primary database which includes the financial condition of 400 pension plans covered by the PBGC. The model then runs 5,000 different scenarios with all manner of economic assumptions. *Id.* These are the last PIMS estimates before the passage of premium increases in the Deficit Reduction Act.

⁴⁴ Risk Exposure, *supra* note 42. The CBO model estimates how much a private insurer would be willing to pay to assume the PBGC's obligations over a 10-year, 15-year, and 20-year time horizon. *Id.* at 7. Using information on pension plans' assets and liabilities, benefit obligations and projected premium payments to the PBGC, the CBO computes the probabilities of insurance losses to the PBGC over each time period. The present value of those expected losses is the cost of the PBGC insurance and hence what the government should expect to pay. *Id.*

⁴⁵ While some of this difference may be accounted for by differing primary data sets and economic assumptions, most of it comes from the CBO's more expansive assumption about the number of companies that are likely to terminate their plans over the next ten years. *Id.* at 12. As for other important conceptual issues, CBO assumes that the same ratio of current workers to retired workers exists in each pension plan and hence that the increasing present value of vested benefits for workers as they near retirement offsets the falling present value of benefits for retirees as they age. Along those lines, the CBO model also assumes a constant number of participants and hence premium contributions over time. *Id.* at 24.

reform, it soon became clear that Congress only had the political will and, to some extent, the relevant ability to pass a temporary measure.

The Bush Administration kicked off serious legislative debate by releasing its reform proposal on July 8, 2003.⁴⁶ The proposal responded to the economic situation by suggesting structural changes in the method of calculating plan liabilities as well as the classification of “at-risk” plans. The proposal suggested changing the discount rate used in calculating plan liabilities by replacing the 30-year Treasury bond rate with a yield curve based upon investment grade corporate bonds.⁴⁷ The Administration also proposed defining “at-risk” plans as those plans that are attached to firms with a non-investment grade credit rating and a funding ratio below 50 percent.⁴⁸ If deemed “at-risk,” a plan would be frozen such that it could not accrue new benefits, improve benefits, or provide lump-sum payments to individuals wishing to exit the plan.⁴⁹ The Administration’s plan was primarily concerned with establishing funding requirements based upon a realistic measurement of risk.

The House Ways and Means Committee was the first legislative committee to tackle PBGC reform in the wake of the Administration’s proposal.⁵⁰ The Ways and Means Committee bill immediately centered the debate on short-term fixes for the underfunding problem created by the “perfect storm” and away from the more systemic changes based upon risk assessment offered by the Administration. The Committee bill only recommended a temporary, three-year, requirement to use a yield curve based upon investment grade corporate bonds.⁵¹

Almost two months after the House Ways and Means Committee passed a PBGC reform bill and about a month before the full House would approve that bill, the Senate Finance Committee, on September 17, 2003, passed its own version of PBGC reform.⁵² While also eschewing the “at-risk” plans issue, the bill did include the Administration’s proposal for a permanent switch to a company specific yield curve.⁵³ However, the Finance Committee bill waived the requirement for deficit reduction contributions for three years for plans that were not required to make a deficit reduction contribution in 2000.⁵⁴ Such a measure constituted a broad exception that clearly attempted to cushion the funding blow for those companies that were particularly hurt by the “perfect storm”.

⁴⁶ Department of Treasury, Office of Public Affairs, *The Administration Proposal to the Accuracy and Transparency of Pension Information*, July 8, 2003, available at <http://www.treasury.gov/press/releases/js529.htm> [hereinafter *2004 Administration Proposal*].

⁴⁷ *2004 Administration Proposal*, *supra* note 51. For a basic discussion of yield curves as they relate to the PBGC see Center on Federal Financial Institutions, PBGC: A Yield Curve Primer (2004) available at <http://www.coffi.org/pubs/Primer%20on%20Yield%20Curve%205.pdf>.

⁴⁸ *2004 Administration Proposal*, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Pension Preservation and Savings Expansion Act of 2003, H.R. 1776, 108th Cong. (2003) (as introduced to the House, Apr. 11, 2003).

⁵¹ *Id.* at § 705. The corporate bond rates discussed in this section track the previously used 30-year Treasury rates but are uniformly lower than the Treasury rate. Government Accountability Office, Commercial Aviation: Bankruptcy and Pension Problems are Symptoms of Underlying Structural Issues 45 (2005), available at <http://www.gao.gov/new.items/d05945.pdf> [hereinafter *Commercial Aviation*].

⁵² National Employee Savings and Trust Equity Guarantee Act of 2004, S. 2424, 108th Cong. (2004) (as introduced to the Senate, May. 14, 2004).

⁵³ *Id.* at § 401.

⁵⁴ *Id.* at §406.

On October 8, 2003 the full House, by a vote of 292-2, approved the Ways and Means Committee's bill with no relevant changes and thus only dealt with the discount rate issue while ignoring the "at-risk" plans issue.⁵⁵ The Senate Health, Education, Labor and Pensions (HELP) Committee passed its own version of PBGC reform soon after, on October 29, 2003.⁵⁶ The HELP bill mirrored almost precisely the House bill.⁵⁷

When the full Senate passed its version of the bill on January 28, 2004 by a vote of 78 to 19, it was clearly inspired by the House bill as well as the Finance and HELP bills but added its own take on the issue.⁵⁸ The Senate bill did include the temporary interest rate change contained in the House bill and also did not include any provisions for "at-risk" companies.⁵⁹ However, the Senate added a new facet to the debate by altering the funding exception provided by the Finance Committee bill. The final Senate bill allowed airline, steel and other companies that chose to apply, to waive 80 percent of their deficit reduction contribution in the first-year and 60 percent in the second-year.⁶⁰ Such language, not included in any previous versions of the bill, changed the tone of the debate from one which dealt only at an abstract level with risk assessment and fixing the underfunding problems generated by the "perfect storm" to one focused on the particulars of the risks faced by different industries.

Facing such a shift in tone, the bill that emerged from conference committee and was eventually signed by the President on April 10, 2004, represented a compromise amongst provisions and principles.⁶¹ The compromise bill that became the final incarnation of the Pension Funding Equity Act of 2004 included the temporary, three year requirement to use a yield curve based upon investment grade corporate bonds while modifying the Senate's funding exception.⁶² The exception combined the language included in the Finance Committee bill with that included in the final Senate bill to produce an exception for airline, steel, and other companies that chose to apply and were not required to make deficit reduction contributions in 2000.⁶³ The exemption additionally allowed qualified companies to waive 80 percent of their deficit reduction contributions in the first two years after the passage of the legislation.⁶⁴

While President Bush did sign the legislation, the combination of provisions present in the final Equity Act represented a significant departure from the risk principles offered by the Administration less than a year earlier. The final bill took a much shorter-term view on the issues and was focused primarily on correcting the problems created by the "perfect storm" on the early 2000s. The Pension Funding Equity Act clearly did not address the long-term structural problems facing the PBGC and instead focused on the short-term consequences of recent economic developments.

⁵⁵ Pension Funding Equity Act of 2003, H.R. 3108, 108th Cong. (2003) (as introduced to the House, Sept. 17, 2003).

⁵⁶ Pension Stability Act, S. 2005, 108th Cong. (2004) (as introduced to the Senate, Jan. 9, 2004).

⁵⁷ *Id.* at § 2.

⁵⁸ Pension Stability Act, H.R. 3108, 108th Cong. (2004) (as introduced to the Senate, Jan. 8, 2004).

⁵⁹ *Id.* at § 2.

⁶⁰ *Id.* at § 3.

⁶¹ Pension Funding Equity Act of 2004, P.L. 108-218 (2004).

⁶² *Id.* at § 101.

⁶³ *Id.* at § 102.

⁶⁴ *Id.*

The most recent round of PBGC reform demonstrated a more serious commitment on the part of legislators to address the long-term problems facing the PBGC. Although the financial viability of the PBGC clearly prompted the recent reforms, there was still intense debate surrounding how best to restore the PBGC's solvency while balancing the needs of distressed industries and companies. After the passage of the Equity Act in early 2004, the problems facing the PBGC only grew. Not only did the cash flow and accrual accounting numbers generally continue in the wrong direction as shown earlier, but it became clear that these problems were not temporary but were a result of long-term structural issues.

The Bush Administration began the most recent PBGC reform when Secretary of Labor, Elaine Chao, released the Administration's reform proposal at a news conference on January 10, 2005.⁶⁵ As before, the Administration's proposal set a benchmark for reform by focusing on reducing the risk to the PBGC. Along those lines, the proposal raised per-participant premiums to \$30 and indexed such premiums to wage growth going forward.⁶⁶ Further, the proposal defined ongoing liabilities as the full present value of obligations based upon an AA investment grade corporate bond yield curve.⁶⁷ According to the proposal, the Administration also sought to eliminate credit balances entirely so that they would not reduce the payments required by pension plans.⁶⁸ Credit balances arise when a pension plan sponsor makes a contribution in one year that is higher than the minimum required in that year. In an attempt to more closely match payments with potential liabilities, the proposal defined "at-risk" plans as those that were attached to non-investment grade rated firms.⁶⁹ These provisions were clearly consistent with the proposal's overall theme of increasing plan contributions when at all possible and erring on the side of PBGC financial viability as opposed to the needs of economically unstable companies.

The House once again began the consideration of PBGC reform when the House Education and Workforce Committee passed a bill on June 30, 2005.⁷⁰ That bill included many of the Administration's ideas but scaled a number of them back in a way that indicated reluctance to burden companies excessively. Importantly, the bill only restricted the use of credit balances for those plans funded under 80 percent of liabilities and so allowed most plans to continue to use credit balances to offset liabilities.⁷¹ In another strong departure from the Administration's proposal, the Committee's bill defined "at-risk" plans as those plans funded at under 60 percent of liabilities.⁷²

Less than a month after the House Education and Workforce Committee passed its bill, on July 25, 2005, the Senate Finance Committee passed the Senate's first version

⁶⁵ Department of Labor, *Protecting the Retirement Security of America's Workers: The President's Plan for Reforming Private Defined Benefit Pension Plans*, Jan. 10, 2005 available at http://www.dol.gov/_sec/media/speeches/20050110_retirement.htm.

⁶⁶ Department of Labor, *Strengthen Funding for Single-Employer Pension Plans*, Feb. 7, 2005, at 32 available at <http://www.dol.gov/ebsa/pdf/seproposal2.pdf>.

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 14-15.

⁷⁰ Pension Protection Act of 2005, H.R. 2830, 108th Cong. (2005) (as reported by the House Education and Workforce Committee, Sept. 22, 2005).

⁷¹ *Id.* at § 102(f).

⁷² *Id.* at § 102(h).

of the most recent PBGC reform.⁷³ The Finance Committee presented a strong bill that compromised away from the Administration's principles in a few key areas. First, the bill did not reduce in anyway the use of credit balances.⁷⁴ In contrast, the bill took an even stronger stance on the "at-risk" issue than that proposed by the Administration. The bill defined an "at-risk" plan as one attached to a non-investment grade company *or* funded at less than 50 percent of its liabilities.⁷⁵ Furthermore, the bill placed benefit restrictions on *all* "at-risk" plans such that "at-risk" plans could not increase benefits, offer lump-sum payment or even accrue benefits, no matter their level of funding.⁷⁶ Such strict provisions must have been part of some kind of compromise because at the same time that the Finance Committee's bill reduced the amortization period to 7 years it created an exception for airline companies, which allowed them to amortize their payments over 14 years.⁷⁷ Amortization periods, which create a cushion for obtaining full funding, had been set at as many as 30 years.

In contrast, the Senate's Health Education, Labor and Pensions Committee passed a bill on September 8, 2005 that was much more moderate on all provisions.⁷⁸ For example, the bill increased the per-participant premium to \$30 but did not index premiums to future wage growth.⁷⁹ Additionally, the bill did not change the credit balance system at all.⁸⁰

The House Ways and Means Committee did not take up PBGC reform legislation until November 9, 2005 — over four months after the Education and Workforce Committee — when it passed its on version of the bill.⁸¹ The bill included an increase in per-participant premiums to the \$30 level but declined to index future increases to wage growth.⁸² While mirroring the Education and Workforce language with respect to almost all of the ongoing liabilities issues, including as applied to credit balances, the bill did impose move severe penalties for plans which do not meet basic funding obligations.⁸³ In addition, the bill followed the Education and Workforce structure with reference to "at-risk" plans without imposing any additional benefit restrictions for "at-risk" plans beyond the restrictions applied to all plans.⁸⁴ In comparison to the Education and Workforce bill and the Administration's proposal, the Ways and Means Committee's bill took a shorter-term view by refusing to index per-participant premiums and further relaxing the "at-risk" provisions pushed by the Administration.

⁷³ National Employee Savings and Trust Equity Guarantee Act of 2005, S. 1953, 109th Cong. (2005) (as introduced to the Senate, Nov. 2, 2005).

⁷⁴ *Id.*

⁷⁵ *Id.* at § 430(f).

⁷⁶ *Id.*

⁷⁷ *Id.* at § 430(c); *Id.* at § 334.

⁷⁸ Senate Health, Education, Labor and Pensions Committee, *Senators Kennedy and Enzi Propose Bipartisan Pensions Reform to Provide Retirement Security for Millions of Americans*, Sept. 8, 2006, available at http://help.senate.gov/Min_press/2005_09_08_b.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Pension Protection Act of 2005, H.R. 2830, 108th Cong. (2005) (as reported by the House Ways and Means Committee, Dec. 6, 2005).

⁸² *Id.* at § 401.

⁸³ *Id.* at § 102(f).

⁸⁴ *Id.* at § 122.

After the passage of bills by both the Finance and the HELP committees by early September, the bill stalled in the Senate. The lag initially occurred because Senator Grassley, the chairman of the Finance Committee, and Senator Enzi, the chairman of the HELP committee, could not agree on what version of the pension bill to bring to the floor of the Senate.⁸⁵ However, by September 22, the Senators had agreed to bring a compromise bill to the floor.⁸⁶ Once the bill included credit rating provisions, Senators DeWine and Mikulski put a hold on the legislation with the backing of business groups.⁸⁷ The hold was not rescinded until November 10, 2005 when the bill was finally brought to the full Senate for consideration.⁸⁸

When the full Senate passed its version of the bill on November 16, 2005, almost a month before the House would pass its own version of the bill, it represented a compromise that departed significantly from the principles set forth by the Administration.⁸⁹ The bill did follow the lead of all of the other proposals by increasing per-participant premiums to \$30 but did not index premiums to future wage growth.⁹⁰ In terms of ongoing liabilities, the Senate bill required full funding of liabilities based on an investment grade corporate bond curve.⁹¹ In a new twist, the Senate dealt with credit balances by requiring them to be valued at market value.⁹² In terms of “at-risk” plans, the Senate bill defined such plans as those attached to a non-investment grade firm *and* funded at less than 93 percent of plan liabilities.⁹³ However, the bill only required an increase in “at-risk” plan liabilities to include possible termination costs and did not put additional benefit restrictions on such plans.⁹⁴ Following the HELP Committee’s lead, the Senate bill reduced the amortization period to 7 years but allowed airlines to amortize over 14 years.⁹⁵

The final House bill passed 294-132 on December 15, 2005 closely resembled the bill put forward by the powerful Ways and Means Committee.⁹⁶ The only two differences in the final bill were that it indexed per-participant premiums to wage growth and allowed for an exception in contributions for interstate bus companies.⁹⁷ While the final House bill did not exactly resemble the Administration’s proposal, it increased the financial solvency of the PBGC and the defined benefit pension plan system by creating more realistic measures of plan liabilities.

In the midst of the PBGC reform debate, Congress dealt with a related bill, which was produced out of the budget reconciliation procedures. While the specifics of the

⁸⁵ See *Provisions of Cap Hill Pension Reform Agreement*, MAIN WIRE, SEPT. 28, 2005.

⁸⁶ See *id.*

⁸⁷ See Jerry Geisel, *Pension Plan Funding Reform Takes Tortuous Path*, BUS. INSURANCE, July 2, 2001 at 14.

⁸⁸ See *id.*

⁸⁹ PENSION SECURITY AND TRANSPARENCY ACT OF 2005, S. 12960, 109TH CONG. (2005) (as passed by the Senate, Nov. 16, 2005).

⁹⁰ *Id.* at § 401.

⁹¹ *Id.* at § 101(g).

⁹² *Id.* at § 201(c).

⁹³ *Id.* at § 102(i).

⁹⁴ *Id.*

⁹⁵ *Id.* at § 102(c); *Id.* at § 403.

⁹⁶ PENSION PROTECTION ACT OF 2005, H.R. 2830, 108TH CONG. (2005) (as passed by the House, Dec. 15, 2005).

⁹⁷ *Id.* at § 401; *Id.* at § 121(a) (excepting interstate bus companies from certain funding rules for 2005).

legislative process leading up the signing of the Deficit Reduction Act on February 9, 2006 do not merit much attention in this context, it is important to note the relationship of the two bills.⁹⁸ Since, as discussed above, the PBGC has a direct relationship to the federal budget; it was encompassed in the budget reconciliation process. The result of that process for the PBGC was to see per-participant premiums increase to \$30 with future premiums indexed to wage growth.⁹⁹ While the discussions about the budgetary effect of such provisions likely framed the discussions of some parts of the PBGC reform debate, the provisions of the Deficit Reduction Act are superseded by any PBGC-specific legislation signed after February 9, 2006.¹⁰⁰

However, in the final analysis, the bill passed after conference by the House and Senate did not change the premium increases put into place by the Deficit Reduction Act. It was not until August 3, 2006 that the Senate finally passed its last version of pension reform. The process initially took so long because House and Senate negotiators were at odds over pension-related issues such as at-risk plans and credit balances.¹⁰¹ However, the final few months of negotiations focused on somewhat unrelated issues such as the estate tax and the extension of other tax provisions.¹⁰² In the end, the House moved the process forward by passing a pension bill devoid of other provisions and, in the end, the Senate followed suit.¹⁰³ While the President had threatened to veto any bill he believed would not restore the solvency of the defined benefit pension system, he did sign the final version of the Pension Protection Act passed by the House and Senate.¹⁰⁴ The particulars of the final bill will be discussed below in relation to the success and failure of various stakeholders in the reform process. However, it is worth noting here that the centerpiece of the bill, in accordance with almost all of the relevant proposals, was to increase the funding requirements to 100 percent over the next 7 years.¹⁰⁵

B. Reasons For and Results of Recent Reform

Mainly, popular accounts of the past three years of pension reform have focused primarily on the effect of various interest groups in driving the reform process.¹⁰⁶ Such a depiction is only partially correct, as it focuses almost exclusively on the political and procedural battles of the Congressional process while ignoring some of the structural dynamics informing the reform process. In looking at these dynamics, this section of the article will focus on the explanation for the particular process and results of reform while also looking at what different stakeholders were able to achieve in the political process.

⁹⁸ DEFICIT REDUCTION ACT OF 2005, P.L. 109-171 (2006).

⁹⁹ *Id.* at § 8101.

¹⁰⁰ *Id.*

¹⁰¹ See Deborah Solomon, *Pension Measure to Enact Changes Over Several Years*, WALL STREET JOURNAL Aug. 5, 2006.

¹⁰² See Congress Divide Jeopardizes Pension Bill, ASSOCIATED PRESS July 28, 2006.

¹⁰³ See Solomon, *supra* note 101.

¹⁰⁴ There is some indication that a related bill will be discussed during the Fall Congressional session. This bill would revisit the issue of whether or not only airlines that place a “hard freeze” on their pension plans should be governed by certain more lax accounting rules. Mary Williams Walsh, *A Pension Overhaul Gives, and Later Takes Away*, NEW YORK TIMES Aug. 5, 2006.

¹⁰⁵ Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006) (as passed by the House, July 28, 2006) at § 101.

¹⁰⁶ See, e.g. Editorial, *The Pension Pinata*, NEW YORK TIMES Aug. 13, 2006.

This section argues that, as a group, special interests, were able to secure certain preferential treatment in recent pension reform, but, in the larger context these changes did not blunt the overall fiscal effect of reform.

As relevant PBGC reform legislation has moved through Congress there has been a bitter and public battle on the part of interest groups to blunt certain aspects of such reform. Generally, these groups, composed mainly of business and labor interests, have tried to affect policy proposals that attempt to improve the financial health of the PBGC and therefore to put a greater funding burden on pension plans. In essence, these special interests have fought to reduce the premiums paid by employers for their pension plan insurance.¹⁰⁷

The effect of the business lobby on recent PBGC reform partially confirms the popular account. The best single example of the effectiveness of the business lobby comes from the decision by Senators DeWine and Mikulski to put a hold on the 2006 bill in the Senate. While DeWine and Mikulski relented, they did so only with a promise of being able to raise various business lobby complaints in conference.¹⁰⁸ The business lobby was particularly strong in pushing back on the credit rating issue because many companies, such as General Motors, would fall into an “at-risk” category if junk bond status guaranteed such a designation.¹⁰⁹ In many ways, it is possible to argue that union special interests were aligned with business special interests in a way that also helps explain the gradual erosion of certain funding requirements over the course of the legislative process. From the beginning, there were reports of unions aligning themselves with business interests out of a desire to preserve pension plans.¹¹⁰ In a show of the unity between labor and business on this issue, United Auto Workers President Alan Reuther came out against the Administration’s proposal alongside representatives from the Chamber of Commerce.¹¹¹

In evaluating the validity of an interest group account of recent pension reform in explaining the political dynamics surrounding PBGC reform, it is important to understand business’s and labor’s reasons for wanting particular substantive changes in PBGC legislation and the magnitude of the changes they were able to secure. The yield curve component of PBGC reform was designed to assess a plan’s risk based upon the specifics of each individual company. This approach was less concerned with merely reducing underfunding than with establishing funding requirements based upon a realistic measurement of risk. As the debate deepened in the second round of reform, critics of using bond yields became concerned that bond rates would prove inappropriate because bonds are tied to particular end dates while pensions have no particular expiration date. Such criticism of the use of bond rates faded in PBGC reform as there was consensus among the various proposals in each round of reform that a continued use of 30-year Treasury rates was unacceptable. Yield curve bond rates track Treasury rates but are systematically lower and thus increase the amount of funding required on the part of

¹⁰⁷ See “Plans Proliferate to Reform Federal Pension Insurer”, *BestWire* June 8, 2005 (citing Richard Ippolito).

¹⁰⁸ See Geisel, *supra* note 87.

¹⁰⁹ See Stephanie Kirchgaessner, “Legislation Strains Cozy Links Between Business and Politics”, *Financial Times* Nov. 21, 2005.

¹¹⁰ See James A. Klein, “Uniting to Repair Pensions”, *Washington Times* Sept. 1, 2002, p. A16.

¹¹¹ See Stephanie Kirchgaessner, “Bush Pension Reform Faces Heavy Opposition”, *Financial Times* Apr. 27, 2005, p. 8.

pension plans. While business lobbies succeeded in limiting the move from Treasury rates to yield curves to a temporary one in the first round of reform, they were unable to do so in the second round of reform as the economic circumstances created a consensus in favor of a permanent change.¹¹²

In addition to arguments over whether or not to use bond yields at all, the debate progressed to include the question of what type of bond yields to utilize. While the first round of reform had used high-quality investment grade or “non-junk” bonds, there was a move in the second round of reform by some to focus only on bonds with AA ratings or better. Those in favor of a higher standard argued that using better quality bonds would hold plans to a higher funding standard, which would match the importance of pension obligations. Business lobbies argued that a higher standard of bonds would increase contribution requirements and risk harming companies and their plans. In the end, business groups were able to limit the yield curves used to include investment grade corporate bonds and not just AA or better corporate bonds.¹¹³

With another complexity of estimating ongoing liabilities, a debate arose over the issue of smoothing periods. A smoothing period is the amount of time over which discount rates are averaged. Many argued for reducing the smoothing period to 4 years so as to more realistically reflect plan liabilities based upon the most current market conditions. Opponents of such a reduction in the smoothing period argued that pensions are in fact long-term obligations and so changes in funding requirements should not be subject to such short-term market fluctuations. This claim was tied to the idea that such fluctuations risked hurting businesses. Lobbyists succeeded in fending off the desire of some to eliminate the smoothing period entirely.¹¹⁴

One of the biggest areas of contention, also related to calculating ongoing liabilities, was the use of credit balances. Under ERISA rules, credit balances were carried by plans from year to year based upon an assumed interest rate even if the assets that had been purchased with the additional pension funding had declined. Those arguing for the elimination or restriction of credit balances claimed that allowing such credit when the value of the actual assets had declined distorted the funding ratio of any given plan. Those in favor of maintaining credit balances argued that companies should be encouraged to make greater than the minimum required contributions and therefore be rewarded for doing so. Maintaining credit balances was one of the main issues that caused Senators DeWine and Milkuski to put a hold on the Senate bill and was very important to business lobbyists because credit balances reduced the amount of present funding obligations on the part of companies. Ultimately, credit balances were restricted but not eliminated.¹¹⁵

¹¹² Congress chose a simplified version of the yield curve which created three separate categories to be applied depending on when the obligation was due: 1-5 years, 6-20 years, and the remaining period. Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006) (as passed by the House, July 28, 2006) at § 102(h)(2)(C).

¹¹³ *Id.* at § 102(h)(2)(D).

¹¹⁴ Congress reduced the smoothing period to two years. *Id.*

¹¹⁵ Congress eliminated double counting of credit balances by preventing credit balances from being applied to the underfunding calculation and the contribution calculation. *Id.* at § 102(f). Additionally, Congress agreed to index credit balances to actual returns and not assume a specific interest rate without reference to current market conditions. *Id.* Credit balances can be used to substitute for cash contributions if the plan is funded above the 80 percent level without including previous credit balances. *Id.*

The second set of major issues dealt with in the PBGC reform debate was whether or not to create a separate category for “at-risk” plans and how to define such plans. Designating plans as “at-risk” would provide a longer-term solution to some of the PBGC’s problems by requiring plans that were more likely to be in financial difficulty to make larger contributions to their plans. Creating such “at-risk” status raised a good deal of controversy because big business argued that requiring additional payments from the most financially vulnerable companies risked pushing those companies over the edge or, at a minimum, causing them to exit from the defined benefit system.

While there were still arguments over whether or not any “at-risk” category was acceptable because of potential negative effects on already unsound plans when the second round of PBGC reform began, the major definitional question concerned the use of credit ratings in determining “at-risk” plans. Some argued that a plan should be defined as “at-risk” if the company attached to the plan had a non-investment grade credit rating. The proponents of such a rule claimed that while such a rating is not tied in any specific way to the funding status of a plan, empirically a bad credit rating is a good measure of such high-risk plans. Business arguments against the use of credit rating included the minimal direct relevance of credit ratings to the funding status of a plan as well as the fact that not all firms are rated. These arguments caused some to advocate for an “at-risk” definition that focused at least in part on funding status. However, in advancing a stronger argument against the use of credit ratings, some claimed that the potential economic problems of creating an “at-risk” definition would be exacerbated by the use of credit ratings. This group argued that credit ratings would penalize companies in cyclical industries as such companies are likely to have poor credit ratings at precisely the times that they are most economically vulnerable. The conference committee dropped references to non-investment grade status in the definition of “at-risk”: a big win for business and labor lobbyists.¹¹⁶

One remaining issue involved the question of what to do when a plan was not fully funded. Similar to situations where new benefits are introduced, it does not make sense to penalize plans for immediate rule changes or the short-term market fluctuations that decrease a plan’s assets as pension obligations are long-term obligations. Amortization periods provide plans a number of years, traditionally as many as 30, to fully fund obligations created in any given year. Those arguing for a substantially reduced amortization period claimed that longer periods functionally do not require underfunded plans to make up the difference in plan funding before their plans are likely to terminate. On the other side, those in favor of allowing economically troubled companies to maintain liquidity argued that if funding rules were to be strengthened, it was important that companies have a long time to make up such shortfalls so as to maintain liquidity. In the end, the amortization period was reduced to seven years: a number which was likely a reasonable compromise besides the different positions.

A final area involved the politically contentious issue of whether or not to create funding exceptions for certain industries or particular companies. In many ways, the intuitions surrounding such measures are the opposite of those surrounding the “at-risk” debate. The reason raised for giving particular exceptions to different industries or companies was that those industries or companies were particularly financially vulnerable

¹¹⁶ *Id.* at § 102(i). A plan is “at-risk” if it less than 80 percent funded on a normal basis and less than 70 percent funded on the basis of the stricter, “at-risk” basis. *Id.*

and so requiring full deficit reduction contributions risked pushing those companies over the edge or causing those plans to exit the system. The argument on the opposite side was twofold. First, there was a simple question of where to draw the line on which industries or companies should be excepted and in addition there was the argument that such vulnerable companies are precisely the ones that should be required to pay the full contribution because they are at a greater risk of default. In particular, the airline lobby was effective in achieving gains in the recent PBGC reform process. In the 2004 reform bill, airlines were the primary force behind the funding relief section, which was expanded to cover all businesses.¹¹⁷ The best bill the airlines were able to achieve came in the form of the Senate Employee Pension Preservation Act, which gave airlines a 25 year amortization period and raised the interest rate assumptions.¹¹⁸ While that bill never passed, it is not hard to imagine that the power of business and labor lobbies in the Senate participated in the compromises in the final Senate bill which blunted the “at-risk” definition by requiring funding at less than 93 percent. In the Senate bill, airlines were also able to achieve a specific 14-year amortization exception. In the final bill, airlines with frozen plans were given a 17-year amortization period while other airlines were held to the same 7-year period as other companies.¹¹⁹

A common thread running throughout this discussion of the rationale behind the business and labor lobbies’ position in PBGC reform is the implicit assumption that placing additional pressure on companies (to the point of causing them to go bankrupt) should be avoided. In response to this argument, many have simply declared that if these companies are overly fragile perhaps they should reorganize in bankruptcy. Those arguments were made in the context of pending accounting rule changes. When the Financial Accounting Standards Board (“FASB”) announced new rules in early 2006 to take effect at the end of 2006, the announcement only heightened corporate fears regarding the effect of requiring increased contributions to the PBGC on corporate balance sheets. These rule changes, which are designed to require companies to more accurately reflect their obligations, mandate that companies add their pension obligations to their financial balance sheet.¹²⁰ Some have claimed that these changes could decrease shareholder equity by about 10 percent in the largest 1,000 firms.¹²¹ While others have pointed out that these numbers are already included in fiscal reports and that the rule only mandates mandating a change in the placement of the information, it is clear that

¹¹⁷ See *Funding Relief Fails to Clear Senate*, FACTS ON FILE WORLD NEWS DIGEST Dec. 31, 2003; see also *Faced with Hill Resistance Airlines Back Off Pension Fix*, NAT’L J. CONGRESSDAILY, Aug. 11, 2003; see also Jerry Geisel, *Senate Panel OKs Change in Pension Funding*, BUSINESS INSURANCE, Sept. 22, 2003, at 1.

¹¹⁸ See *Obstacles Face Bill Providing Pension Relief to Legacy Carriers*, AIRLINE BUSINESS REPORT May 9, 2005.

¹¹⁹ Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006) (as passed by the House, July 28, 2006) at § 402.

¹²⁰ See Financial Accounting Standards Board, *News Release: FASB Adds Comprehensive Project to Reconsider Accounting for Pensions and Other Postretirement Benefits*, Nov. 10, 2005, <http://www.fasb.org/news/nr111005.shtml>.

¹²¹ Norman Ornstein, *Congress Should Take Up Pension Reform Before It’s Too Late*, ROLL CALL, May 24, 2006. According to one study, the typical large firm could see its balance sheet weakened by \$1.7 billion. *US Hill Leaders Seek Elusive Pension Overhaul Breakthrough*, MAIN WIRE, APR. 18, 2006 (citing Milliman study).

companies view FASB's pending rule changes as threatening their financial positions.¹²² Regardless of where one stands on these particular arguments, all concerned came to an agreement that creating more certainty through reform will at least allow companies to better plan for their future pension obligations.¹²³

While initially convincing, there are reasons to suggest that business and union lobbyists did not play as big of a role in the reform process as one might predict based upon traditional political science theory. To adequately address the impact of such lobbying groups, it is important to take a step back and realize the context of their efforts. To be sure, any business with a pension plan would have initially decried almost every element of the Administration's reform proposal in each round of reform. In that context, while it can be said that lobbyists won some gains for their clients, it is unclear that they altered the character of the reform fundamentally. For example, in the first round of PBGC reform, businesses initially came out against all of the particular provisions of the Administration's proposal, including those changing the interest rate, but later backed off and focused their efforts on the funding relief provisions.¹²⁴

The most obvious and important example of the failure of interest groups in changing the context of the PBGC reform debate involved the raising of per-participant premiums. It was widely recognized that because these premiums had not been raised since 1991, some increase was necessary. While there was relatively little disagreement about the amount by which such premiums should be raised immediately, there was some question about how to deal with premiums going forward. In particular, the question was whether or not to index premium increases to wage growth. Increasing the base premium provided legislators with the easiest and most effective way of increasing the PBGC's financial position by increasing its revenue base. This was the best method of increasing the PBGC's financial position precisely because it required the most from employers. In essence, a rise in premium constituted a tax increase on employers. After all, such money does not go into funding employers' own plans but is counted as on-budget revenue in the overall federal budget. In the end, the increase to \$30 per participant indexed to wage growth in the Deficit Reduction Act was left unchanged and is now law.

Also, estimates of the effectiveness of the different versions of the most recent round of PBGC reform point to the fact that the provisions that special interests have been focused on did not make a large difference in the context of overall PBGC fiscal reform. First, COFFI estimates indicate that there is not a significant difference between reform proposals in terms of the ultimate reduction in the long-term deficit facing the PBGC. COFFI estimates that the Administration's proposal would reduce the price of a bailout from \$92 billion to \$45 billion, the House bill would reduce the price of a bailout to \$49 billion and the Senate bill would have a comparable outcome as the House bill.¹²⁵ In the context of the CBO's 20-year prediction of a \$91 billion deficit or COFFI's 20-year prediction of a \$62 billion deficit, the \$5 billion difference between the

¹²² See Tom Anderson, *Pension Reform has Little Impact on Current Funding*, EMP. BENEFIT NEWS, Mar. 1, 2006 (pointing out that the new FASB rules only change the positioning of pension obligation on financial statements and not what is actually reported).

¹²³ See Tami Luhby, *Legislation Aimed at Guarding Traditional Pensions Could Spur Companies to Abandon More Plans*, NEWSDAY, Apr. 12, 2006, at A39.

¹²⁴ See *Faced with Hill Resistance*, *supra* note 117.

¹²⁵ Solvency, *supra* note 138; Center on Federal Financial institutions, PBGC: Senate Finance Reform Bill (2005), available at <http://www.coffi.org/pubs/PBGC%20Senate%20Finance%20Bill.pdf>.

Administration's initial proposal and the Congressional bills is not altogether convincing evidence that interest groups are driving the process. That is, because these reductions in payout necessarily come from greater funding on the part of businesses, interest groups may be making a small difference once a the larger debate is framed, but they certainly are not in control of the entire policy discussion.

While the primary vehicle for such reductions in the price of a PBGC bailout comes from increases in premiums, further evidence of the limited effect of lobbying comes from the effect of changes in contribution requirements. The PBGC estimates that the Administration's proposals would generate \$1,000 billion in contributions over the next ten years or 110 percent of what previous law would have provided.¹²⁶ By comparison, the PBGC estimates that both the House and Senate bills would lead to about \$843 billion in funding over the next ten years which would be 92 percent of the funding that would have been provided by previous law.¹²⁷ One might read these numbers as an example of the effect of business lobbies in reducing required contributions from those originally required by the Administration. While this claim is true to a limited degree, a notable difference relates to the different transition periods assumed in each proposal, something which lobbyists have not paid much attention to, at least in public, and which only creates such a large difference because of the shorter, 10-year window, assumed by the PBGC estimates.¹²⁸ Looking beyond the absolute numbers and towards the similarities in the estimates of the effects of the House and Senate bills, it becomes clear that the industry specific provisions included in the Senate bill and not in the House bill, which have been the subject of much debate, cannot be making a very large difference in the ultimate amount of contributions required by the system.

In addition to the fact that the magnitude of the interest group effect is not as large as initially predicted, the interest group explanation of PBGC reform can also be placed into question with a more complex account of the divisions amongst labor groups. While the traditional account would indicate that there are no immediate benefits to be had by supporting the PBGC's long-term fiscal solvency, it seems that at least some members of the labor movement did not see it that way. In reality, some parts of the labor movement focused on the long-run fiscal stability of the PBGC by advocating increased funding.¹²⁹ That the reason for this split in the labor ranks is not entirely clear, however, there are a few possible explanations. Most likely, the split mirrors the disputes that occur over renegotiating contracts when companies face bankruptcy in that harsher funding requirements – which are similar to giving back collective bargaining gains because they

¹²⁶ Pension Benefit Guaranty Corporation, *The Impact of Pension Reform Proposals on Claims Against the Pension Insurance Program, Losses to Participants, and Contributions* 8 (2005), available at http://www.pbgc.gov/docs/impact_of_reform_proposals_1005.pdf [hereinafter *Impact of Proposals*].

¹²⁷ *Id.* It is important to note that these numbers were generated assuming that the law reverts back to using Treasury bonds as the basis for the discount rate. *Id.*

¹²⁸ *See id.* at 15. This is true because of the phase-ins contained in the legislative proposals. Some argue that projecting past 10 years is pointless because there is likely to be another round of legislation in the next decade, however, this round of legislation will compromise the baseline from which future rounds of legislation depart. Additionally, when dealing with long-term structural retirement program long-term effects are important part of how the current situation is judged. For example, one of the main reasons for the most recent reforms was that the PBGC would run out of money by 2020, clearly more than a decade from the date of reform.

¹²⁹ *See Pitched Debate Looms Over Pension Reform: Legislation Includes Key Provision for Retail Fund Industry*, MONEY MANAGEMENT EXECUTIVE, Dec. 12, 2005.

reduce the amount of benefits employees are likely to be offered and accrue – tradeoff with long-term fiscal solvency of the plans and the PBGC – which are similar to allowing a company to stay out of bankruptcy. In this particular context, part of the pressure to accept reform may come from the fact that unions recognize that they have been part of the problem by accepting improved benefit formulas from financially shaky employers.¹³⁰ Finally, one reason for this split may be derived from the fact that higher wage earners lose more when plans are funded by the PBGC because of the PBGC cap on annuities, which may incline those workers toward supporting stricter plan solvency requirements.¹³¹

In addition to investigating divisions amongst labor groups, it is also important to look at potentially important divisions among businesses. While most of this discussion and certainly that in the popular press, has focused on business interest as a single factor, there is reason to suspect that different groups of businesses might have diverged in their objectives in recent PBGC reform. The two potentially divergent groups include those with underfunded plans and those with fully funded plans. These groups are likely to pose a united front against the PBGC premium portion of recent reform as such increases create new obligations for all businesses each year. However, in the area of funding reform, these two groups should diverge in their positions. Businesses with underfunded pension plans, as has been widely reported, clearly do not want increased funding rules as they increase obligations on the business. However, businesses with already funded plans do not see such funding rules as creating a burden because having a fully funded pension plan means that increased funding restriction generally affect such businesses. However, increased funding rules have the virtue of forcing underfunded businesses to increase solvency of the overall system as well as individual plans in a way that causes less plans to put obligations on the PBGC which are ultimately funded by funded plans. This is true because when underfunded plans leave the PBGC with increased obligations, the PBGC or the federal government will have to pay for such obligations with tax increases in the form of premium increases or increases in general taxes: both of which will negatively affect fully funded businesses.

In supplementing the popular account discussed above and in trying to provide greater insight into PBGC reform, the rest of this section presents an explanation of how such legislation was passed. This discussion of the practical reality of PBGC reform will attempt to explain how this legislation was passed by focusing on what raised the possibility of reform and what allowed such reform to be completed.

In many ways, concepts such as “policy window” and “policy entrepreneur” provide a useful point of departure for such an explanation of PBGC reform.¹³² The “perfect storm” of the early 2000s and the resulting effects on pension plans and the PBGC created the necessary policy window. While the “perfect storm” got the ball

¹³⁰ See Gregory Crawford and Vineeta Anand, *Looming Pension Crisis Needs Creative Solutions; Economists, Politicians say the Time is Ripe for Reform*, INVESTMENT NEWS, May 9, 2005 (citing James Wooten).

¹³¹ See COMMERCIAL AVIATION, *supra* note 56, at 54-55.

¹³² *ee* JOHN W. KINGDON, *AGENDA ALTERNATIVES AND PUBLIC POLICIES* (1995). (discussing the concepts of a policy window and policy entrepreneur). In order to keep the discussion focused on the particulars of recent reform, the discussion here only briefly references a large literature on the political process. Nonetheless, the analysis here certainly owes a debt of gratitude to the relevant political science literature as it provides a useful frame in understanding any effort at legislative reform.

rolling, airline bankruptcies, and especially United's bankruptcy, quickened the pace of reform. As the PBGC began to report declining numbers over the course of the relevant period and airline bankruptcies became prominent, tremendous momentum for reform was generated.¹³³

During the PBGC reform discussions in 2001, the debate centered on how much to *reduce* premiums and how much to *increase* the burden placed on the PBGC.¹³⁴ In many ways, the issue of PBGC reform was raised initially in 2003 precisely because circumstances had changed so dramatically. As the earlier discussion indicates, by 2002, the PBGC was beginning to face the prospect of long-term financial trouble. By 2003, the Government Accountability Office had declared the PBGC itself "high risk".¹³⁵

The crisis that generated this policy window largely framed the debate on the financial status of the PBGC and made certain portions of the Administration's proposals, which reflected a financial management view, uncontroversial among lawmakers. However, as was pointed out above, it would be a mistake to believe provisions such as that which raised the per-participant premium to \$30 were uncontroversial in the business and labor community. It was in this larger context that divisions within Congress and between parties grew over smaller issues on which interest groups were able to carry weight.¹³⁶

While this basic analysis points to the importance of the financial context surrounding the PBGC in motivating reform, in order to more fully explain why and how that context shaped the actual reform debate it is necessary to delve deeper into the particular ways in which the crisis was framed. To begin, the combination of declining balance sheets and long-term structural problems led many participants and observers of the legislative process to invoke the specter of the Savings and Loan crisis of the 1980s.¹³⁷ These individuals claimed that the PBGC would soon face a situation in which it could not pay for the benefits it had guaranteed and would therefore require a massive government bailout. One prominent think tank noted that if nothing were done to restore the system, such a rescue would cost taxpayers \$92 billion.¹³⁸

In response to the Savings and Loan image, many cautioned that such a comparison was unwarranted. The first reason to exercise some cautious optimism was that defined benefit plans had been resilient of the course of time and had faced issues of underfunding in the past.¹³⁹ Along those lines, many still focused on the effect of the "perfect storm" in creating the underfunding crisis and so cautioned that the current

¹³³ See Denise Marois, *Pension Reform Moving Swiftly Forward*, AVIATION DAILY, Mar. 8, 2005, at 3.

¹³⁴ See Jerry Geisel, *Pension Reform Revisited*, BUS. INSURANCE, July 2, 2001 at 3.

¹³⁵ Government Accountability Office, Pension Benefit Corporation Single-Employer Insurance Program: Long-Term Vulnerabilities Warrant "High Risk" Designation (2003), available at <http://www.gao.gov/new.items/d031050sp.pdf>.

¹³⁶ See *id.*

¹³⁷ See, e.g., Editorial, *Congress Set to Confer on Big Pension Changes*, BUS. INSURANCE, Dec. 19, 2005, at 1 (quoting House Majority Leader Boehner); see also Jerry Geisel, *A Wishy-Washy Congress Needs Some Starch*, ST. LOUIS POST-DISPATCH, Mar. 25, 2005, at A49.

¹³⁸ Center on Federal Financial institutions, PBGC: Legislation May Not Restore Solvency (2005), available at <http://www.coffi.org/pubs/PBGC%20Legislation%20May%20Not%20Restore%20Solvency.pdf> [Hereinafter Solvency].

¹³⁹ See Danielle Tozier, *Milliman: Top 100 Pension Plans in Good Shape*, INVESTMENT MGMT. WKLY., June 5, 2006.

financial problems could easily be over-stated as an indication of long-term structural problems with the PBGC.¹⁴⁰ Finally, even if the Savings and Loan comparison was appropriate, many pointed out that the timeframe for such a collapse was at least a decade away and so there was plenty of time to confront the issue. Therefore, reform should not be rushed simply for the sake of staving off a Savings and Loan style bailout.¹⁴¹

Although the Savings and Loan comparison was doubtlessly over-stated by many, it would be naïve to claim that the system did not face serious challenges. While it was mostly as a result of the “perfect storm,” the PBGC \$7.7 billion surplus of 2001 had become a \$23.3 billion deficit by the end of 2004.¹⁴² Additionally, while some also pointed to the decline of the importance of defined benefit plans, more generally that did not mean that many individuals did not rely on those plans and that a failure of the PBGC to pay out benefits would not risk undermining many crucial sectors of the economy.

While the general economics facing the PBGC in early 2004 certainly raised many eyebrows in Washington and around the country, in some ways it was the domino effect portended by the problems facing the airline industry that really motivated the most recent PBGC reform debate. As a result of the emerging number of corporate bankruptcies that were resulting in terminated defined benefit pension plans, there was a threat of a domino effect that could cripple the entire system.¹⁴³ The clear competitive advantage gained by one company by removing its pension plan from its books seemed to be driving industry competitors to declare bankruptcy and shed their own defined benefit plans. While most of these declarations were legitimate there was a fear, motivated by a few instances of curious accounting practices, that more and more companies in all sectors of the economy would view declaring bankruptcy and getting rid of pension obligations as an important component of economic strategy.¹⁴⁴

Since the airline industry would prove such a crucial motivator of the most recent round of PBGC reform, it is useful to take a closer look at the effect of these bankruptcies on the PBGC. Since 2000, Delta Airlines, Northwest, United, and US Airways, which represented 40 percent of domestic seating capacity, have all gone bankrupt.¹⁴⁵ Twenty-two of the 162 airline bankruptcies that have occurred since deregulation in 1978, have occurred in the last 5 years.¹⁴⁶ At the time of its plan termination in May of 2005, United pensions were underfunded by \$9.8 billion.¹⁴⁷ Even with United and US Airways having

¹⁴⁰ American Benefits Council, Promises to Keep: The True Nature of the Risks to the Defined Benefit Pension System 1-2 (2005), *available at* <http://www.americanbenefitscouncil.org/documents/pbgcdraft092205.pdf>.

¹⁴¹ *Id.*

¹⁴² Pension Benefit Guaranty Corporation, Impact on Contributions, Funded Ratios, and Claims Against the Pension Insurance Program of the Administration’s Pension Reform Proposal 2 (2005), *available at* http://www.pb.gc.gov/docs/administration_reform_proposal_0405.pdf [hereinafter Impact on Reform].

¹⁴³ See Daniel, *supra* note 2.

¹⁴⁴ See, e.g., Donald L. Bartlett et. al., *The Broken Promise*, TIME MAG., Oct. 31, 2005 (detailing the suspicious circumstances surrounding Polaroid’s bankruptcy filing and reemergence).

¹⁴⁵ Commercial Aviation, *supra* note 51, at 1.

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.* at 3. The plan owed \$16.8 billion in benefits and had \$7 billion in assets. While the PBGC does guarantee most benefits, in the United Airline and US Airways bankruptcies participants lost \$5.3 billion in benefits. *Id.*

shed their pensions, the rest of the airline industry pension plans remain underfunded by \$13.7 billion.¹⁴⁸

Of course, the major economic and ultimately political debate centers on how the blame should be apportioned for the situation facing airlines. If the airlines are without fault or the “perfect storm” is the reason for such underfunding then proposals which exempt airlines from certain funding requirements might be worthwhile as a method of enhancing industry-wide liquidity and allowing the companies and their pension plans to survive. Without reform, the airline industry owed \$10.4 billion in contributions over the next four years.¹⁴⁹ On the other hand, if the airlines themselves are mostly to blame then they do not deserve any funding exceptions because such exceptions would continue to reward airlines for their failure to account for their promises to workers in the form of defined benefit pension plans.

While no one knows for sure who or what is to blame for the airline industry’s current problems, there are some basic facts that point toward the industry playing at least some substantial role in the problems facing the industry’s pension plans if not for the problems facing the industry’s underlying economic structure. During the profitable years of 1997-2002, airlines dramatically underfunded their pension plans.¹⁵⁰ Additionally, it is the structure of the airline industry, which includes high fixed costs, cyclical demand and intense competition, and not pension plans, which are responsible for the overall economic problems facing the industry.¹⁵¹ Finally, it is far from clear and probably unlikely that restricting airlines’ liquidity would make them more likely to enter bankruptcy.¹⁵²

Despite the availability of such a policy window explanation, it is important to note that the existence of such a window does not guarantee the passage of reform. In the PBGC case, the question of what generates actual reform once a policy window is created is particularly interesting because the recent trends have been against increases in regulation and forms of taxation both of which PBGC reform bucked. PBGC reform was certainly not guaranteed: it almost died in the House because the Chairman of the Ways and Means Committee, Bill Thomas, initially wanted to include PBGC reform as part of a larger Social Security and retirement policy reform bill.¹⁵³ Of course, such a bill would have been doomed to failure because of the controversial nature of Social Security reform.¹⁵⁴ This example points out two important qualifications on the importance of policy windows. First, the momentum built by a crisis and the possibility of a policy window can be squandered by small, and largely procedural, decisions. Second, and more importantly, such a window by itself is not enough as evidenced by the failure of Social Security reform.

¹⁴⁸ *Id.* at 4.

¹⁴⁹ *Id.*

¹⁵⁰ In 51 of 101 cases, companies could have made greater, tax free, contributions to their pension plans *Id.* at 46. In general, in 2002 more than half of the 100 largest pension plans were underfunded with most plans making no contributions at all in that year. See Charles J. Ford et. al., “Weaknesses in Defined Benefit Pension Funding Rules: A Look at the Largest Plans, 1995-2002”, 44 *Brandeis L.J.* 351 (2006).

¹⁵¹ Commercial Aviation, *supra* note 51, at 1.

¹⁵² *Id.* at 37.

¹⁵³ See Jessica Marquez, *Proposed Ban Raises Need For Alternatives; "Shutdown" Pensions*, WORKFORCE MANAGEMENT, May 1, 2005, at 34.

¹⁵⁴ See *id.*

While the final analysis of what went wrong in Social Security reform must be left to historians, in answering the question of how one capitalizes on the momentum created by a policy window, it is useful to pause to focus on Social Security reform and compare it to PBGC reform. First, the PBGC faced a similar issue to that facing the Social Security system as the shrinking workforce meant that fewer and fewer workers were becoming the base for funding the benefits of a larger and larger beneficiary population.¹⁵⁵ However, the problems facing the PBGC were worse than those facing Social Security because the exiting of plans from the defined benefit system further reduced the funding base.¹⁵⁶ One reason for distinguishing between the two is related to the simple magnitude of the issue both in actual program size and in public knowledge. Since Social Security is a much larger program along both of these dimensions, it may well be that it was harder for interest groups to mobilize the support necessary to defeat PBGC reform. Similarly, interest groups in the Social Security context are generally larger, more organized, and more powerful. This may also explain why unorthodox legislative measures like a commission were necessary for earlier instances of Social Security reform and not for PBGC reform. There also seems to have been less of an initial consensus on the existence of a crisis in the Social Security context than there was in the most recent round of PBGC reform. If this reflects a reality that the PBGC was in greater crisis than Social Security at the time of recent reform then the policy window theory is only bolstered.

Also, the crisis facing the PBGC was concretized in two ways that the crisis facing Social Security never was. First, the US Airways and United bankruptcies that occurred during the initial phases of PBGC reform reinforced the problems facing the PBGC demonstrated the impact of pension plan problems in a way that nothing did for Social Security. Furthermore, these and other bankruptcies concretized pension plans' problems for workers. While, as with Social Security, such promises had yet to come due, in many ways living through their employers' bankruptcy forced workers to confront the situation of their pension plans as well as that of the PBGC. Lawmakers thinking along these lines might have therefore prioritized a desire to avoid blame for the loss of future benefits since there was very little credit to be taken. One might think that workers would also have perceived their Social Security benefits as in jeopardy when the Social Security crisis was publicized. However, newspaper articles are not the same as experience via corporate bankruptcy and many people already did not expect Social Security to continue to exist but certainly believed their pensions, which they believed they were directly accumulating via their employers, would exist upon their. Beyond all of that, there is a question of whether or not the problems facing Social Security were even publicized in a way that made people believe their benefits were threatened since so much of the discussion surrounding Social Security reform focused on the possibility of private accounts. Finally, one might read Social Security as a further cautionary tale demonstrating that even when a policy window is created; it is possible for reform to get bogged down as the result of the specifics of the reform and perhaps the leverage of interest groups.

¹⁵⁵ See Government Accountability Office, *Private Pensions: The Pension Benefit Guaranty Corporation and Long-Term Budgetary Challenges* 11 (2005), available at <http://www.gao.gov/new.items/d05772t.pdf> [hereinafter *Long-Term Budgetary Challenges*].

¹⁵⁶ See *id.*

One particular way of making reform failures such as Social Security reform less likely comes from the work of a strong policy entrepreneur. In the original ERISA context, there were a number, including Senator Javitz.¹⁵⁷ In the context of recent PBGC reform, there are two likely candidates for such a distinction. The first is President Bush or the Administration broadly speaking. The President through the Secretary of Labor, Elaine Chao, and Bradley Belt, the now former head of the PBGC, strongly pressed a reform agenda driven by the idea of PBGC solvency. While important, such Administration support for particular agenda items is not without precedent and not without failure: witness Social Security reform. In the PBGC reform drama Representative, and now majority leader, Boehner played the role of an additional policy entrepreneur. In addition to pushing reform through the House Education and Workforce Committee when he chaired that committee, Boehner was an outspoken supporter of serious reform from the beginning and continued to be so when he took over the job of majority leader of the House.¹⁵⁸ While Boehner's ascendancy was fortuitous for PBGC reform, his continued support of reform played a crucial role in taking it from a well-positioned idea to a reality.

While Congress did not need to resort to use of more traditional forms of unorthodox processes, such as commissions or summits, PBGC reform did make use of some untraditional and rule-like mechanisms. The primary example of this comes from the budget reconciliation process that took place at the same time as the most recent round of PBGC reform. As discussed above, the PBGC has a complicated relationship to the federal budget in that it is a net cash-flow positive in the short-term because of its collection of premiums but is a long-term actuarial liability.¹⁵⁹ Because the budget reconciliation process creates such pressure on legislators to agree to policy changes, it provided a great place to concretize one of the most important components of PBGC reform: premium increases. In fact, the pressure to reconcile the budget was so great as to cause the HELP Committee to increase premiums above \$45 per-participant despite the fact that the Committee's PBGC reform legislation only raised premiums to \$30 per-participant.¹⁶⁰ In any event, the ultimate Deficit Reduction Act cemented an increase to \$30 per-participant indexed to wage growth. While such a provision was specifically designated as temporary pending any new PBGC reform legislation, the budget reconciliation process provided a baseline ahead of Conference Committee negotiations and also guaranteed such premium increases in the event that no PBGC reform legislation was ultimately passed. In this way, the budget reconciliation process contextualized the fight over premium increases in terms of strict budgetary rules, which made it harder for interest groups to exert leverage.

While in some sense laying the groundwork for a PBGC reform consensus, there is a question of whether or not such budget reconciliation measures with respect to the PBGC should be encouraged. The answer is generally "no" but in this situation "yes." In general, using the PBGC as a short-term revenue source is dangerous because it shows a

¹⁵⁷ See James A. Wooten, *The Employer Retirement Income Security Act of 1974: A Political History* 12-15 (2004) (contextualizing the PBGC as providing the insurance function in the ERISA system).

¹⁵⁸ See Jerry Geisel, "House Legislator Seeks to Bolster PBGC's Finances", *Business Insurance*, Sept. 8, 2003, p. 1.

¹⁵⁹ This program that most closely resembles the PBGC in this way is National Flood Insurance. See Kosterlitz, *supra* note 14 (citing Douglas Elliot, President of COFFI).

¹⁶⁰ See Jerry Geisel, *Senate Panel OKs Big Premium Hike*, *BUSINESS INSURANCE*, Oct. 24, 2005, at 1.

positive cash-flow to the federal budget when in fact it is a long-term liability. In some sense, this makes the PBGC's premiums a yearly revenue generator for the federal budget when those premiums are meant conceptually to finance future benefit payments. For example, the 2004 federal budget credited the PBGC with a net cash surplus of \$247 million even though it assumed more than \$3 billion in new liabilities as the result of a number of airline bankruptcies.¹⁶¹ This tendency can be explained with reference to the most recent budget reconciliation bill where PBGC pension reform was estimated as a net saving of \$4.1 billion over 10 years.¹⁶² While even during the current round of PBGC reform such budget antics should not be lauded, they can be justified from a long-term budgetary perspective because of the importance of setting the presumption in favor of a core component of PBGC reform.

The relationship between PBGC reform and theories of unified government are particularly complex. The Congress within which the most recent round of PBGC reform took place failed to get much legislation passed. That overall trend points against the importance of unified government in aiding legislation because throughout the period Republicans have controlled both houses and the Presidency. However, PBGC reform provides an example of where unified government may have been useful in aiding reform. First, the alliance between the President and Representative Boehner, who led the House majority through much of the legislative process, provides evidence that such an alliance can be helpful. In many ways, the bipartisan and general Washington consensus about the crisis facing the PBGC generated most of the substantive context for the debate. Similar to the interest group theory, unified government did break down when the legislation entered more specific discussions over less consequential provisions. It is clear from the testimony of the Secretary of Labor, the Director of the Congressional Budget Office, and the Director of the PBGC, that the Administration felt that Congress watered down PBGC reform over time.¹⁶³ In the end, it was the Senate in particular that angered the Administration and those in favor of a financial management perspective by allowing airlines and other businesses a number of exceptions. Once again, the PBGC reform story questions the importance of a political science explanation for legislative reform, in this case the theory of unified government, by pointing out that such a theory has some force in explaining during the particulars of the legislative process but does not frame the entire substantive debate.

¹⁶¹ Risk Exposure, *supra* note 42, p. 4.

¹⁶² See Cong. Budget Office, Cost Estimate: Deficit Reduction Act of 2005 65 (2006), available at <http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf>. This is complicated because primary estimates indicate a \$3.6 billion reduction over 2006-2010 period and a \$7.9 billion reduction over 2006-2015 based on offsets to direct spending from premium receipts. *Id.* at 73. However, toward the end of the period the decrease is reduced by \$7.4 billion because the on-budget part of the PBGC would not be exhausted as quickly and so there would not be that much revenue coming in from the off-budget fund. *Id.* This is true for budgetary estimates of all of the other versions of bills discussed here. These dual effects often result in many bills being budget negative because of non-related provisions. See, e.g., Cong. Budget Office, Cost Estimate: Pension Protection Act of 2005 (2005), available at <http://www.cbo.gov/ftpdocs/69xx/doc6935/hr2830.pdf>.

¹⁶³ See, e.g., *Solvency of Pension Benefit Guaranty Corporation: Hearing Before Comm. on Senate Budget*, 109th Cong. (2005) (statement of Bradley, Executive Director of the PBGC).

IV. CONCLUSION

Popular accounts of the pension reform process have consistently focused on the legislative maneuvers of various interest groups. Such a focus lacks a depth of explanation required by those interested in understanding the effect of such legislation on key stakeholders. By focusing on the structural changes in recent reform, this analysis highlights the relative ineffectiveness of major lobbyists in achieving their stated goals as well as the effect of recent reform on other components of the federal budget. In particular, the change in per-participant PBGC premiums marks a serious change in the PBCG finances which dwarfs small changes in funding requirements for various companies in fiscal important. In that light, the paper should be read as pushing popular accounts to expand their scope of inquiry beyond the legislative process and to focus on the overall goals and substance of reform in evaluating the effects of interest groups and other actors on such reform efforts. The goal of this article is not to convince readers that the most recent round of reform has been a total success from the standpoint of fiscal solvency. It does, however, seek to paint a clearer picture of the recent round of pension reform so that the effects of such reform for individual stakeholders can be more clearly understood.

Figure 1
The Budgetary Treatment of the PBGC

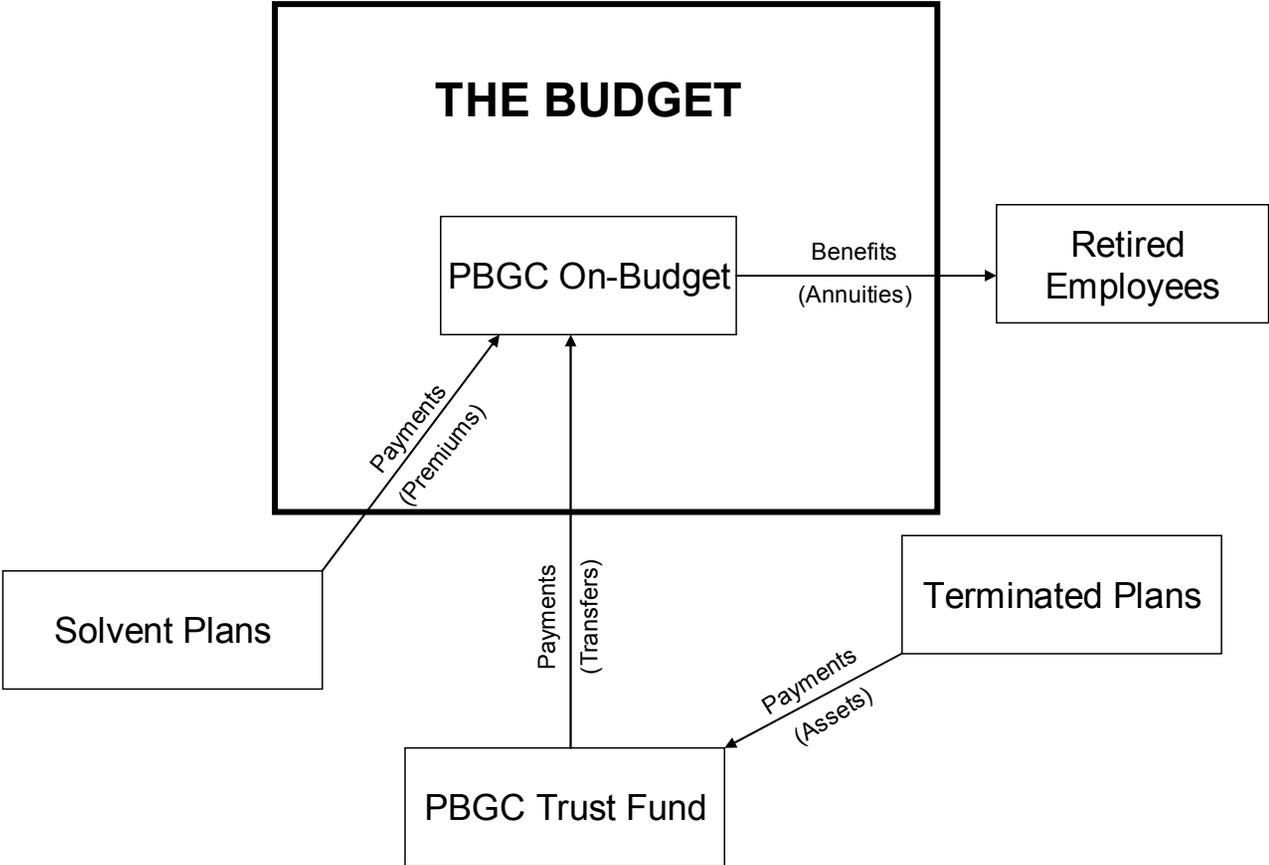
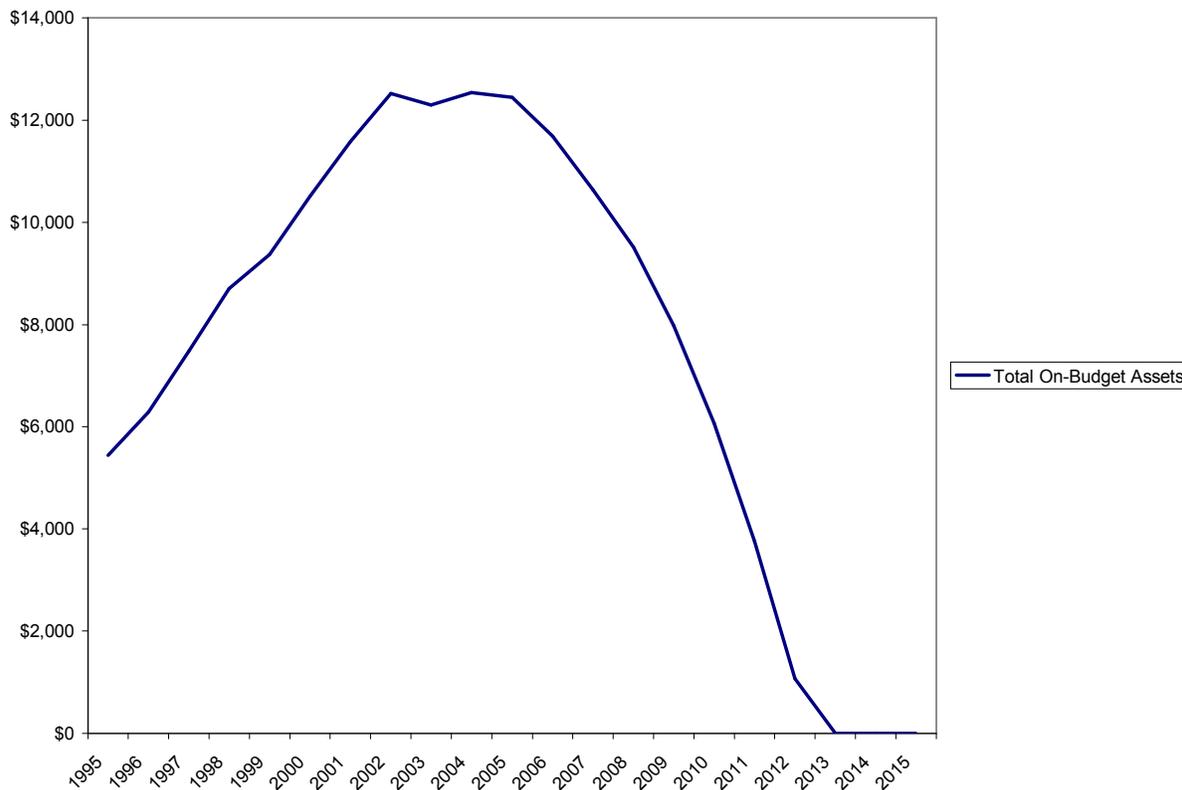
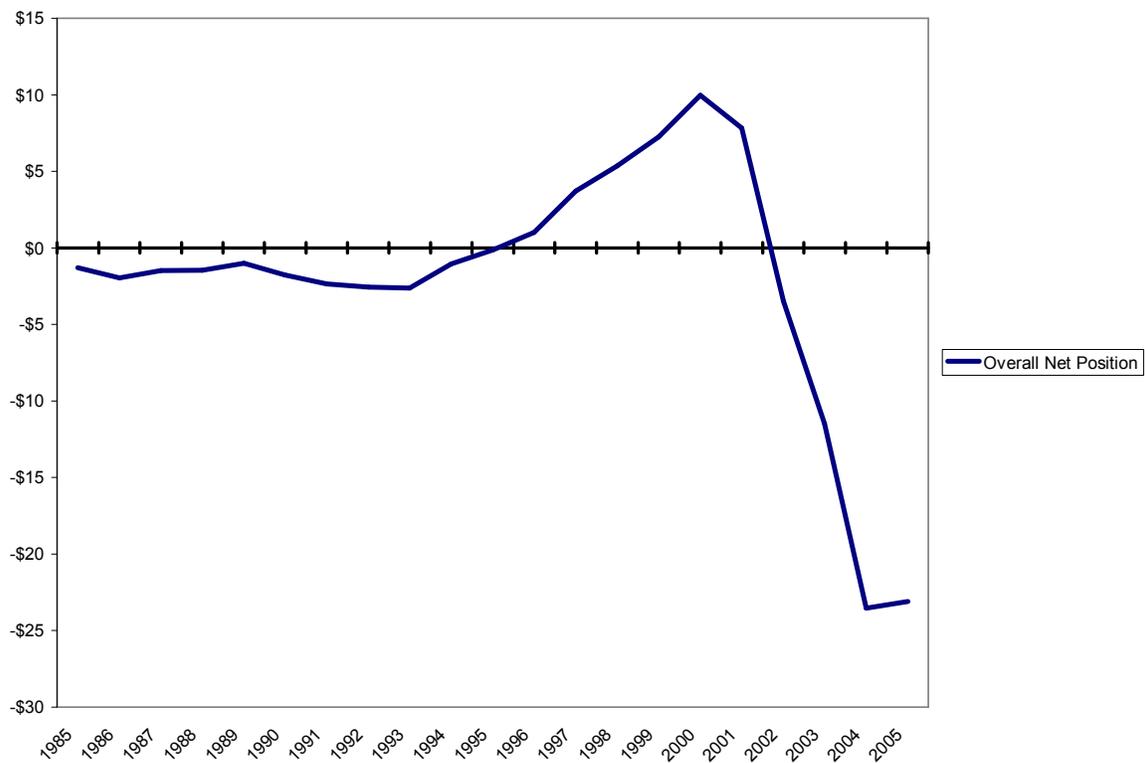


Figure 2
 Historical Data and CBO Model
 PBGC's On-Budget Assets, 1995-2015
 (Millions of Dollars)¹⁶⁴



¹⁶⁴ Budget of the United States Government: Appendix (various years) [hereinafter Budget of the United States Government]; Guide to Understanding, *supra* note 6.

Figure 3
PBGC's Overall Net Position, 1985-2004
(Billions of Dollars)¹⁶⁵



¹⁶⁵ Databook 2004, *supra* note 41.

Table 1
CBO Long-Term Net Position Model
PBGC Prospective Net Costs for Single-Employer Plans
(Billions of Dollars)¹⁶⁶

	Market Value
10 Year (2014)	\$63
15 Year (2019)	\$96
20 Year (2024)	\$119

¹⁶⁶ Risk Exposure, *supra* note 42.