Union Calendar No. 14

109TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPT. 109–31
Part 1

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

TO ACCOMPANY

S. 256

together with

DISSENTING, ADDITIONAL DISSENTING, AND ADDITIONAL MINORITY VIEWS

APRIL 8, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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APRIL 8, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS, ADDITIONAL DISSENTING VIEWS, AND ADDITIONAL MINORITY VIEWS

[To accompany S. 256]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 256) to amend title 11 of the United States Code, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

PURPOSE AND SUMMARY

S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," is a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.

With respect to the interests of creditors, the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability,[1] the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system. The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ("needs-based bankruptcy relief" or "means testing"), which is intended to ensure that debtors repay creditors the maximum they can afford. S. 256 also establishes new eligibility standards for consumer bankruptcy relief and includes provisions intended to deter serial and abusive bankruptcy filings. It substantially augments the responsibilities of those charged with administering consumer bankruptcy cases as well as those who counsel debtors with respect to obtaining such relief. In addition, the bill caps the amount of homestead equity a debtor may shield from creditors, under certain circumstances.

S. 256 also includes various consumer protection reforms. The bill penalizes a creditor who unreasonably refuses to negotiate a pre-bankruptcy debt repayment plan with a debtor. It strengthens the disclosure requirements for reaffirmation agreements (agreements by which debtors obligate themselves to repay otherwise dischargeable debts) so that debtors will be better informed about their rights and responsibilities. The legislation requires certain monthly credit card billing statements to include specified explanatory statements regarding the increased amount of interest and repayment time associated with making minimum payments. The bill requires certain home equity loan and credit card solicitations to include enhanced consumer disclosures. It also prohibits a creditor from terminating an open end consumer credit plan simply because the consumer has not incurred finance charges on the account. S. 256 allows debtors to shelter from the claims of creditors certain education IRA plans and retirement pension funds. It requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences. The bill also re-

[1] As one academic explained:

> [S]hoplifting is wrong; bankruptcy is also a moral act. Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one's promises. It is a decision not to reciprocate a benefit received, a good deed done on the promise that you will reciprocate. Promise-keeping and reciprocity are the foundation of an economy and healthy civil society.

Bankruptcy Reform: Joint Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Cong. 98 (1999) (statement of Prof. Todd Zywicki).

quires debtors, after they have filed for bankruptcy, to participate in financial management instructional courses so they can hopefully avoid future financial distress.

With respect to business bankruptcy, S. 256 includes several significant provisions intended to heighten administrative scrutiny and judicial oversight of small business bankruptcy cases, which often are the least likely to reorganize successfully. In addition, it contains provisions designed to reduce systemic risk in the financial marketplace, the enactment of which Federal Reserve Board Chairman Alan Greenspan described as being "extremely important."[2] The bill includes heightened protections for family farmers facing financial distress and allows family fishermen to qualify for a specialized form of bankruptcy relief currently available only to family farmers. The bill also includes provisions concerning transnational insolvencies, bankrupt health care providers, the treatment of tax claims, and data collection. In response to the exponential increase in bankruptcy filings, the bill authorizes the creation of 28 additional bankruptcy judgeships.

BACKGROUND AND NEED FOR THE LEGISLATION

On February 1, 2005, Senator Charles Grassley (R-IA) (for himself and seven original cosponsors) introduced S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." Thereafter, F. James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, (for himself and 60 original cosponsors) introduced legislation (H.R. 685) identical to S. 256 on February 9, 2005.

S. 256, as introduced, is substantively identical to legislation that the House passed in the prior Congress on two separate occasions with overwhelming bipartisan support.[3] It is also substantively similar to a modified version of a bankruptcy reform conference report that the House passed in the 107th Congress by a vote of 244 to 116.[4]

FACTORS SUPPORTING BANKRUPTCY REFORM

Representing the most comprehensive set of reforms in more than 25 years, S. 256's consumer bankruptcy provisions respond to several factors. First, the recent escalation of consumer bankruptcy filings does not appear to be just a temporary event, but part of a generally consistent upward trend.[5] In 1998, for example, bankruptcy filings exceeded one million for the first time in our nation's

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[2] Letter from Alan Greenspan, Chairman, Federal Reserve Board, to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary (Sept. 3, 2002) (on file with the Subcommittee on Commercial and Administrative Law).

[3] On March 19, 2003, the House passed H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Prevention Act of 2003," by a vote of 315 to 113. 149 CONG. REC. H2099–00 (daily ed. Mar. 19, 2003). Thereafter, the House, on January 28, 2004, passed S. 1920, as amended, the text of which was substituted with the text of H.R. 975, as passed by the House, by a vote of 265 to 99. 150 CONG. REC. H218–19 (daily ed. Jan. 28, 2004).

[4] H.R. Rep. No. 107–617 (2002). The modifications consisted of the deletion of two provisions, one dealing with unlawful protest activities and the other authorizing additional bankruptcy judgeships. The text of the conference report, as modified, was introduced as H.R. 5545, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003." H.R. 5545, 107th Cong. (2002). In turn, the text of H.R. 5545 was substituted as an amendment to H.R. 333. The House, thereafter, passed H.R. 333, as amended. 148 CONG. REC. H8876–77 (daily ed. Nov. 14, 2002).

[5] Press Release, Administrative Office of the U.S. Courts, Record Breaking Bankruptcy Filings Reported in Calendar Year 2002, at 1 (Feb. 14, 2003) (noting that "[b]ankruptcy filings continue to break historic records").

history. Over the past decade, the number of bankruptcy filings has *nearly doubled to more than 1.6 million cases filed in fiscal year 2004.*[6] As a result, there is a growing perception that bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort.[7] Despite the view of opponents of bankruptcy reform that abuse in the system is not widespread and that most bankruptcy filings result from causes beyond debtors' control, such as family illness, job loss or disruption, or divorce,[8] the Committee concluded that reforms were nevertheless necessary.

Second, there are significant losses asserted to be associated with bankruptcy filings. As one witness explained during the Senate Judiciary Committee's hearing on S. 256 earlier this year:

> Like all other business expenses, when creditors are unable to collect debts because of bankruptcy, some of those losses are inevitably passed on to responsible Americans who live up to their financial obligations. Every phone bill, electric bill, mortgage, furniture purchase, medical bill, and car loan contains an implicit bankruptcy "tax" that the rest of us pay to subsidize those who do not pay their bills. Exactly how much of these bankruptcy losses is passed on from lenders to consumer borrowers is unclear, but economics tells us that at least some of it is. We all pay for bankruptcy abuse in higher down payments, higher interest rates, and higher costs for goods and services.[9]

According to some analyses, the increase in consumer bankruptcy filings has adverse financial consequences for our nation's economy. For instance, it was estimated that in 1997 alone *more than $44 billion* of debt was discharged by debtors who filed for bankruptcy relief,[10] a figure when amortized on a yearly basis amounts to a loss of at least $110 million every day.[11] These losses, according to one estimate, translate into a $400 annual "tax" on every household in our nation.[12] In 2003, the *Nilson Report* (a credit industry newsletter) announced that issuers of proprietary and general pur-

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[6] *See* Press Release, Administrative Office of the U.S. Courts, Bankruptcy Filings Down in Fiscal Year 2004, at 1 (Dec. 3, 2004) (noting that "[d]espite the drop in filings, bankruptcies remain at historic highs, well above the 1.5 million record first set in 2002"); Becky Yerak, *Bankrupt Filings in E. Mich. Skyrocket; High Debt, Slow Economy Spur 22% Increase in 2002, Biggest Jump in the United States,* THE DETROIT NEWS, Feb. 24, 2003, at 1A (noting that in the Eastern District of Michigan alone, bankruptcy filings for 2002 increased by 22 percent over the prior year).

[7] *See, e.g.,* Becky Yerak, *Bankrupt Filings in E. Mich. Skyrocket; High Debt, Slow Economy Spur 22% Increase in 2002, Biggest Jump in the United States,* THE DETROIT NEWS, Feb. 24, 2003, at 1A (noting that "[t]he stigma of filing for bankruptcy continues to abate while, at the same time, lenders impose few if any credit restrictions").

[8] *See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the Senate Comm. on the Judiciary,* 109th Cong. (2005) (statement of Prof. Elizabeth Warren).

[9] *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the Senate Comm. on the Judiciary,* 109th Cong. (2005) (prepared statement of Prof. Todd Zywicki).

[10] *Bankruptcy Reform Act of 1998 (Pt. I): Hearings on H.R. 3150 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary,* 105th Cong. 147 (1998) (statement of Mark Lauritano, Senior Vice President, WEFA, Inc.).

[11] *Bankruptcy Reform: Joint Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 106th Cong. 26 (1999) (statement of Dean Sheaffer on behalf of the National Retail Federation).

[12] *Bankruptcy Reform Act of 1998 (Pt. I): Hearings on H.R. 3150 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary,* 105th Cong. 147 (1998) (statement of Mark Lauritano, Senior Vice President, WEFA, Inc.).

pose credit cards "lost $18.9 billion in 2002 from consumer bankruptcy filings," an increase of 15.1 percent over the prior year.[13] The Credit Union National Association (CUNA) reported that credit unions, as of 2002, lost "nearly $3 billion from bankruptcies" since Congress began its consideration of bankruptcy reform legislation in 1998.[14] CUNA estimates that over 40% of all credit union losses in 2004 will be bankruptcy-related, and those losses will total approximately $900 million.[15]

A third factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse. A civil enforcement initiative undertaken in 2002 by the United States Trustee Program (a component of the Justice Department charged with administrative oversight of bankruptcy cases) has "consistently identified" such problems as "debtor misconduct and abuse, misconduct by attorneys and other professionals, problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged."[16] According to the United States Trustee Program, "Abuse of the system is more widespread than many would have estimated."[17] Such abuse ultimately hurts consumers as well as creditors.

A fourth factor relates to the fact that some bankruptcy debtors are able to repay a significant portion of their debts, according to several studies.[18] Current law, however, has no clear mandate requiring these debtors to repay their debts. Accordingly, "[w]hile there is a universal agreement among the courts that an individual debtor's ability to repay his or her debts from future earnings is, at the very least, a factor in determining whether substantial abuse would occur in a chapter 7 case, there are differences among the courts as to the extent to which they rely on a debtor's ability to repay."[19]

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[13] *Bankruptcy Losses on Cards,* THE NILSON REPORT, Jan. 2003, at 1.

[14] John K. McKechnie, III, Letter to Editor, *Credit Union* J. 6 (June 24, 2002); see William R. Mapother, *Counseling Could Overturn Losses,* CREDIT UNION MAG. 34 (Dec. 2002) (quoting CUNA President Dan Mica).

[15] *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the Senate Comm. on the Judiciary,* 109th Cong. (2005) (prepared statement of Kenneth Beine).

[16] Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: the Civil Enforcement Initiative,* AM. BANKR. INSTITUTE J. 12 (Sept. 2002).

[17] J. Christopher Marshall, *Civil Enforcement: An Early Report,* JOURNAL OF THE NAT'L ASS'N OF BANKR. TRUSTEES (NABTALK) 39 (Fall 2002).

[18] *See, e.g., Bankruptcy Reform Act of 1999 (Pt. II): Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary,* 106th Cong. 298 (1999) (statement of Thomas S. Neubig, Ernst & Young LLP—Policy Economics and Quantitative Analysis Group, concluding that "large numbers of 1997 U.S. chapter 7 filers have the ability to repay large portions of their debts"); *id.* at 228–29 (statement of Michael E. Staten, Credit Research Center, concluding that "about 25 percent of chapter 7 debtors could have repaid at least 30 percent of their non-housing debts over a 5-year repayment plan, after accounting for monthly expenses and housing payments" and that "[a]bout 5 percent of chapter 7 filers appeared capable of repaying all of their non-housing debt over a 5-year plan," although these "calculations assumed income would remain unchanged relative to expenses over the 5 years"); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors,* 7 AM. BANKR. L. J. 27, 31 (1999) (concluding that 3.6% of sampled debtors "emerged as apparent can-pays").

[19] Robert C. Furr & Marc P. Barmat, *11 U.S.C. Section 707(b)—The U.S. Trustee's Weapon Against Abuse,* NAT'L ASS'N BANKR. TRUSTEES (NABTALK) 11, 14 (Winter 2002–03).

PRIOR CONGRESSIONAL CONSIDERATION OF BANKRUPTCY REFORM

Proposed reforms to bankruptcy law and practice have been under consideration by Congress for nearly eight years[20] and have generally enjoyed broad support from the business community, banking and financial services industries as well as other groups such as family farmers and child support enforcement agencies. In Congress, support for bankruptcy reform legislation has likewise been overwhelming, bipartisan and bicameral.

Since the 105th Congress, the House has passed bankruptcy reform legislation on eight separate occasions. In the 105th Congress, for example, the House passed both H.R. 3150, the "Bankruptcy Reform Act of 1998," and the conference report on that bill by veto-proof margins.[21] In the 106th Congress, the House passed H.R. 833, the successor to H.R. 3150, by a veto-proof margin of 313 to 108[22] and agreed to the conference report[23] by voice vote.[24] Although the Senate subsequently passed this legislation by a vote of 70 to 28,[25] President Clinton pocket-vetoed it. In the 107th Congress, the House again registered its overwhelming support for bankruptcy reform on two more occasions. On March 1, 2001, the House passed H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act," by a vote of 306 to 108.[26] The House thereafter passed a modified version of the conference report on H.R. 333, as previously noted.[27] In the last Congress, the House passed H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003," by a vote of 315 to 113 and S. 1920, which consisted of the text of H.R. 975, as passed by the House, by a vote of 265 to 99.[28]

Likewise, the Senate has on numerous occasions expressed strong bipartisan support for bankruptcy reform legislation. In the 105th Congress, the Senate passed bankruptcy reform legislation by a vote of 97 to 1.[29] In the 106th Congress, the Senate passed similar legislation by a vote of 83 to 14[30] and a subsequent conference report by a vote of 70 to 28.[31] In the 107th Congress, the Senate passed a bankruptcy reform bill by a vote of 82 to 16.[32] Last month, the Senate passed S. 256, as amended, by a vote of 74 to 25.[33]

The Committee and the Subcommittee on Commercial and Administrative Law (Subcommittee), beginning in the 105th Congress, have held a total of 18 days of hearings on the operation of the

[20] Comprehensive bankruptcy reform legislation (H.R. 2500, the "Responsible Borrower Protection Bankruptcy Act") was first formally introduced in the House on September 18, 1997. H.R. 2500, 105th Cong. (1997).

[21] 144 CONG. REC. H4442 (daily ed. June 10, 1998) (vote on final passage of H.R. 3150 was 306 to 118); 144 CONG. REC. H10239–40 (daily ed. Oct. 9, 1998) (vote on final passage of the conference report on H.R. 3150 was 300 to 125).

[22] 145 CONG. REC. H2771 (daily ed. May 5, 1999).

[23] H.R. REP. NO. 106–970 (2000).

[24] 146 CONG. REC. H9840 (daily ed. Oct. 12, 2000).

[25] 146 CONG. REC. S11730 (daily ed. Dec. 7, 2000).

[26] 147 CONG. REC. H600–01 (daily ed. Mar. 1, 2001).

[27] *See supra* note 3.

[28] 149 CONG. REC. H2099–00 (daily ed. Mar. 19, 2003);150 Cong. Rec. H218–19 (daily ed. Jan. 28, 2004).

[29] 144 CONG. REC. S10767 (daily ed. Sept. 23, 1998).

[30] 146 CONG. REC. S255 (daily ed. Feb. 2, 2000).

[31] 146 CONG. REC. S11730 (daily ed. Dec. 7, 2000).

[32] 147 CONG. REC. S2379 (daily ed. Mar. 15, 2001).

[33] 151 CONG. REC. S2474 (daily ed. Mar. 10, 2005).

bankruptcy system and the need for reform.[34] Eleven of these hearings were devoted solely to consideration of S. 256's predecessors, H.R. 3150 (105th Congress), H.R. 833 (106th Congress), H.R. 333 (107th Congress), and H.R. 975 (108th Congress). Over the course of these hearings, nearly 130 witnesses, representing nearly every major constituency in the bankruptcy community, testified. With regard to H.R. 833 alone, testimony was received from 69 witnesses, representing 23 organizations, with additional material submitted by other groups.

The Senate likewise has held numerous hearings on the subject of bankruptcy reform and related issues. Since the 105th Congress, the Senate has held eleven hearings, including a hearing held earlier this year on S. 256.[35] In fact, the inaugural hearing on H.R.

[34] The dates and subject matters of these hearings are as follows:

April 16, 1997:
Hearing on the operation of the bankruptcy system and status report from the National Bankruptcy Review Commission.

April 30, 1997:
Hearing on H.R. 764, the "Bankruptcy Amendments of 1997," and H.R. 120, the "Bankruptcy Law Technical Corrections Act of 1997."

October 9, 1997:
Hearing on H.R. 2592, the "Private Trustee Reform Act of 1997" and review of post-confirmation fees in chapter 11 cases.

November 13, 1997:
Hearing on the Report of the National Bankruptcy Review Commission.

February 12, 1998:
Hearing on H.R. 2604, the "Religious Liberty and Charitable Donation Protection Act of 1997."

March 10–11, 18–19, 1998:
Hearings on H.R. 3150, the "Bankruptcy Reform Act of 1998," H.R. 3146, the "Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998," and H.R. 2500, the "Responsible Borrower Protection Bankruptcy Act."

March 11–12, 18–19, 1999:
Hearings on H.R. 833, the "Bankruptcy Reform Act of 1999."

November 2, 1999:
Joint oversight hearing on additional bankruptcy judgeship needs.

April 11, 2000:
Oversight hearing on the limits on regulatory powers under the Bankruptcy Code.

February 7–8, 2001:
Hearings on H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2001."

March 4, 2003:
Hearing on H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003" and the need for bankruptcy reform.

[35] The Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary conducted the following hearings:

April 11, 1997:
Hearing on the increase in personal bankruptcies and the crisis in consumer credit.

August 1, 1997:
Hearing to review the negative impact of bankruptcy on educational funding.

August 8, 1997:
Hearing regarding bankruptcy laws for family farmers.

September 22, 1997:
Hearing on the Bankruptcy Code's effect on religious freedom and a review of the need for additional bankruptcy judgeships.

October 21, 1997:
Hearing to review the recommendations of the National Bankruptcy Review Commission.

December 7, 1997:
Hearing regarding international bankruptcy laws.

March 11, 1998:
Hearing on S. 1301, "The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to the Consumer Bankruptcy Crisis."

May 19, 1998:
Hearing to review business bankruptcy issues.

March 11, 1999:

Continued

833 during the 106th Congress was held jointly by the Subcommittee together with the Senate Subcommittee on Administrative Oversight and the Courts on March 11, 1999,[36] marking the first time in more than 60 years that a bicameral hearing was held on the subject of bankruptcy reform.[37]

It is also important to note that bankruptcy reform legislation is the product of extensive bipartisan and bicameral negotiation and compromise. For example, conferees during the 106th Congress spent nearly seven months engaged in an informal conference to reconcile differences between the House and Senate passed versions of bankruptcy reform legislation. In the 107th Congress, conferees formally met on three occasions and ultimately agreed—after an 11-month period of negotiations—to a bipartisan conference report.[38]

On February 10, 2005, the Senate Committee on the Judiciary held a hearing on S. 256 that provided an opportunity to review the reasons why the current bankruptcy system needs reform and how this legislation would implement those reforms.[39] Testimony was received from eight witnesses, including: Kenneth Beine on behalf of CUNA; Maria Vullo, a partner with the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP; Malcom Bennett on behalf of the National Multi Housing Council/National Apartment Association; Philip Strauss on behalf of the National Child Support Enforcement Association; Dave McCall on behalf of the United Steel Workers of America, AFL-CIO; R. Michael Stewart Menzies, Sr. on behalf of the Independent Community Bankers of America; Prof. Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School; and Prof. Todd J. Zywicki, Visiting Professor of Law at Georgetown University Law Center.

Among the matters considered at the hearing were: (1) the adequacy of the current bankruptcy system with respect to the detection of fraud and abuse; (2) how abuse and fraud in the current bankruptcy system impact on American businesses and our nation's citizens generally; (3) whether the legislation adversely impacts individuals deserving of bankruptcy relief; (4) whether the

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Hearing on H.R. 833, the "Bankruptcy Reform Act of 1999," held jointly with the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary.

November 2, 1999:

Oversight hearing on additional bankruptcy judgeship needs held jointly with the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary.

February 10, 2005:

Hearing on S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005."

[36] Representatives on behalf of the Commercial Law League of America, CUNA, MBNA America Bank, N.A., National Retail Federation, and the National Consumer Law Center also testified. Some of the nation's leading jurists and academics presented testimony as well. *Bankruptcy Reform: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 106th Cong. (1999).

[37] Senators testifying at the hearing included Charles Grassley (R-IA), Joseph Biden (D-DE) and Christopher Dodd (D-CT). House Members included Jim Moran (D-VA), Pete Sessions (R-TX) and Nick Smith (R-MI). *Id.*

[38] H.R. REP. NO. 107–617 (2002). Signatories on behalf of the House included: F. James Sensenbrenner, Jr. (R-WI), Henry Hyde (R-IL), George Gekas (R-PA), Lamar Smith (R-TX), Steve Chabot (R-OH), Bob Barr (R-GA), Rick Boucher (D-VA), Michael Oxley (R-OH), Spencer Bachus (R-AL), Billy Tauzin (R-LA), Joe Barton (R-TX), John Boehner (R-OH), and Michael Castle (R-DE). Signatories on behalf of the Senate included: Patrick Leahy (D-VT), Joe Biden (D-DE), Charles Schumer (D-NY), Orrin Hatch (R-UT), Chuck Grassley (R-IA), Jon Kyl (R-AZ), Mike DeWine (R-OH), Jeff Sessions (R-AL), and Mitch McConnell (R-KY).

[39] *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 109th Cong. (2005).

proposed reforms would assist those who are charged with administrative oversight of bankruptcy cases and law enforcement matters; and (5) whether, given current economic circumstances, the need for comprehensive bankruptcy reform still exists.

On February 17, 2005, the Senate Judiciary Committee marked up S. 256 and ordered the bill, as amended, to be favorably reported by a vote of 12 to 5. Over the course of the markup, five amendments were passed. These amendments consisted of the following:

1. an amendment by Senator Edward Kennedy (D-MA) clarifying that a debtor's reasonably necessary expenses for health insurance, disability insurance, and health savings accounts for the debtor and for the debtor's spouse and dependents are allowed expenses under the bill's needs-based test;
2. an amendment by Senator Kennedy limiting retention bonuses, severance pay, and other payments to insiders of the debtor, under certain circumstances;
3. an amendment by Senator Russell Feingold (D-WI) increasing the monetary threshold with respect to the venue of a proceeding to recover a consumer debt;
4. an amendment by Senator Patrick Leahy (D-VT) clarifying that a debt based on a Federal or state securities law violation is nondischargeable; and
5. an amendment by Senator Kennedy requiring the United States trustee to apply to the court for the appointment of a chapter 11 trustee if there are reasonable grounds to suspect fraud, under certain circumstances.

On March 10, 2005, the Senate passed S. 256, as amended, by a vote of 74 to 25. Nearly 130 amendments were filed. Of the amendments that were offered, 24 failed, 24 were withdrawn, eight were passed either by vote or unanimous consent. The amendments that were accepted consisted of the following:

1. an amendment by Senator Jeff Sessions (R-AL) clarifying that the special circumstances exception to the bill's needs-based test includes a debtor with a serious medical condition or a debtor on active duty in the military to the extent these factors justify adjustment to income or expenses as well as clarifying the safe harbor from the needs-based test with respect to veterans;
2. an amendment by Senator Leahy restricting public access to certain personal information regarding an individual contained in bankruptcy case files to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to such individual or the individual's property;
3. an amendment by Senator Arlen Specter (R-PA) increasing the filing fees for chapter 7 and chapter 11 bankruptcy cases, reducing the filing fees for chapter 13, and adjusting the allocation of such fees among various governmental entities;

4. an amendment by Senator Feingold providing for the automatic periodic adjustment for inflation of certain monetary amounts specified in the Bankruptcy Code;
5. an amendment by Senator Feingold authorizing a court to: (a) seal all public records pertaining to a fraudulent involuntary bankruptcy petition, under certain circumstances, (b) prohibit any consumer reporting agency from issuing any consumer report containing any reference to such petition; and (c) expunge all records pertaining to such petition upon the expiration of the statute of limitations for the crimes associated with the filing of a fraudulent involuntary bankruptcy petition. It also amends the Federal criminal statute to make it a criminal offense to file a fraudulent involuntary bankruptcy petition; [40]
6. an amendment by Senator Feingold creating an exception to the bill's mandatory consumer credit counseling and financial management training requirements for a debtor who is unable to complete these requirements because of incapacity, disability, or active duty in a military combat zone;
7. an amendment by Senator Richard Durbin (D-IL) creating an exception from the bill's needs-based test for a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty or performing a homeland defense activity; and
8. an amendment by Senator James Talent (R-MO) authorizing a bankruptcy trustee to avoid any transfer of property by a debtor to a self-settled trust made within ten years preceding the filing of the debtor's bankruptcy case if the debtor is a beneficiary of such trust and the debtor made such transfer with actual intent to hinder, delay, or defraud a creditor.

HIGHLIGHTS OF BANKRUPTCY REFORMS

Consumer Creditor Bankruptcy Protections.

Needs-Based Reforms. Chapter 7 is a form of bankruptcy relief by which an individual debtor receives an immediate unconditional discharge of personal liability for certain debts in exchange for relinquishing his or her nonexempt assets to a bankruptcy trustee for liquidation and distribution to creditors.[41] This "unconditional discharge" in chapter 7 contrasts with the "conditional discharge" provisions of chapter 13, under which a debtor commits to repay some portion of his or her financial obligations in exchange for retaining nonexempt assets and receiving a broader discharge of debt than is available under chapter 7. Allowing consumer debtors in financial distress to choose voluntarily an "unconditional discharge" has

[40] This amendment is similar to legislation considered by the House in the 108th Congress. H.R. 1529, 108th Cong. (2003). The bill was ordered favorably reported without amendment by the House Judiciary Committee, H.R. REP. NO. 108–110 (2003), and passed by voice vote by the House. 149 CONG. REC. H5104 (daily ed. June 10, 2003). The principal difference between this legislation and section 332 of the Act is that the bill would have permitted the court to expunge the case upon dismissal of the fraudulent involuntary petition.

[41] Under the Bankruptcy Code, only an individual may obtain a chapter 7 discharge. Thus, a corporation is not eligible to receive a discharge under chapter 7. 11 U.S.C. § 727(a)(1).

been a part of American bankruptcy law since the enactment of the Bankruptcy Act of 1898.[42]

The concept of needs-based bankruptcy relief has long been debated in the United States. President Herbert Hoover, for instance, recommended to Congress in 1932, "The discretion of the courts in granting or refusing discharges should be broadened, and they should be authorized to postpone discharges for a time and require bankrupts, during the period of suspension, to make some satisfaction out of after-acquired property as a condition to the granting of a full discharge."[43] In 1938, chapter XIII (the predecessor to chapter 13 of the Bankruptcy Code) was enacted as a purely voluntary form of bankruptcy relief that allowed a debtor to propose a plan to repay creditors out of future earnings.[44]

Over the ensuing years, there continued to be repeated expressions of support for and opposition to means-testing bankruptcy reform.[45] In 1967, various organizations testifying before Congress in support of such reform included the American Bar Association, the American Bankers Association, the Chamber of Commerce of the United States, CUNA, the National Federation of Independent Businesses, and the American Industrial Bankers Association.[46] The Commission on the Bankruptcy Laws of the United States, while supporting the concept that repayment plans should be "fostered," nevertheless concluded in 1973 that "forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system."[47] The Bankruptcy Reform Act of 1978[48] retained the principle that a debtor's decision to choose relief premised on repayment to creditors should be "completely voluntary."[49]

Although the Bankruptcy Code as originally enacted in 1978 provided that a chapter 7 case could only be dismissed for "cause," the Code was amended in 1984 to permit the court to dismiss a chapter 7 case for "substantial abuse."[50] This provision, codified in section 707(b) of the Bankruptcy Code,[51] was added "as part of a package of consumer credit amendments designed to reduce perceived

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[42] Bankruptcy Act of 1898, 30 Stat. 544 (1898) (repealed 1978). The rationale of an unconditional discharge was explained by Congress more than 100 years ago:

> [W]hen an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.

H.R. REP. NO. 55–65, at 43 (1897).

[43] President's Special Message to the Congress on Reform of Judicial Procedure, 69 Pub. Papers 83, 90 (Feb. 29, 1932).

[44] Chandler Act of 1938, 52 Stat. 840 (1938).

[45] *See, e.g.,* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES—JULY 1973, H.R. DOC. NO. 93 137, pt. I, at 158 (1973) (observing that "proposals have been made to Congress from time to time that a debtor able to obtain relief under chapter XIII [predecessor of chapter 13] should be denied relief in straight bankruptcy").

[46] *Hearings on H.R. 1057* and *H.R. 5771 Before the Subcomm. No. 4 of the House Comm. on the Judiciary,* 90th Cong. (1967).

[47] *See, e.g.,* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES—JULY 1973, H.R. DOC. NO. 93–137, pt. I, at 159 (1973).

[48] Pub. L. No. 95–598, 92 Stat. 2549 (1978).

[49] H.R. REP. NO. 95–595, at 120 (1977) (observing that "[t]he thirteenth amendment prohibits involuntary servitude" and suggesting that "a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition").

[50] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 312, 98 Stat. 333, 335 (1984).

[51] 11 U.S.C. § 707(b).

abuses in the use of chapter 7."[52] It was intended to respond "to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid their obligations."[53] In 1986, section 707(b) was further amended to allow a United States trustee (a Department of Justice official) to move for dismissal.[54]

The utility of section 707(b) is limited for several reasons. Under current law, neither the court nor the United States trustee is required to file a motion to dismiss a chapter 7 case for substantial abuse under section 707(b). In addition, other parties in interest, such as chapter 7 trustees and creditors, are prohibited from filing such motions. In fact, section 707(b) specifies that a motion under that provision may not even be made "at the request or suggestion of any party in interest."[55] The standard for dismissal—substantial abuse—is inherently vague, which has lead to its disparate interpretation and application by the bankruptcy bench.[56] Some courts, for example, hold that a debtor's ability to repay a significant portion of his or her debts out of future income constitutes substantial abuse and therefore is cause for dismissal;[57] others do not.[58] A further reason militating against filing section 707(b) motions is that the Bankruptcy Code codifies a presumption that favors granting a debtor a discharge.[59]

Over the course of its hearings since the 105th Congress, the Committee received testimony explaining that if needs-based reforms and other measures were implemented, the rate of repayment to creditors would increase as more debtors were shifted into chapter 13 (a form of bankruptcy relief where the debtor commits to repay a portion or all of his debts in exchange for receiving a broad discharge of debt) as opposed to chapter 7 (a form of bankruptcy relief where the debtor receives an immediate discharge of personal liability on certain debts in exchange for turning over his or her nonexempt assets to the bankruptcy trustee for distribution to creditors).

Needs-based reforms would amend section 707(b) of the Bankruptcy Code to permit a court, on its own motion, or on motion of the United States trustee, private trustee, bankruptcy administrator, or other party in interest (including a creditor), to dismiss a chapter 7 case for abuse if it was filed by an individual debtor

[52] 6 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY § 707.LH[2], at 707–30 (15th ed. rev. 2002).

[53] *Id.* at § 707.04.

[54] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554, § 219, 100 Stat. 3088, 3101 (1986).

[55] 11 U.S.C. § 707(b).

[56] *See, e.g.,* David White, *Disorder in the Court: Section 707(b) of the Bankruptcy Code,* 1995–96 ANN. SURVEY OF BANKR. L. 333, 355 (1996) (noting that the courts "have taken divergent views in an attempt to define the term" and have resorted to "a variety of methods" in applying it to specific cases); Robert C. Furr & Marc P. Barmat, *11 U.S.C. Section 707(b)—The U.S. Trustee's Weapon Against Abuse,* NAT'L ASS'N BANKR. TRUSTEES (NABTALK) 11, 14 (Winter 2002–03).

[57] *See, e.g., Zolg v. Kelly* (*In re* Kelly), 841 F.2d 908, 913–14 (9th Cir. 1988) (observing that the "principal factor to be considered in determining substantial abuse is the debtor's ability to repay debts for which a discharge is sought").

[58] *See, e.g., In re* Braley, 103 B.R. 758 (Bankr. E.D. Va. 1989), *aff'd,* 110 B.R. 211 (E.D. Va. 1990). Notwithstanding the fact that the debtors in Braley had disposable monthly income of nearly $2,700, the bankruptcy court did not dismiss the case for substantial abuse. *Id.* at 760. The court concluded, "Based upon this legislative history, we are persuaded that no future income tests exists [sic] in 707(b) and if it did, as a finding of fact, the Braley family has insufficient future income to merit barring the door in light of the circumstances of this Navy family." *Id.* at 762.

[59] Section 707(b) of the Bankruptcy Code mandates that "[t]here shall be a presumption in favor of granting the relief requested by the debtor." 11 U.S.C. § 707(b).

whose debts are primarily consumer debts. Alternatively, the chapter 7 case could be converted to a case under chapter 11 or chapter 13 on consent of the debtor.

In addition, these reforms contemplate replacing the current law's presumption in favor of the debtor with a mandatory presumption of abuse that would arise under certain conditions. As amended, section 707(b) of the Bankruptcy Code would require a court to presume that abuse exists if the amount of the debtor's remaining income, after certain expenses and other specified amounts are deducted from the debtor's current monthly income (a defined term)[60] when multiplied by 60, exceeds the lower of the following: (1) 25 percent of the debtor's nonpriority unsecured claims, or $6000 (whichever is greater); or (2) $10,000. Section 102 mandates that the debtor's expenses include reasonably necessary expenditures for health insurance, disability insurance, and health savings accounts for the debtor, the debtor's spouse, and dependents of the debtor. In addition, the debtor's expenses must include those incurred to maintain the safety of the debtor and the debtor's family from family violence as identified in section 309 of the Family Violence Prevention and Services Act or other applicable law. In addition to other specified expenses,[61] the debtor's monthly expenses—exclusive of any payments for debts (unless otherwise permitted)—must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook[62] as Nec-

[60] Section 102(b) of the bill defines "current monthly income" as the average monthly income from all sources that the debtor receives (or, in a joint case, the debtor and the debtor's spouse receive), without regard to whether it is taxable income, in the six-month period preceding the bankruptcy filing. It includes any amount paid on a regular basis by any entity (other than the debtor or, in a joint case, the debtor and the debtor's spouse) to the household expenses of the debtor or the debtor's dependents and, in a joint case, the debtor's spouse, if not otherwise a dependent. It excludes Social Security Act benefits and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes. It also excludes payments to victims of international terrorism or domestic terrorism (as defined in 18 U.S.C. § 2331) on account of their status as victims of such terrorism.

[61] Under section 102(a), a debtor's monthly expenses may also include:

- an additional five percent of the food and clothing expense allowances under the Internal Revenue Service National Standards expenses category, if demonstrated to be reasonable and necessary;
- the debtor's average monthly payments on account of secured debts, including any additional payments to secured creditors that a chapter 13 debtor must make to retain possession of a debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents that collateralizes such debts;
- claims and expenses entitled to priority under section 507 of the Bankruptcy Code, such as child support and alimony;
- the continuation of actual expenses paid by the debtor that are reasonable and necessary for the care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family who is otherwise unable to pay such expenses;
- housing and utility expenses in excess of those specified by the Internal Revenue Service, under certain circumstances;
- the actual administrative expenses (including reasonable attorneys' fees) of administering a chapter 13 plan for the district in which the debtor resides up to ten percent of projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees; and
- the actual expenses for each dependent child under the age of 18 years up to $1,500 per year per child to attend a private elementary or secondary school, under certain circumstances.

[62] INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL—Financial Analysis Handbook pt. 5.15.1 (rev. May 1, 2004).

essary Expenses[63] under the National[64] and Local Standards[65] categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses.[66]

The means test permits the mandatory presumption of abuse to be rebutted only if: (1) the debtor demonstrates special circumstances justifying any additional expense or adjustment to the debtor's current monthly income for which there is no reasonable alternative; and (2) such additional expense or income adjustment caused the debtor's current monthly income (reduced by various amounts) when multiplied by 60 to be less than the lesser of either: (i) 25 percent of the debtor's nonpriority unsecured claims, or $6,000 (whichever is greater), or (ii) $10,000.[67] Special circumstances include such factors as whether the debtor has a serious medical condition or is on active duty in the Armed Services to the extent these factors justify adjustment to income or expenses.

Where the mandatory presumption of abuse does not apply or has been rebutted, the court, in order to determine whether the granting of relief under chapter 7 would constitute an abuse, must consider: (1) whether the debtor filed the chapter 7 case in bad faith; or (2) whether the totality of circumstances of the debtor's financial situation (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection) demonstrates abuse.

Should a court grant a section 707(b) motion made by a trustee and find that the action of the debtor's counsel in filing the chapter 7 case violated Federal Rule of Bankruptcy Procedure 9011,[68] S.

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[63] The Internal Revenue Manual defines the term "necessary expenses" as expenses:

> that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income. The expenses must be reasonable. The total necessary expenses establish the minimum a taxpayer and family need to live.

Id. at pt. 5.15.1.7.

[64] The Internal Revenue Manual's "National Standards" establish standards for five types of expenses: food (includes all meals, home and away), housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary), apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair), personal care products and services (includes hair care products, haircuts, oral hygiene products, electric personal care appliances), and miscellaneous (a discretionary allowance of $100 for one person and $25 for each additional person in a taxpayer's family). Except for miscellaneous expenses, these expense standards are derived from Bureau of Labor Statistics Consumer Expenditure Survey and are stratified by income and household size. *Id.* at pt. 5.15.1.8.

[65] "Local Standards," under the Internal Revenue Manual, establish expense standards for housing (e.g., mortgage or rent, property taxes, interest, parking, necessary maintenance and repair, homeowner's or renter's insurance, and homeowner dues and condominium fees) and transportation expenditures (e.g., vehicle insurance, vehicle payment, maintenance, fuel, state and local registration, parking fees, tolls, driver's license fees, and public transportation). Utilities (e.g., gas, electricity, water, fuel, oil, bottled gas, wood and other fuels, trash and garbage collection, septic cleaning, and telephone) are included under the housing expense category. Housing standards are established for each county within a state. Transportation standards are determined on a regional basis. *Id.* at pt. 5.15.1.9.

[66] The Internal Revenue Manual does not establish monetary amounts with regard to necessary expenses that it characterizes as "Other Expenses." Rather, it provides a non-exclusive list of these expenses, that must otherwise satisfy the "necessary expense test," described in note 63 *supra*. The list includes expenditures for certain accounting and legal fees, child care, dependent care for an elderly or disabled person, health care, taxes, court-ordered payments, life insurance, involuntary deductions (e.g., union dues, uniforms, work shoes), charitable contributions, and certain education expenses. *Id.* at pt. 5.15.1.10.

[67] The debtor must itemize and provide documentation of each additional expense or income adjustment as well as explain the special circumstances that make such expense or income adjustment reasonable and necessary. In addition, the debtor must attest under oath to the accuracy of any information provided to demonstrate that such additional expenses or adjustments to income are required.

[68] Fed. R. Bankr. P. 9011. This rule is the bankruptcy analog to Federal Rule of Civil Procedure 11, which authorizes a court to impose sanctions against an attorney or party who com-

256 authorizes the court to order the attorney to reimburse the trustee for all reasonable costs in prosecuting the motion, including reasonable attorneys' fees. In addition, the court may assess an appropriate civil penalty.[69]

Two types of "safe harbors" apply to the means test. One provides that only a judge, United States trustee, bankruptcy administrator, or private trustee may file a motion to dismiss a chapter 7 case under section 707(b) of the Bankruptcy Code if the debtor's income (or in a joint case, the income of debtor and the debtor's spouse) does not exceed the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household. The second safe harbor provides that no motion under section 707(b)(2) (dismissal based on a chapter 7 debtor's ability to repay) may be filed by a judge, United States trustee, bankruptcy administrator, private trustee, or other party in interest if the debtor (including the circumstance where the debtor is a veteran) and the debtor's spouse combined have income that does not exceed the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household.[70] In addition, the bill includes a safe harbor from the bill's needs-based test for a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).

Other Reforms Dealing with Abuse. S. 256 contains various reforms tailored to remedy certain types of fraud and abuse within the present bankruptcy system. For example, the bill substantially limits a debtor's ability to file successive bankruptcy cases. It also addresses abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief. In addition, S. 256 prevents the discharge of debts based on fraud, embezzlement, and malicious injury in a chapter 13 case. Other abuse reforms include a provision authorizing the court to dismiss a chapter 7 case filed by an individual debtor convicted of a crime of violence or a drug trafficking crime on motion of the victim, under certain circumstances. And, the court, as a condition of confirming a chapter 13 plan, must find that the debtor filed the chapter 13 case in good faith.

The bill also restricts the so-called "mansion loophole." Under current bankruptcy law, debtors living in certain states can shield

mences a frivolous actions or files other inappropriate documents in violation of this Rule's requirements.

[69] Section 102(a) of S. 256 specifies that the signature of an attorney on a bankruptcy petition, pleading, or written motion constitutes a certification that the attorney has: (1) performed a reasonable investigation into the circumstances giving rise to such petition, pleading or motion; and (2) determined that the document is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and does not constitute an abuse under section 707(b)(1) of the Bankruptcy Code. Pursuant to section 102(a), the signature of an attorney on a bankruptcy petition constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

[70] In a case that is not a joint case, current monthly income of the debtor's spouse is not considered if the debtor and the debtor's spouse are separated under applicable nonbankruptcy law or the debtor and the debtor's spouse are living separate and apart (other than for the purpose of evading this provision) and the debtor files a statement under penalty of perjury containing certain specified information.

from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocate to these states just to take advantage of their "mansion loophole" laws. S. 256 closes this loophole for abuse by requiring a debtor to be a domiciliary in the state for at least two years before he or she can claim that state's homestead exemption; the current requirement can be as little as 91 days.[71] The bill further reduces the opportunity for abuse by requiring a debtor to own the homestead for at least 40 months before he or she can use state exemption law; current law imposes no such requirement.[72] S. 256 prevents securities law violators and others who have engaged in criminal conduct from shielding their homestead assets from those whom they have defrauded or injured. If a debtor was convicted of a felony, violated a securities law, or committed a criminal act, intentional tort, or engaged in reckless misconduct that caused serious physical injury or death, the bill overrides state homestead exemption law and caps the debtor's homestead exemption at $125,000. To the extent a debtor's homestead exemption was obtained through the fraudulent conversion of nonexempt assets (e.g., cash) during the ten-year period preceding the filing of the bankruptcy case, S. 256 requires such exemption to be reduced by the amount attributable to the debtor's fraud.

S. 256 also authorizes a trustee to avoid any transfer of property that a debtor made to a self-settled trust (of which the debtor is a beneficiary) within the ten-year period preceding the filing of the debtor's bankruptcy case if the debtor made the transfer with actual intent to hinder, delay, or defraud a creditor of the debtor.

Protections for Creditors—In General. S. 256 includes provisions intended to provide greater protections for creditors, while ensuring that the claims of those creditors entitled to priority treatment, such as spousal and child support claimants, are not adversely impacted. These include provisions: (1) ensuring that creditors receive proper and timely notice of important events and proceedings in a bankruptcy case; (2) prohibiting abusive serial filings and extending the period between successive discharges; and (3) implementing various provisions designed to improve the accuracy of the information contained in debtors' schedules, statements of financial affairs. They also clarify that creditors holding consumer debts may participate without counsel at the section 341 meeting of creditors (which provides an opportunity for creditors to examine the debtor under oath).

Enforcement of Family Support Obligations. S. 256 accords domestic and child support claimants a broad spectrum of special protections. The legislation creates a uniform and expanded definition of domestic support obligations to include debts that accrue both before or after a bankruptcy case is filed. It gives the highest payment priority for these debts (current law only accords them a seventh-level priority),[73] with allowance for the payment of trustee administrative expenses, under certain conditions. In addition, the bill mandates that a debtor must be current on postpetition domestic support obligations to confirm a chapter 11, chapter 12 (family

[71] *See* 11 U.S.C. § 522(b)(2)(2)(A).

[72] If the debtor owns the homestead for less than 40 months, the provision imposes a $125,000 homestead cap. In effect, this provision overrides state exemption law authorizing a homestead exemption in excess of this amount and allows such law to control if it authorizes a homestead exemption in a lesser amount.

[73] 11 U.S.C. § 507(a)(7).

farmer) or chapter 13 plan of reorganization. To facilitate the domestic support collection efforts by governmental units, the legislation creates various exceptions to automatic stay provisions of the Bankruptcy Code (which enjoin many forms of creditor collection activities). It also broadens the categories of nondischargeable family support obligations with the result that these debts will not be extinguished at the end of the bankruptcy process. The legislation, in addition, mandates that spousal and child support claimants as well as state child support agencies receive specified information and notices relevant to pending bankruptcy cases.

Protections for Secured Creditors. S. 256's protections for secured creditors include a prohibition against bifurcating a secured debt incurred within the 910-day period preceding the filing of a bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the debtor's personal use. Where the collateral consists of any other type of property having value, S. 256 prohibits bifurcation of specified secured debts if incurred during the one-year period preceding the filing of the bankruptcy case. The bill clarifies current law to specify that the value of a claim secured by personal property is the replacement value of such property without deduction for the secured creditor's costs of sale or marketing. In addition, the bill terminates the automatic stay with respect to personal property if the debtor does not timely reaffirm the underlying obligation or redeem the property.[74] S. 256 also specifies that a secured claimant retains its lien in a chapter 13 case until the underlying debt is paid or the debtor receives a discharge.

Protections for Lessors. With respect to the interests of lessors, S. 256 requires chapter 13 debtors to remain current on their personal property leases and to provide proof of adequate insurance. The bill specifies that a lessor may condition assumption of a personal property lease on cure of any outstanding default and it provides that a lessor is not required to permit such assumption. The bill also addresses a problem faced by thousands of large and small residential landlords across the nation whose tenants file for bankruptcy relief solely for the purpose of staying pending eviction proceedings so that they can live "rent free."

Consumer Debtor Bankruptcy Protections. The bill's consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases. S. 256 mandates that certain services and specified notices be given to consumers by professionals and others who provide bankruptcy assistance. To ensure compliance with these provisions, the bill institutes various enforcement mechanisms.

In addition, S. 256 amends the Truth in Lending Act to require certain credit card solicitations, monthly billing statements, and related materials to include important disclosures and explanatory statements regarding introductory interest rates and minimum payments, among other matters. These additional disclosures are intended to give debtors important information to enable them to better manage their financial affairs.

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[74] Redemption is a method by which a chapter 7 debtor can retain certain types of personal property by paying the holder of a lien on such property the allowed amount of the holder's secured lien. 11 U.S.C. § 722.

S. 256 contains provisions to help debtors better understand their rights and obligations with respect to reaffirmation agreements. To enforce these protections, the bill requires the Attorney General to designate a United States Attorney for each judicial district and a FBI agent for each field office to have primary law enforcement responsibility regarding abusive reaffirmation practices, among other matters.

The legislation also expands a debtor's ability to exempt certain tax-qualified retirement accounts and pensions. It creates a new provision that allows a consumer debtor to exempt certain education IRAs and state tuition plans for his or her child's postsecondary education from the claims of creditors.

Most importantly, S. 256 requires debtors to participate in credit counseling programs before filing for bankruptcy relief (unless special circumstances do not permit such participation). The legislation's credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating [75]—before they decide to file for bankruptcy relief. The bill also requires debtors, after they file for bankruptcy relief, to receive financial management training that will provide them with guidance about how to manage their finances, so that they can avoid future financial difficulties. The mandatory credit counseling and financial management training requirements do not apply if the debtor is unable to complete these requirements because of incapacity or disability, or because he or she is on active duty in a military combat zone.

Other debtor protections include expanded notice requirements for consumers. Under the bill, individuals with primarily consumer debts must receive notice of alternatives to bankruptcy relief before they file for bankruptcy and it requires them to be informed of other matters pertaining to the integrity of the bankruptcy system. The legislation also permits certain filing fees and related charges to be waived, in appropriate cases, for individuals who lack the ability to pay these costs.

Highlights of Business Bankruptcy Reforms.

S. 256 contains a comprehensive set of reforms pertinent to business bankruptcies. They include provisions addressing the special problems presented by small business bankruptcies and single asset real estate debtors as well as provisions dealing with business bankruptcy cases in general. S. 256 establishes a new form of bankruptcy relief for transnational insolvencies intended to promote international comity and greater certainty. It also includes provisions concerning the treatment of certain financial contracts under the banking laws as well as under the Bankruptcy Code. S. 256 responds to the special needs of family farmers by making chapter 12 of the Bankruptcy Code (a form of bankruptcy relief available only to eligible family farmers) permanent. For the first time, it also allows certain family fishermen to qualify for chapter 12 relief.

[75] Under current law, for example, a bankruptcy filing may be reported on a consumer's credit report for ten years. 15 U.S.C. § 1681c (2002).

Protections Against Excessive Payments To a Debtor's Insiders and Fraud by a Debtor's Management. S. 256 significantly restricts a corporate debtor's ability to pay bonuses, severance payments, and other payments to insiders of the debtor after the bankruptcy case is filed and requires the court to approve any such payment. In addition, it requires the United States trustee to apply for the appointment of a trustee if there are reasonable grounds to suspect that current members of a chapter 11 debtor's governing body, chief executive officer, chief financial officer, or members of the debtor's governing body who selected the debtor's chief executive officer or chief financial officer participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

Protections for Employees. S. 256 provides heightened protections for employees. It requires certain back pay awards granted as a result of a debtor's violation of Federal or state law to receive one of the highest payment priorities in a bankruptcy case. In addition, the bill streamlines the appointment of an ERISA administrator for an employee benefit plan, under certain circumstances, to minimize the disruption that results when an employer files for bankruptcy relief. S. 256 also increases the monetary cap on wage and employee benefit claims entitled to priority under the Bankruptcy Code from $4,650 to $10,000 and lengthens the reachback period for wage claims from 90 days to 180 days. The bill amends the Bankruptcy Code to facilitate the recovery of avoidable transfers and excessive pre- and post-petition compensation, such as bonuses, paid to insiders of a debtor. In addition, S. 256 limits the ability of chapter 11 debtors to unilaterally terminate retiree benefit plans on the eve of bankruptcy.

Small Business/Single Asset Real Estate Debtors. S. 256 includes provisions with respect to small business and single asset real estate debtors largely derived from recommendations of the National Bankruptcy Review Commission.[76]

Most chapter 11 cases are filed by small business debtors. Although the Bankruptcy Code envisions that creditors should play a major role in the oversight of chapter 11 cases, this often does not occur with respect to small business debtors. The main reason is that creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases. The resulting lack of creditor oversight creates a greater need for the United States trustee to monitor these cases closely. Nevertheless, the monitoring of these debtors by United States trustees varies throughout the nation. S. 256 addresses the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees and the bankruptcy courts.

With regard to the Bankruptcy Code's treatment of single asset real estate debtors, S. 256 makes several amendments. First, it eliminates the monetary cap from the single asset real estate debtor definition. Second, it makes these debtors subject to the bill's

[76] *See generally* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, at 303–706 (Oct. 20, 1997).

small business reforms. Third, S. 256 amends the automatic stay provisions by permitting a single asset real estate debtor to make requisite interest payments out of rents or other proceeds generated by the real property.

Financial Contracts. S. 256 contains a series of provisions pertaining to the treatment of certain financial transactions under the Bankruptcy Code and relevant banking laws.[77] These provisions are intended to reduce "systemic risk" in the banking system and financial marketplace.[78] To minimize the risk of disruption when parties to these transactions become bankrupt or insolvent, the bill amends provisions of the banking and investment laws, as well as the Bankruptcy Code, to allow the expeditious termination or netting of certain types of financial transactions. Many of these provisions are derived from recommendations issued by the President's Working Group on Financial Markets[79] and revisions espoused by the financial industry.

Family Farmers and Family Fishermen. S. 256 helps small family farmers facing financial distress. While current bankruptcy law has a specialized form of bankruptcy relief—chapter 12—that is specifically designed for family farmers, its benefits for farmers are limited because of its restrictive eligibility requirements. S. 256 responds to this problem in several key respects: it more than doubles the debt eligibility limit and requires it to be periodically adjusted for inflation; it lowers the requisite percentage of a farmer's income that must be derived from farming operations; and it gives farmers more flexibility with respect to how certain creditors can be repaid. As a result, many more deserving family farmers facing financial hard times will be able to avail themselves of chapter 12. In addition, S. 256 makes chapter 12 a permanent component of the bankruptcy laws and extends the benefits of this form of bankruptcy relief to family fishermen.

Transnational Insolvencies. In response to the increasing globalization of business enterprises and operations, S. 256 establishes a separate chapter under the Bankruptcy Code devoted to transnational insolvencies. These provisions are intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of these cases. They reflect consensus recommendations of the National Bankruptcy Review Commission.[80]

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[77] In addition to the Bankruptcy Code, the bill amends the Federal Deposit Insurance Act, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Federal Deposit Insurance Corporation Improvement Act of 1991, the Federal Reserve Act, and the Securities Investor Protection Act of 1971.

[78] The report on H.R. 4393, a bill substantially similar to title IX of S. 256 that was introduced in the 105th Congress, explained as follows:

> Systemic risk is the risk that the failure of a firm or disruption of a market or settlement system will cause widespread difficulties at other firms, in other market segments or in the financial system as a whole. If participants in certain financial activities are unable to enforce their rights to terminate financial contracts with an insolvent entity in a timely manner, or to offset or net their various contractual obligations, the resulting uncertainty and potential lack of liquidity could increase the risk of an inter-market disruption.

H.R. REP. NO. 105–688, pt. 1, at 2 (1998).

[79] The Working Group's members included representatives from the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Securities and Exchange Commission, and the Department of the Treasury, including the Office of the Comptroller of the Currency. *Id.* at 1.

[80] REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, at 351–70 (Oct. 20, 1997).

Protections for Small Business Owners. Under current bankruptcy law, a business can be sued by a bankruptcy trustee and forced to pay back—as a preferential transfer—monies previously paid to it by a firm that later files for bankruptcy protection. S. 256 contains provisions making it easier—particularly for small businesses—to defend against these suits. These provisions largely reflect recommendations of the National Bankruptcy Review Commission.[81]

Health Care Providers. S. 256 adds a provision to the Bankruptcy Code intended to give patients of bankrupt health care providers various protections. These include provisions specifying requirements for the disposal of patient records so that a patient's privacy and the confidentiality of such records when they are in the custody of a health care business in bankruptcy are protected. In addition, the bill includes a provision according administrative expense priority to the actual, necessary costs and expenses of closing a health care business (including the disposal of patient records or transferral of patients) incurred by a trustee, Federal agency, or a department or state agency. If warranted, it also authorizes the court to order the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients. Other provisions include the requirement that a bankruptcy trustee use all reasonable and best efforts to transfer patients from a health care business that is being closed to an appropriate alternative facility that meets certain specified criteria.

Other Provisions Having General Impact.

Privacy Protections. Under current law, nearly every item of information filed in a bankruptcy case is made available to the public. S. 256 restricts public access to certain personal information pertaining to an individual contained a bankruptcy case file to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property. In addition, the bill prohibits the disclosure of the names of the debtor's minor children and requires such information to be kept in a nonpublic record, which can be made available for inspection only by the court and certain other designated entities. Further, S. 256 prohibits the sale of customers' personally identifiable information by a business debtor unless certain conditions are satisfied.

Additional Bankruptcy Judgeships. S. 256 authorizes 28 additional bankruptcy judgeships on a temporary basis and extends three currently existing temporary judgeships.[82] This provision responds to the 59 percent increase in the caseload of bankruptcy

[81] *Id.* at 793–803.

[82] Districts authorized additional bankruptcy judgeships under S. 256 include the following: Eastern District of California (one), Central District of California (three), Delaware (four), Southern District of Florida (two), Southern District of Georgia (one), Maryland (three), Eastern District of Michigan (one), Southern District of Mississippi (one), New Jersey (one), Nevada (one), Eastern District of New York (one), Northern District of New York (one), Southern District of New York (one), Eastern District of North Carolina (one), Eastern District of Pennsylvania (one), Middle District of Pennsylvania (one), Puerto Rico (one), South Carolina (one), Western District of Tennessee (one), Eastern District of Virginia (one).

judges since 1992, reported by the Administrative Office of the United States Courts.[83]

Miscellaneous Provisions. Under current law, an appeal from a bankruptcy court decision must be heard by a Federal district court or bankruptcy appellate panel before it may be heard by a Federal court of appeals. S. 256 authorizes a direct appeal from a bankruptcy court decision to the court of appeals, under certain circumstances. Other general provisions include allowing attorneys to share compensation with bona fide public service attorney referral programs, and mandating that a bankruptcy court conduct scheduling conferences in a bankruptcy case if necessary to further its expeditious and economical resolution. In addition, the bill requires the United States Trustee Program to compile various statistics regarding chapter 7, 11 and 13 cases and to make these data available to the public. S. 256 also permits a court to seal all public records pertaining to a fraudulent involuntary bankruptcy petition, under certain circumstances, and to prohibit a consumer reporting agency from issuing a consumer report containing any reference to such petition.

HEARINGS

The Committee on the Judiciary held no hearings on S. 256.

COMMITTEE CONSIDERATION

On March 16, 2005, the Committee met in open session and ordered favorably reported the bill S. 256 without an amendment by a recorded vote of 22 to 13, a quorum being present.

VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following roll call votes occurred during the Committee's consideration of S. 256.

1. An amendment by Mr. Conyers disallowing: (a) claims resulting from an assignment of a debtor's right to receive military pay, or military pension or disability benefits; (b) certain claims owed by a servicemember or a dependent of a servicemember that are either secured or conditioned upon a personal check held for future deposit or electronic access to a bank account; or (3) claims owed by a servicemember or dependent of a servicemember requiring the payment of interest and other charges in excess of 36 percent. The amendment also allows the discharge of certain debts based on the debtor's right to receive military pay, or military pension or disability benefits. Defeated 15 to 20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	

[83] Press Release, Administrative Office of the U.S. Courts, Record Breaking Bankruptcy Filings Reported in Calendar Year 2002 (Feb. 14, 2003) (noting that "no new bankruptcy judgeships have been created since 1992").

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green			
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	15	20	

2. An amendment by Mr. Watt and Mr. Delahunt disallowing a claim for a debt based on an extension of credit on which the annual rate of interest in excess of 50 percent was imposed or in excess of a limit on allowable interest under applicable nonbankruptcy law. Defeated 9 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Keller			
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	9	15	

3. An amendment by Mr. Watt amending section 102 of the bill to permit a debtor to claim as an expense, in addition to elementary and secondary school educational expenses, the actual tuition costs per each child (exclusive of room and board) to attend a post-secondary education institution, and certain other educational programs. Defeated 10 to 17.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	10	17	

4. An amendment by Mr. Nadler amending sections 404, 411, 417, 436, 437, and 438 of the bill to permit the court, under specified circumstances, to extend certain time periods specified therein. Defeated 13 to 18.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)	X		
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	13	18	

5. An amendment by Mr. Schiff amending section 102 of the bill to prohibit a judge, United States trustee, trustee, or other party in interest from dismissing a chapter 7 case on the basis of the debtor's ability to repay if the debtor is an identity theft victim, under certain circumstances. Defeated 13 to 15.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler			
Mr. Green		X	
Mr. Keller			
Mr. Issa			
Mr. Flake			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	13	15	

6. An amendment by Mr. Delahunt amending Bankruptcy Code section 548 to authorize a trustee to avoid a transfer of an interest of a debtor made within the ten-year period preceding the bankruptcy filing to an asset protection trust if the amount of the transfer or aggregate amount of all transfers during such period exceeds $125,000, with certain exceptions. Defeated 10 to 15.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green			
Mr. Keller		X	
Mr. Issa			
Mr. Flake		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	10	15	

7. An amendment by Mr. Berman and Mr. Meehan amending Bankruptcy Code section 522 to create a uniform Federal homestead exemption floor in the amount of $150,000 for a medically distressed debtor. Defeated 13 to 18.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot			
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	13	18	

8. An amendment by Mr. Nadler amending Bankruptcy Code section 523(a) to provide that a debt that results from any judgment, order, consent order, or decree entered in any Federal or state court or contained in any settlement agreement entered into by the debtor that arises from: (a) the violation of certain specified offenses under title 18 of the United States Code; (b) an offense under state law that would be a civil rights crime (as described in the preceding clause); (c) a violation under 42 U.S.C. § 1983; or (d) the intentional actions of a debtor that violate a valid court order enforcing a civil rights law described in (a) or (b). It also amends Bankruptcy Code section 523(a)(13) to include an order of restitution under the criminal law of a state. Defeated 11 to 17.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller			
Mr. Issa			
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	11	17	

9. An amendment by Mr. Meehan amending section 102 of the bill to provide that the needs-based requirements under Bankruptcy Code section 707(b)(2)(A) through (C) (as amended by section 102) shall not apply to, and the court may not dismiss or convert a chapter 7 case filed by, a debtor who is a disabled veteran based on any form of means testing, under certain specified circumstances. Defeated 12 to 19.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green			

ROLLCALL NO. 9—Continued

	Ayes	Nays	Present
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	12	19	

10. An amendment by Ms. Jackson Lee amending section 102 of the bill to increase the amount of actual expenses a chapter 7 debtor may claim under the provision's needs-based test for certain educational costs for a debtor's dependent child from $1,500 to $3,000. Defeated 12 to 21.

ROLLCALL NO. 10

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler			
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		

ROLLCALL NO. 10—Continued

	Ayes	Nays	Present
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Was1hington)	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	12	21	

11. Three en bloc amendments by Ms. Jackson Lee as follows: (a) amending Bankruptcy Code section 523(a) to provide that a debt arising from certain sex offenses in which the victim was an individual who had not attained the age of 17 years is nondischargeable; (b) amending Bankruptcy Code section 523(a) to provide that a debt arising from a judicial, administrative, or other action related to the consumption or consumer purchase of a tobacco product that is based in whole or in part on false pretenses, a false representation, or actual fraud is nondischargeable; and (c) amending section 708 of the bill to provide that the confirmation of a chapter 11 plan under Bankruptcy Code section 1141 does not discharge a debtor that is corporation from a debt specified in Bankruptcy Code section 523(a)(9). Defeated 9 to 20.

ROLLCALL NO. 11

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler			
Mr. Green			
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		

ROLLCALL NO. 11—Continued

	Ayes	Nays	Present
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff			
Ms. Sánchez			
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	20	

12. Motion to report S. 256 favorably. Passed 22 to 13.

ROLLCALL NO. 12

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Inglis	X		
Mr. Hostettler			
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Smith (Washington)			

ROLLCALL NO. 12—Continued

	Ayes	Nays	Present
Mr. Van Hollen		X	
Mr. Sensenbrenner, Chairman	X		
Total	22	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

In compliance with clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of budget authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, S. 256, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. Congress,
Congressional Budget Office,
Washington, DC, April 4, 2005.

Hon. F. James Sensenbrenner, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," as reported by the House Committee on the Judiciary. This version of S. 256 is identical to the legislation as passed by the Senate on March 10, 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gregory Waring (for Federal spending), who can be reached at 226–2860, Annabelle Bartsch (for Federal revenues), who can be reached at 226–2720, Melissa Merrell (for the State and local impact), who can be reached at 225–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

Douglas Holtz-Eakin.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

S. 256—Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

SUMMARY

CBO estimates that implementing S. 256 would result in gross discretionary costs of $392 million over the 2006–2010 period, primarily to pay for increased responsibilities of the United States Trustees (U.S. Trustees), assuming appropriation of the necessary amounts. At the same time, the act would increase the fees charged for filing certain bankruptcy cases and would change how some of these fees are currently recorded in the budget during the first 5 years after enactment. We estimate that implementing the act would increase the amount of bankruptcy fees that are treated as an offset to appropriations by $75 million over the 5-year period, resulting in an estimated net increase in discretionary spending of approximately $318 million over this period.

In addition, CBO estimates that enacting S. 256 would increase revenues by about $60 million over the 2006–2010 period and by about $140 million over the 2006–2015 period primarily because of provisions that temporarily amend the Treasury's allocation of filing fees. Finally, enactment of S. 256 would authorize additional judgeships, and we estimate that the mandatory pay and benefits for those positions would cost $26 million over the next 5 years and $45 million over the 2006–2015 period.

On balance and assuming appropriation of the necessary amounts to implement the act, CBO estimates that its enactment would increase budget deficits by about $280 million over the 2006–2010 period.

S. 256 contains two intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs would be insignificant and would not exceed the threshold established in UMRA ($62 million in 2005, adjusted annually for inflation). Overall, CBO expects that enacting this bill would benefit State and local governments by enhancing their ability to collect outstanding obligations in bankruptcy cases.

S. 256 would impose private-sector mandates, as defined in UMRA, on bankruptcy attorneys, creditors, bankruptcy petition preparers, debt-relief agencies, consumer reporting agencies, and credit and charge-card companies. CBO estimates that the direct costs of those mandates would exceed the annual threshold established by UMRA ($123 million in 2005, adjusted annually for inflation).

MAJOR PROVISIONS

In addition to establishing means-testing for determining eligibility for chapter 7 bankruptcy relief, S. 256 would:

- Require the Executive Office for the U.S. Trustees to establish a test program to educate debtors on financial management;
- Authorize 28 new temporary judgeships and extend four existing judgeships;

- Permit courts to waive chapter 7 filing fees and other fees for debtors who could not pay such fees in installments;
- Require that at least one of every 250 bankruptcy cases under chapter 13 or chapter 7 be audited by an independent certified public accountant;
- Require the Administrative Office of the United States Courts (AOUSC) to receive and maintain tax returns for certain chapter 7 and chapter 13 debtors;
- Require the AOUSC and the U.S. Trustees to collect and publish certain statistics on bankruptcy cases; and
- Increase chapter 7 and chapter 11 bankruptcy filing fees, decrease chapter 13 filing fees, and change the budgetary treatment of such fees over a specified period of time.

Other provisions would make various changes affecting the bankruptcy provisions for municipalities and the treatment of tax liabilities in bankruptcy cases.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

As shown in Table 1, CBO estimates that implementing S. 256 would result in a net increase in discretionary spending of about $318 million over the 2006–2010 period, subject to future appropriation actions. In addition, we estimate that mandatory spending for the salaries and benefits of bankruptcy judges would increase by less than $100,000 in 2005 and by $26 million over the 2006–2010 period. Enacting the legislation's provisions for adjusting filing fees would increase revenues by about $60 million over the next 5 years. The costs of this legislation fall within budget function 750 (administration of justice).

TABLE 1. ESTIMATED BUDGETARY EFFECTS OF S. 256

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009	2010
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Means-Testing (Section 102)						
Estimated Authorization Level	0	16	24	39	39	36
Estimated Outlays	0	14	23	39	39	36
Studies by U.S. Trustees, GAO, and SBA (Sections 103, 230, and 443)						
Estimated Authorization Level	0	1	*	0	0	0
Estimated Outlays	0	1	*	0	0	0
Debtor Financial Management Training (Section 105)						
Estimated Authorization Level	0	3	1	0	0	0
Estimated Outlays	0	2	1	*	0	0
Credit Counseling Certification (Section 106)						
Estimated Authorization Level	0	4	7	8	8	7
Estimated Outlays	0	4	6	8	8	7
Maintenance of Tax Returns (Section 315)						
Estimated Authorization Level	0	2	2	2	2	2
Estimated Outlays	0	2	2	2	2	2
Changes in Bankruptcy Filing Fees (Sections 325 and 418)						
Estimated Authorization Level	0	–46	–49	6	7	7
Estimated Outlays	0	–46	–49	6	7	7
U.S. Trustee Site Visits (Section 439)						
Estimated Authorization Level	0	3	3	3	3	3
Estimated Outlays	0	3	3	3	3	3
Compiling and Publishing Data (Sections 601–602)						
Estimated Authorization Level	0	1	7	8	8	8
Estimated Outlays	0	1	7	8	8	8
Audit Procedures (Section 603)						
Estimated Authorization Level	0	0	16	17	17	16
Estimated Outlays	0	0	16	17	17	16
Additional Judgeships—Support Costs (Section 1223)						
Estimated Authorization Level	*	8	17	17	18	18
Estimated Outlays	*	7	16	17	18	18
FTC Toll-Free Hotline (Section 1301)						
Estimated Authorization Level	0	2	1	1	1	1
Estimated Outlays	0	2	1	1	1	1
Total Discretionary Changes						
Estimated Authorization Level	*	–6	29	101	103	98
Estimated Outlays	*	–10	26	101	103	98
CHANGES IN DIRECT SPENDING						
Additional Judgeships (Section 1223)						
Estimated Budget Authority	*	3	6	6	6	6
Estimated Outlays	*	3	5	6	6	6
CHANGES IN REVENUES						
Changes in Revenue from Filing Fees						
Estimated Revenues	0	–6	–12	30	24	24

NOTES: GAO = Government Accountability Office; SBA = Small Business Administration; FTC = Federal Trade Commission.
* = less than $500,000.

BASIS OF ESTIMATE

For this estimate, CBO assumes that S. 256 will be enacted by July 2005 and that the amounts necessary to implement the act will be appropriated for each fiscal year. Many of the act's new provisions would be effective 180 days after enactment. However, a few provisions would be effective 18 months after enactment. CBO assumes those provisions would take effect in fiscal year 2007.

Spending Subject to Appropriation

Most of the estimated increases in discretionary spending under S. 256 would be required to fund the additional workload that would be imposed on the U.S. Trustees. Those increases would be partially offset for fiscal years 2006 and 2007 by changes in bankruptcy filing fees that would be recorded as offsetting collections under the act. CBO estimates that implementing S. 256 would result in a net increase in discretionary costs of about $318 million over the 2006–2010 period, with most of the increase falling after 2007.

Means-Testing (Section 102). This section would establish a system of means-testing for determining a debtor's eligibility for relief under chapter 7. Under the proposed means test, if the amount of debtor income remaining after certain expenses and other specified amounts are deducted from the debtor's current monthly income exceeds the threshold specified in section 102, then the debtor would be presumed ineligible for chapter 7 relief. A debtor who could not demonstrate "special circumstances," which would cause the expected disposable income to fall below the threshold, could file under other chapters of the bankruptcy code.

Although the private trustees would be responsible for conducting the initial review of a debtor's income and expenses and filing the majority of motions for dismissal or conversion, CBO expects that the workload of the U.S. Trustees would increase under the means-testing provision. The U. S. Trustees would provide increased oversight of the work performed by the private trustees, file additional motions for dismissal or conversion, and take part in additional litigation that is expected to occur as the courts and debtors debate allowable expenses and other related issues. Although CBO cannot predict the amount of such litigation, we expect that, during the first few years following enactment of the act, the amount of litigation could be significant as parties test the new law's standards. In subsequent years, litigation could begin to subside as precedents are established. Based on information from the U.S. Trustees, CBO estimates that the U.S. Trustees would require 200 additional attorneys, paralegals, and analysts to address the increased workload. As a result, CBO estimates that implementing this provision would cost about $150 million over the 2006–2010 period, assuming appropriation of the necessary funds.

Studies by the U.S. Trustees, Government Accountability Office (GAO), and Small Business Administration (SBA) (Sections 103, 205, 230, and 443). Section 103 would require the U.S. Trustees to conduct a study regarding the use of Internal Revenue Service expense standards for determining a debtor's current monthly expenses and the impact of those standards on debtors and bankruptcy courts. Section 230 would require GAO to conduct a study regarding the feasibility of requiring trustees to provide the Office of Child Support Enforcement information about outstanding child support obligations of debtors. Section 205 would require GAO to conduct a study on the treatment of consumers by creditors with respect to reaffirmation agreements. Section 443 would require the Administrator of SBA, in consultation with the Attorney

General, the U.S. Trustees, and the AOUSC, to conduct a study on small business bankruptcy issues. Based on information from the U.S. Trustees, GAO, and SBA, CBO estimates that completing the necessary studies would cost about $1 million in 2006 and less than $500,000 in 2007, subject to the availability of appropriated funds.

Debtor Financial Management Test Training Program (Section 105). This section would require the U.S. Trustees to establish a test training program to educate debtors on financial management. The test training program would be authorized for six judicial districts over an 18-month period. Based on information from the U.S. Trustees, CBO estimates that about 90,000 debtors would participate if such a program were administered by the U.S. Trustees in fiscal years 2006 and 2007. At a projected cost of about $40 per debtor, CBO estimates that implementing this provision would cost nearly $4 million over the 2006–2007 period.

Credit Counseling Certification (Section 106). This section would require the U.S. Trustees to certify, on an annual basis, that certain credit counseling services could provide adequate services to potential debtors. Based on information from the U.S. Trustees, CBO estimates that the U.S. Trustees would require additional attorneys and analysts to handle the greater workload associated with certification. CBO estimates that implementing this provision would cost $33 million over the 2006–2010 period.

Maintenance of Tax Returns (Section 315). This section would authorize the AOUSC to receive and retain debtors' tax returns for the year prior to the commencement of the bankruptcy for chapter 7 and chapter 13 filings. Such collection and storage of tax returns would commence only at the request of a creditor. Based on information from the AOUSC, CBO expects that creditors will request tax information in about 25 percent of such cases. CBO estimates that implementing section 315 would cost $10 million over the 2006–2010 period to store and provide access to about two million tax returns.

Changes in Bankruptcy Filing Fees (Sections 325 and 418). Section 325 would increase chapter 7 and chapter 11 bankruptcy filing fees, decrease the chapter 13 filing fee, and change the distribution of such fees during the first 5 years after enactment. Considering the expected reduction in the use of chapter 7 because of means-testing and a provision in section 418 that would allow fee waivers, CBO estimates that implementing the new fee structure and changes in fee classifications would result in a net increase in offsetting collections totaling $75 million over the 2006–2010 period.

Current Law Filing Fees. Under current law, the filing fee for chapter 7 and chapter 13 is $155 and is divided between the U.S. Trustee System Fund (recorded as an offsetting collection), the AOUSC (recorded as an offsetting receipt), the private trustee assigned to the case, and the remainder is recorded as a governmental receipt (i.e., revenue). The filing fee for chapter 11 relief is currently set at $800 and is divided between the U.S. Trustee System Fund and the AOUSC, and the remainder is also recorded as a governmental receipt. Section 325 would change the filing fees for chapters 7, 13, and 11 to $200, $1,000, and $150, respectively.

Distribution of Filing Fees. During the first 2 years after enactment, the S. 256 would allow the U.S. Trustee System Fund to retain (as an offset to appropriations) a larger portion of the *current-law* chapter 7, 13, and 11 *filing fees.* At the same time, the act would temporarily reduce for 2 years the percentage of current-law filing fees allocated to the AOUSC, and, because current law sets the private trustee's portion of the filing fee at a flat amount ($45), no portion of the current-law filing fees would be recorded as governmental receipts during fiscal years 2006 and 2007. After 2 years, the distribution of the filing fees under S. 256 would revert to the distribution formula in current law.

Under S. 256, the general fund of the Treasury would receive any increase in bankruptcy *filing fees* due to enactment of the legislation over the 2006–2010 period. Beginning in 2011, the full amount of the proposed fees would be allocated according to the formula specified in current law. Of the $200 fee for chapter 7 filers, about $55 would be recorded as an offsetting collection to the appropriation for the U.S. Trustees System Fund, and almost $68 would be recorded as an offsetting receipt and spent without further appropriation by the AOUSC. The private trustee assigned to the case would receive $45 and the remainder of the fee would be recorded as a governmental receipt. Of the $150 fee for a chapter 13 case, the U.S. Trustee System Fund would receive about $41, and the AOUSC would receive almost $51 per case to spend without further appropriation. Finally, of the $1,000 fee per chapter 11 case, the U.S. Trustee System Fund would receive $500, the AOUSC would receive $250, and the remainder of the fee would be recorded as a governmental receipt.

Fee Waivers. Section 418 would permit a bankruptcy court or district court to waive the chapter 7 filing fee and other fees for a debtor who is unable to pay such fees in installments. Based on information from the AOUSC, CBO expects that, in fiscal year 2006, chapter 7 filing fees would be waived for about 3.5 percent of all chapter 7 filers and that the percentage waived would gradually increase to about 10 percent by fiscal year 2009.

U.S. Trustee Site Visits in Chapter 11 Cases (Section 439). This section would expand the responsibilities of the U.S. Trustees in small business bankruptcy cases to include site visits to inspect the debtor's premises, review records, and verify that the debtor has filed tax returns. Based on information from the U.S. Trustees, CBO estimates that implementing section 439 would require about 20 additional analysts to conduct over 2,300 site visits each year. CBO estimates that implementing this provision would cost about $15 million over the 2006–2010 period for the salaries, benefits, and travel expenses associated with those additional personnel.

Compilation and Publication of Bankruptcy Data and Statistics (Sections 601–602). Beginning 18 months after enactment, the act would require the AOUSC to collect data on chapter 7, chapter 11, and chapter 13 cases and the U.S. Trustees to make such information available to the public. CBO estimates that it would cost about $32 million over the 2006–2010 period to meet these requirements. Of the total estimated cost, about $25 million would be required for additional legal clerks, analysts, and data base support. The remainder would be incurred by the U.S. Trustees for compiling data and providing Internet access to records pertaining to bankruptcy cases.

Audit Procedures (Section 603). Beginning 18 months after enactment, S. 256 would require that at least one out of every 250 bankruptcy cases under chapter 7 and chapter 13, plus other selected cases under those chapters, be audited by an independent certified public accountant. Based on information from the U.S. Trustees, CBO estimates that less than 1 percent of about 1.6 million cases a year would be subject to potential audits. Each audit would cost roughly $1,000 (in 2005 dollars). CBO also expects that the U.S. Trustees would need about 10 additional analysts and attorneys to support the follow-up work associated with the audits. We estimate that implementing this provision would cost $66 million over the 2006–2010 period.

Additional Judgeships—Support Costs (Section 1223). This provision would extend four temporary bankruptcy judgeships and authorize 28 new temporary bankruptcy judgeships. Based on information from the AOUSC, CBO assumes that about half of the 28 new positions would be filled by the beginning of fiscal year 2006 and the rest would be filled by the start of fiscal year 2007. Also, we anticipate that all four temporary judgeships would be filled by fiscal year 2007. We expect that discretionary expenditures for support costs associated with each judgeship would average about $500,000 annually (in 2005 dollars). CBO estimates that the administrative support of additional bankruptcy judges would cost less than $200,000 in fiscal year 2005 and $76 million over the 2006–2010 period. (Salaries and benefits for the judges are classified as mandatory spending, and those costs are described below.)

Federal Trade Commission Toll-Free Hotline (Section 1301). This section would require the Federal Trade Commission (FTC) to operate a toll-free number for consumers to calculate how long it would take to pay off a credit card debt if they were to make only the minimum monthly payments. Based on information from the FTC about the demand for similar services, CBO expects that the FTC would receive about 20,000 calls each month. CBO estimates that the equipment and personnel necessary to serve this volume of inquires would cost $2 million in 2006 and $6 million over the 2006–2010 period, subject to appropriation of the necessary amounts.

Direct Spending and Revenues

By adding additional judgeships and changing the budgetary classification of bankruptcy filing fees, CBO estimates that enacting S. 256 would increase direct spending by about $45 million over the 2006–2015 period and increase revenues by approximately $140 million over the 2006–2015 period as shown in Table 2.

TABLE 2. ESTIMATED CHANGES IN DIRECT SPENDING AND REVENUES UNDER S. 256

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
CHANGES IN DIRECT SPENDING											
Additional Judgeships (Section 1223)											
Estimated Budget Authority	*	3	6	6	6	6	6	5	3	3	2
Estimated Outlays	*	3	5	6	6	6	6	5	3	3	2
CHANGES IN REVENUES											
Changes in Revenue from Filing Fees											
Estimated Revenues	0	–6	–12	30	24	24	16	16	16	16	16

NOTE: * = less than $500,000.

Additional Judgeships (Section 1223). CBO estimates that enacting the means-testing provision (section 102) would impose some additional workload on the courts. Section 128 would authorize 28 new temporary bankruptcy judgeships and extend four existing temporary judgeships. Based on information from the AOUSC and other bankruptcy experts, CBO expects that the increase in the number of bankruptcy judges would be sufficient to meet the increased workload. Assuming that the salary and benefits of a bankruptcy judge would average about $177,000 a year (in 2005 dollars), CBO estimates that the mandatory costs associated with the salaries and benefits of those additional judgeships would be less than $100,000 in fiscal year 2005, about $26 million over the 2006–2010 period, and about $45 million over the 2006–2015 period.

Changes in Bankruptcy Filing Fees (Sections 102, 325, and 418). Section 325 would increase the fees charged for filing bankruptcy cases and change the classification of where bankruptcy filing fees are recorded in the budget. Under current law, filing fees are divided between the U.S. Trustee System Fund, the AOUSC, the private trustee assigned to the case, and the remainder are recorded as governmental receipts (i.e., revenues). The percentage of the fees allocated to those different parts of the budget varies by chapter.

During the first 5 years of the new fee structure proposed in S. 256, the increase in the chapter 7, chapter 11, and chapter 13 filing fees above the amounts expected to be collected under current law would be recorded as revenues. During the first 2 years after enactment of S. 256, however, the portion of the fees charged under current law for chapters 7, 13, and 11 that are now recorded as revenues would be recorded as offsetting collections or offsetting receipts. The allocation of those fees would return to the same allocation as under current law after 2 years. In sum, CBO estimates that enacting S. 256 would increase revenues by about $60 million over the 2006–2010 period and by about $144 million over the 2006–2015 period. (The change in offsetting receipts would be matched by additional spending, resulting in no net change in direct spending.)

Tax Provisions (Title VII). Title VII of S. 256 would alter several provisions related to tax claims. It would alter the treatment of certain tax liens, disallow the discharge of taxes resulting from fraudulent tax returns under chapter 11 or chapter 13 of the bankruptcy code, require periodic cash payments of priority tax claims, and specify the rate of interest on tax claims. Title VII also would change the status of assessment periods for tax claims and would alter various administrative requirements. Based on information from the Internal Revenue Service and the Joint Committee on Taxation, CBO estimates that these provisions would increase revenues, but that any increase would be negligible.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 256 contains intergovernmental mandates as defined in UMRA, but CBO estimates that any resulting costs would not be significant and would not exceed the threshold established in UMRA ($62 million in 2005, adjusted annually for inflation). Overall, CBO expects that enacting this act would benefit State and local governments by enhancing their ability to collect outstanding obligations in bankruptcy cases.

Mandates

Section 227 of the act would preempt State laws governing contracts between a debt relief agency and a debtor but only to the extent that those State laws are inconsistent with the Federal requirements set forth in S. 256. Such preemptions are mandates as defined in UMRA. Because the preemption would not require States to take any action, CBO estimates that the costs to comply with this mandate would not be significant.

Section 719 would require State and local income tax procedures to conform to the Internal Revenue Code with regard to dividing tax liabilities and responsibilities between the estate and the debtor, the tax consequences of partnerships and transfers of property, and the taxable period of the debtor. CBO estimates that this provision would increase costs for the administration of State and local tax laws but would not require State and local tax rates to conform to the Federal rates. Such administrative costs would not be significant and would likely be offset by increased collections by State and local governments.

Other Impacts

The changes to bankruptcy law in the act would affect State and local governments primarily as creditors and holders of claims against debtors for taxes or child support payments. In addition, it would change some of the State statutes that govern which of a debtor's assets are protected from creditors in a bankruptcy proceeding.

According to the Federation of Tax Administrators, while total bankruptcy filings have increased in the last decade, the proportion of claims collected by States from taxpayers in bankruptcy has remained relatively constant—about 5 percent of claims owed. CBO cannot predict how much more money might be collected under this legislation; however, we think that it is likely that State and local governments would collect a greater share of future claims than they would under current law.

Domestic Support Obligations. S. 256 would enhance a State's ability to collect domestic support obligations, including child support. Domestic support obligations owed to State or local governments would be given priority over all other claims except those same obligations owed to individuals. The act would make those debts nondischargeable (not able to be written-off at the end of bankruptcy). The act also would require that filers under chapter 11 and 13 cases pay domestic support obligations owed to government agencies or individuals in order to receive a discharge of outstanding debts. In addition, under S. 256, the automatic stay that is triggered by filing bankruptcy would not apply to domestic support obligations owed by debtors or withheld from regular income as it currently does. The act also would require bankruptcy trustees to notify individuals with domestic support claims of their right to use the services of a State child support enforcement agency and to notify the agency that it has done so. The last known address of the debtor would be a part of the notification.

Exemptions. Although bankruptcy is regulated according to Federal statute, States are allowed to provide debtors with certain exemptions for property, insurance, and other items that are different from those allowed under the Federal bankruptcy code. (Exempt property remains in possession of the debtor and is not available to pay off creditors.) In some States debtors can choose the Federal or State exemption; other States require a debtor to use only the State exemptions. The act would reduce the value of a debtor's homestead exemption under certain circumstances. It also would place a monetary cap on the value of certain property that the debtor may claim as exempt under State or local law. The act would exempt certain types of retirement and education savings as well as contributions to specified employee benefit plans.

These exemption standards would apply regardless of the State policy on exemptions. The new property-value limitations could make more money available to creditors in some cases, while the exemptions on some retirement, education, and other savings generally would make less money available.

Time Limits on Tax Collection. Under some circumstances, a tax claim can qualify for priority status, making it more likely that a State or local government can collect the debt. However, this status is granted only if a tax is assessed within a specific period of time from the date of the bankruptcy filing. If that filing is subsequently dismissed and a new filing is made, the tax claim may lose its priority status. The act would make adjustments to this provision, allowing more time to pass in some circumstances, thus increasing the likelihood that State or local tax claims would maintain their priority status.

Taxes and Administrative Expenses. Under current law, certain expenses and the priority of claims reduce the funds that would otherwise be available to pay tax liens on property. The act would increase the priority of those liens in certain circumstances against certain expenses and claims, thereby making it more likely that funds would remain available to cover tax obligations. The act would allow State and local governments to claim administrative expenses for costs incurred by closing a health care business. The act would provide for a more uniform interest rate on all tax claims and administrative expenses, determined in accordance with applicable nonbankruptcy law rather than at the discretion of a bankruptcy judge.

Tax Return Filing. A number of provisions in the act would require debtors to have filed tax returns before a bankruptcy case may continue. Those provisions would help States identify potential claims in bankruptcy cases where they may be owed delinquent taxes.

Priority of Payments. In some circumstances under current law, debtors have borrowed money or incurred some new obligation that is dischargeable (able to be written-off at the end of bankruptcy) to pay for an obligation that would not be dischargeable. S. 256 would give the new debt the same priority as the underlying debt. If the underlying debt had a priority higher than that of State or local tax liabilities, State and local governments could lose access to some funds. However, it is possible that the underlying debt could be for a tax claim, in which case, the taxing authority would face no loss. Because it is unclear what types of non-dischargeable debts are covered by new debt and the degree to which this new provision would discourage such activity, CBO can estimate neither the direction nor the magnitude of the provision's impact on States and localities.

Municipal Bankruptcy. Title V would clarify regulations governing municipal bankruptcy actions and allow municipalities that have filed for bankruptcy to liquidate certain financial contracts.

Fuel Tax Claims. Under current law, all States owed fuel tax under the International Fuel Tax Agreement must file separate claims against debtors under the bankruptcy code. A provision in title VII would allow a State designated under the agreement to file a single claim on behalf of all States owed the fuel taxes. That provision would simplify the filing process.

Single Asset Cases. Title XII includes a provision that would allow expedited bankruptcy proceedings in certain cases where the debtor's principal asset is some form of real estate. Enacting this provision could benefit State and local governments to the extent that real property is returned to productive tax rolls earlier.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

S. 256 would establish means-testing of individual debtors for determining eligibility for relief under chapter 7 of the bankruptcy code. Under UMRA, duties arising from participation in voluntary Federal programs are not mandates. The bankruptcy process is largely voluntary for debtors, and debtor-initiated bankruptcies are equivalent to participation in a voluntary Federal program. Consequently, new duties imposed by the act on individuals who file as debtors do not meet the definition of private-sector mandates, and additional cost for debtors would not be counted as direct costs for purposes of UMRA.

Mandates

S. 256 would impose private-sector mandates on bankruptcy attorneys, creditors, preparers of bankruptcy petitions, debt-relief agencies, consumer reporting agencies, and credit and charge-card companies. Under the act:

- Consumer bankruptcy attorneys would have to make reasonable inquires to confirm that the information in documents they submit to the court or to the bankruptcy trustee is well-grounded in fact;

- Creditors would have to make disclosures in their agreements with debtors and provide certain notices to the courts and debtors;
- Preparers of bankruptcy petitions and debt-relief agencies would also have to provide certain notices to debtors;
- Federal bankruptcy judges would have the authority to prohibit consumer reporting agencies from issuing a report containing any information relating to certain involuntary bankruptcy petitions the court has dismissed; and
- Credit and charge-card companies would have to disclose specified information in monthly billing statements, introductory rate offers for new accounts, Internet-based solicitations, credit extensions secured by a dwelling, and for late payment deadlines and penalties.

In addition, the act would prohibit credit and charge-card companies from terminating a consumer credit account before its expiration date because the consumer has not incurred finance charges. CBO estimates that the direct costs of the mandates in the act would exceed the annual threshold established by UMRA ($123 million in 2005, adjusted annually for inflation).

Requirements For Attorneys. Section 102 of the act would make bankruptcy attorneys liable for misleading statements and inaccuracies in schedules and documents submitted to the court or to the trustee. To avoid sanctions and potential civil penalties, attorneys would need to verify the information given to them by their clients regarding the list of creditors, assets and liabilities, and income and expenditures. Completing a reasonable investigation of debtors' financial affairs and, for chapter 7 cases, computing debtor eligibility, would require attorneys to expend additional effort. Information from the American Bar Association indicates that this requirement would increase attorney costs by $150 to $500 per case. Based on the 1.6 million projected filings under chapter 7 (liquidation) and chapter 13 (rehabilitation), CBO estimates that the direct cost of complying with this mandate would be between $240 million and $800 million in fiscal year 2007, the first full year of implementation, and would remain in that range through fiscal year 2010. CBO expects that some of the additional costs incurred by attorneys would most likely be passed on to their clients.

Notice and Disclosure Requirements. The act would require certain notices to be disclosed as part of the bankruptcy process. Section 203 would require a creditor with an unsecured consumer debt seeking a reaffirmation agreement with a debtor to provide certain disclosures. The agreement reaffirms the debt discharged in bankruptcy between a holder of a claim and the debtor. Those disclosures must be made clearly and conspicuously in writing and include certain advisories and explanations. The required disclosures could be incorporated into existing standard reaffirmation agreements. Section 221 would require preparers of bankruptcy petitions who are not attorneys to give debtors written notice explaining that the preparer may not provide legal advice. Section 228 would require a debt-relief agency providing bankruptcy assistance to give certain written notices to those assisted and to execute written contracts. The act also would require such agencies also to supply certain advisories and explanations regarding the bankruptcy process.

Most attorneys and debt-relief counselors currently provide similar information, and CBO estimates that the direct costs of complying with those mandates would be small.

S. 256 also would require credit lenders to provide additional disclosures to consumers. It would require credit and charge-card companies to include certain disclosures in billing statements with respect to various open-end credit plans regarding the disadvantages of making only the minimum payment. Other disclosures would be required to be included in application and solicitation materials involving introductory rate offers, Internet-based credit card solicitations, credit extensions secured by a dwelling, and for late payment deadlines and penalties. Based on information from credit lenders, CBO estimates that the incremental costs of complying with the additional disclosure requirements would not be substantial.

Prohibition on Consumer Reporting Agencies. Section 332 would give Federal bankruptcy judges the authority to prohibit consumer reporting agencies from issuing a report containing any information relating certain involuntary bankruptcy petitions the court has dismissed. In the event that the court uses such authority, the duty to comply with the prohibition would be considered a private-sector mandate under UMRA. According to industry representatives, the current practice of consumer reporting agencies is to not report any information when a court dismisses an involuntary bankruptcy petition. Therefore, CBO estimates that the cost of complying with such a mandate would be minimal if any.

Requirement for Closing Credit Accounts. In addition, S. 256 would prohibit termination of a credit account before its expiration date because the consumer has not incurred finance charges. According to industry representatives, credit and charge-card companies do not close accounts based solely on the fact that a consumer has not incurred any finance charges. Thus, CBO expects there would be no direct cost to comply with this prohibition.

Other Impacts on the Private Sector

S. 256 also contains many provisions that would benefit creditors. Most significant for creditors are provisions that are expected to shift some debtors from chapter 7 to chapter 13 bankruptcy proceedings and provisions that would expand the types of debts that would be nondischargeable. By expanding the types of debts that are nondischargeable, some creditors would continue to receive payments on debts that would be discharged under current law. Means-testing in the bankruptcy system would likely result in more individuals being required to seek relief under chapter 13 rather than chapter 7. Because chapter 13 requires debtors to develop a plan to repay creditors over a specified period, the total pool of funds available for distribution for creditors would likely increase. As long as the likelihood of repayment by debtors and the pool of funds increases by an amount greater than the cost to creditors of administering the new bankruptcy code, creditors would be made better off under the act.

PREVIOUS CBO ESTIMATE

On February 28, 2005, CBO transmitted a cost estimate for S. 256 as ordered reported by the Senate Committee on the Judiciary on February 17, 2005. The House Committee on the Judiciary approved the same version of S. 256 as passed by the Senate on March 10, 2005. The Senate-passed version of the legislation and the version ordered reported by the Senate Judiciary Committee have different provisions regarding the distribution of bankruptcy filing fees. Our cost estimates reflect those differences.

The private-sector mandates and cost estimates in the two versions of S. 256 are identical, except for the mandate in section 332 of the House Judiciary version. That mandate, prohibiting consumer reporting agencies from issuing a report containing any information relating to certain involuntary bankruptcy petitions the court has dismissed, was not in the previous version. CBO estimates that the aggregate cost of mandates in each version of S. 256 would exceed UMRA's annual threshold for private-sector mandates.

ESTIMATE PREPARED BY:

Federal Spending: Gregory Waring (226–2860)
Federal Revenues: Annabelle Bartsch (226–2720)
Impact on State, Local, and Tribal Governments: Melissa Merrell (225–3220)
Impact on the Private Sector: Paige Piper/Bach (226–2940)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, S. 256 is intended to improve the bankruptcy system by deterring abuse, setting enhanced standards for bankruptcy professionals, and streamlining case administration. It authorizes the appointment of 28 temporary bankruptcy judgeships to address the 59 percent increase in the caseload of bankruptcy judges since 1992, when additional bankruptcy judgeships were last authorized.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, Section 8, Clauses 3 and 4 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title; References; Table of Contents. The short title of this measure is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act").

TITLE I. NEEDS-BASED BANKRUPTCY

Sec. 101. Conversion. Under current law, section 706(c) of the Bankruptcy Code provides that a court may not convert a chapter 7 case unless the debtor requests such conversion. Section 101 of the Act amends this provision to allow a chapter 7 case to be converted to a case under chapter 12 or chapter 13 on request or consent of the debtor.

Section 102. Dismissal or Conversion. Section 102 implements needs-based debt relief, the legislation's principal consumer bankruptcy reform. Under section 707(b) of the Bankruptcy Code, a chapter 7 case filed by a debtor who is an individual may be dismissed for substantial abuse only on motion of the court or the United States trustee. It specifically prohibits such dismissal at the suggestion of any party in interest.

Section 102 of the Act revises current law in several significant respects. First, it amends section 707(b) of the Bankruptcy Code to permit—in addition to the court and the United States trustee—a trustee, bankruptcy administrator, or a party in interest to seek dismissal or conversion of a chapter 7 case to one under chapter 11 or 13 on consent of the debtor, under certain circumstances. In addition, section 102 of the Act changes the current standard for dismissal from "substantial abuse" to "abuse." Section 102 of the Act also amends Bankruptcy Code section 707(b) to mandate a presumption of abuse if the debtor's current monthly income (reduced by certain specified amounts) when multiplied by 60 is not less than the lesser of 25 percent of the debtor's nonpriority unsecured claims or $6,000 (whichever is greater), or $10,000.

To determine whether the presumption of abuse applies under section 707(b) of the Bankruptcy Code, section 102(a) of the Act specifies certain monthly expense amounts that are to be deducted from the debtor's "current monthly income" (a defined term). These expense items include:

- the applicable monthly expenses for the debtor as well as for the debtor's dependents and spouse in a joint case (if the spouse is not otherwise a dependent) specified under the Internal Revenue Service's National Standards (with provision for an additional five percent for food and clothing if the debtor can demonstrate that such additional amount is reasonable and necessary) and the IRS Local Standards;
- the actual monthly expenses for the debtor, the debtor's dependents, and the debtor's spouse in a joint case (if the spouse is not otherwise a dependent) for the categories specified by the Internal Revenue Service as Other Necessary Expenses;
- reasonably necessary expenses incurred to maintain the safety of the debtor and the debtor's family from family violence as specified in section 309 of the Family Violence Prevention and Services Act or other applicable Federal law, with provision for the confidentiality of these expenses;
- reasonably necessary expenses for health insurance, disability insurance, and health savings account expenditures for the debtor, the debtor's spouse, and dependents of the debtor;
- the debtor's average monthly payments on account of secured debts and priority claims as explained below; and
- if the debtor is eligible to be a debtor under chapter 13, the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to 10 percent of projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

With respect to secured debts, Section 102(a)(2)(C) of the Act specifies that the debtor's average monthly payments on account of secured debts is calculated as the sum of the following divided by 60: (1) all amounts scheduled as contractually due to secured creditors for each month of the 60-month period following filing of the case; and (2) any additional payments necessary, in filing a plan under chapter 13, to maintain possession of the debtor's primary residence, motor vehicle or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts.

With respect to priority claims, section 102(a)(2)(C) of the Act specifies that the debtor's expenses for payment of such claims (including child support and alimony claims) is calculated as the total of such debts divided by 60.

The provision permits a debtor, if applicable, to deduct from current monthly income the continuation of actual expenses paid by the debtor that are reasonable and necessary for the care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (providing such individual is unable to pay for these expenses).

Under section 102, a debtor may also deduct the actual expenses for each dependent child of a debtor to attend a private or public elementary or secondary school up to $1,500 per child if the debtor: (1) documents such expenses, and (2) provides a detailed explanation of why such expenses are reasonable and necessary. In addition, the debtor must explain why such expenses are not already accounted for under any of the Internal Revenue Service National and Local Standards, and Other Expenses categories.

Other expenses that a debtor may claim include additional housing and utilities allowances based on the debtor's actual home energy expenses if the debtor documents such expenses and demonstrates that they are reasonable and necessary.

While the Act replaces the current law's presumption in favor of granting relief requested by a chapter 7 debtor with a presumption of abuse (if applicable under the income and expense analysis previously described), it does provide that this presumption may be rebutted under certain circumstances. Section 102(a)(2)(C) of the Act amends Bankruptcy Code section 707(b) to provide that the presumption of abuse may be rebutted only if: (1) the debtor demonstrates special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative; and (2) the additional expenses or adjustments cause the product of the debtor's current monthly income (reduced by the specified expenses) when multiplied by 60 to be less than the lesser of 25 percent of the debtor's nonpriority unsecured claims, or $6,000 (whichever is greater); or $10,000. In addition, the debtor must itemize and document each additional expense or income adjustment as well as provide a detailed explanation of the special circumstances that make such expense or adjustment necessary and reasonable. Further, the debtor must attest under oath to the accuracy of any information provided to demonstrate that such additional expense or adjustment to income is required.

To implement these needs-based reforms, the Act requires the debtor to file, as part of the schedules of current income and current expenditures, a statement of current monthly income. This statement must show: (1) the calculations that determine whether a presumption of abuse arises under section 707(b) (as amended), and (2) how each amount is calculated.

An exception to the needs-based test applies with respect to a debtor who is a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).

In a case where the presumption of abuse does not apply or has been rebutted, section 102(a)(2)(C) of the Act amends Bankruptcy Code section 707(b) to require a court to consider whether: (1) the debtor filed the chapter 7 case in bad faith; or (2) the totality of the circumstances of the debtor's financial situation demonstrates abuse, including whether the debtor wants to reject a personal services contract and the debtor's financial need for such rejection.

Under section 102(a)(2)(C) of the Act, a court may on its own initiative or on motion of a party in interest in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure, order a debtor's attorney to reimburse the trustee for all reasonable costs incurred in prosecuting a section 707(b) motion if: (1) a trustee files such motion; (2) the motion is granted; and (3) the court finds that the action of the debtor's attorney in filing the case under chapter 7 violated rule 9011. If the court determines that the debtor's attorney violated rule 9011, it may on its own initiative or on motion of a party in interest in accordance with such rule, order the assessment of an appropriate civil penalty against debtor's counsel and the payment of such penalty to the trustee, United States trustee, or bankruptcy administrator. This provision clarifies that a motion for costs or the imposition of a civil penalty must be made by a party in interest or by the court itself in accordance with rule 9011.

Section 102(a)(2)(C) of the Act provides that the signature of an attorney on a petition, pleading or written motion shall constitute a certification that the attorney has: (1) performed a reasonable investigation into the circumstances that gave rise to such document; and (2) determined that such document is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under section 707(b)(1). In addition, such attorney's signature on the petition constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

Section 102(a)(2)(C) of the Act amends section 707(b) of the Bankruptcy Code to permit a court on its own initiative or motion by a party in interest in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure to award a debtor reasonable costs (including reasonable attorneys' fees) in contesting a section 707(b) motion filed by a party in interest (other than a trustee, United States trustee or bankruptcy administrator) if the court: (1) does not grant the section 707(b) motion; and (2) finds that either the movant violated rule 9011, or the attorney (if any) who filed the motion did not comply with section 707(b)(4)(C) and such was made solely for the purpose of coercing a debtor into waiving a right guaranteed under the Bankruptcy Code to such debtor. An exception applies with respect to a movant that is a "small business" with a claim in an aggregate amount of less than $1,000. A small business, for purposes of this provision, is defined as an unincorporated business, partnership, corporation, association or organization that engages in commercial or business activities and employs less than 25 full-time employees. The number of employees of a wholly owned subsidiary includes the employees of the parent and any other subsidiary corporation of the parent. Section 102(a)(2)(C) of the Act clarifies that the motion for costs must be made by a party in interest or by the court. The use of the phraseology in this provision, "in accordance with rule 9011 of the Federal Rules of Bankruptcy Procedure," is intended to indicate that the procedures for the motion of a party in interest or a court acting on its own initiative are the procedures outlined in rule 9011(c).

The Act includes two "safe harbors" with respect to its needs-based reforms. One safe harbor allows only a judge, United States trustee, or bankruptcy administrator to file a section 707(b) motion (based on the debtor's ability to repay, bad faith, or the totality of the circumstances) if the chapter 7 debtor's current monthly income (or in a joint case, the income of the debtor and the debtor's spouse) falls below the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household.

The Act's second safe harbor only pertains to a motion under section 707(b)(2), that is, a motion to dismiss based on a debtor's ability to repay. It does not allow a judge, United States trustee, bankruptcy administrator or party in interest to file such motion if the income of the debtor (including a veteran, as that term is defined in 38 U.S.C. § 101) and the debtor's spouse is less than certain monetary thresholds. This provision does not consider the nonfiling spouse's income if the debtor and the debtor's spouse are separated under applicable nonbankruptcy law, or the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading section 707(b)(2). The debtor must file a statement under penalty of perjury specifying that he or she meets one of these criteria. In addition, the statement must disclose the aggregate (or best estimate) of the amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

Section 102(b) of the Act amends section 101 of the Bankruptcy Code to define "current monthly income" as the average monthly income that the debtor receives (or in a joint case, the debtor and debtor's spouse receive) from all sources, without regard to whether it is taxable income, in a specified six-month period preceding the filing of the bankruptcy case. The Act specifies that the six-month period is determined as ending on the last day of the calendar month immediately preceding the filing of the bankruptcy case, if the debtor files the statement of current income required by Bankruptcy Code section 521. If the debtor does not file such schedule, the court determines the date on which current income is calculated.

"Current monthly income" includes any amount paid by any entity other than the debtor (or, in a joint case, the debtor and the debtor's spouse if not otherwise a dependent) on a regular basis for the household expenses of the debtor or the debtor's dependents (and, the debtor's spouse in a joint case, if not otherwise a dependent). It excludes Social Security Act benefits and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes. In addition, the Act provides that current monthly income does not include payments to victims of international or domestic terrorism as defined in section 2331 of title 18 of the United States Code on account of their status as victims of such terrorism.

Section 102(c) of the Act amends section 704 of the Bankruptcy Code to require the United States trustee or bankruptcy administrator in a chapter 7 case where the debtor is an individual to: (1) review all materials filed by the debtor; and (2) file a statement with the court (within ten days following the meeting of creditors held pursuant to section 341 of the Bankruptcy Code) as to whether or not the debtor's case should be presumed to be an abuse under section 707(b). The court must provide a copy of such statement to all creditors within five days after its filing. Within 30 days of the filing of such statement, the United States trustee or bankruptcy administrator must file either: (1) a motion under section 707(b); or (2) a statement setting forth the reasons why such motion is not appropriate in any case where the debtor's filing should be presumed to be an abuse and the debtor's current monthly income exceeds certain monetary thresholds.

In a chapter 7 case where the presumption of abuse applies under section 707(b), section 102(d) of the Act amends Bankruptcy Code section 342 to require the clerk to provide written notice to all creditors within ten days after commencement of the case stating that the presumption of abuse applies in such case.

Section 102(e) of the Act provides that nothing in the Bankruptcy Code limits the ability of a creditor to give information to a judge (except for information communicated ex parte, unless otherwise permitted by applicable law), United States trustee, bankruptcy administrator, or trustee.

Section 102(f) of the Act adds a provision to Bankruptcy Code section 707 to permit the court to dismiss a chapter 7 case filed by a debtor who is an individual on motion by a victim of a crime of violence (as defined in section 16 of title 18 of the United States Code) or a drug trafficking crime (as defined in section 924(c)(2) of title 18 of the United States Code). The case may be dismissed if the debtor was convicted of such crime and dismissal is in the best interest of the victim, unless the debtor establishes by a preponderance of the evidence that the filing of the case is necessary to satisfy a claim for a domestic support obligation.

Section 102(g) of the Act amends section 1325(a) of the Bankruptcy Code to require the court, as a condition of confirming a chapter 13 plan, to find that the debtor's action in filing the case was in good faith.

Section 102(h) of the Act amends section 1325(b)(1) of the Bankruptcy Code to specify that the court must find, in confirming a chapter 13 plan to which there has been an objection, that the debtor's disposable income will be paid to unsecured creditors. It also amends section 1325(b)(2)'s definition of disposable income. As defined under this provision, the term means income received by the debtor (other than child support payments, foster care payments, or certain disability payments for a dependent child) less amounts reasonably necessary to be expended for: (1) the maintenance or support of the debtor or the debtor's dependent; (2) a domestic support obligation that first becomes due after the case is filed; (3) charitable contributions (as defined in Bankruptcy Code section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in Bankruptcy Code section 548(d)(4)) in an amount that does not exceed 15 percent of the debtor's gross income for the year in which the contributions are made; and (4) if the debtor is engaged in business, the payment of expenditures necessary for the continuation, preservation, and operation of the business. Section 1325(b)(3) provides that the amounts reasonably necessary to be expended under section 1325(b)(2) are determined in accordance with section 707(b)(2)(A) and (B) if the debtor's income exceeds certain monetary thresholds.

Section 102(i) of the Act amends Bankruptcy Code section 1329(a) to require the amounts paid under a confirmed chapter 13 plan to be reduced by the actual amount expended by the debtor to purchase health insurance for the debtor and the debtor's dependents (if those dependents do not otherwise have such insurance) if the debtor documents the cost of such insurance and demonstrates such expense is reasonable and necessary, and the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b). If the debtor previously paid for health insurance, the debtor must demonstrate that the amount is not materially greater than the amount the debtor previously paid. If the debtor did not previously have such insurance, the amount may not be not materially larger than the reasonable cost that would be incurred by a debtor with similar characteristics. Upon request of any party in interest, the debtor must file proof that a health insurance policy was purchased.

Section 102(j) of the Act amends section 104 of the Bankruptcy Code to provide for the periodic adjustment of monetary amounts specified in sections 707(b) and 1325(b)(3) of the Bankruptcy Code, as amended by this Act.

Section 102(k) adds to section 101 of the Bankruptcy Code a definition of "median family income."

Sec. 103. Sense of Congress and Study. Section 103(a) of the Act expresses the sense of Congress that the Secretary of the Treasury has the authority to alter the Internal Revenue Service expense standards to set guidelines for repayment plans as needed to accommodate their use under section 707(b) of the Bankruptcy Code, as amended. Section 103(b) requires the Executive Office for United States Trustees to submit a report within two years from the date of the Act's enactment regarding the utilization of the Internal Revenue Service expense standards for determining the current monthly expenses of a debtor under section 707(b) and the impact that the application of these standards has had on debtors and the bankruptcy courts. The report may include recommendations for amendments to the Bankruptcy Code that are consistent with the report's findings.

Sec. 104. Notice of Alternatives. Section 104 of the Act amends section 342(b) of the Bankruptcy Code to require the clerk, before the commencement of a bankruptcy case by an individual whose debts are primarily consumer debts, to supply such individual with a written notice containing: (1) a brief description of chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of these chapters; (2) the types of services available from credit counseling agencies; (3) a statement advising that a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a bankruptcy case shall be subject to fine, imprisonment, or both; and (4) a statement warning that all information supplied by a debtor in connection with the case is subject to examination by the Attorney General.

Sec. 105. Debtor Financial Management Training Test Program. Section 105 of the Act requires the Director of the Executive Office for United States Trustees to: (1) consult with a wide range of debtor education experts who operate financial management education programs; and (2) develop a financial management training curriculum and materials that can be used to teach individual debtors how to manage their finances better. The Director must select six judicial districts to test the effectiveness of the financial management training curriculum and materials for an 18-month period beginning not later than 270 days after the Act's enactment date. For these six districts, the curricula and materials must be used as the instructional personal financial management course required under Bankruptcy Code section 111. Over the period of the study, the Director must evaluate the effectiveness of the curriculum and materials as well as consider a sample of existing consumer education programs (such as those described in the Report of the National Bankruptcy Review Commission) that are representative of consumer education programs sponsored by the credit industry, chapter 13 trustees, and consumer counseling groups. Not later than three months after concluding such evaluation, the Director must submit to Congress a report with findings regarding the effectiveness and cost of the curricula, materials, and programs.

Sec. 106. Credit Counseling. Section 106(a) of the Act amends section 109 of the Bankruptcy Code to require an individual—as a condition of eligibility for bankruptcy relief—to receive credit counseling within the 180-day period preceding the filing of a bankruptcy case by such individual. The credit counseling must be provided by an approved nonprofit budget and credit counseling agency consisting of either an individual or group briefing (which may be conducted telephonically or via the Internet) that outlined opportunities for available credit counseling and assisted the individual in performing a budget analysis. This requirement does not apply to a debtor who resides in a district where the United States trustee or bankruptcy administrator has determined that approved nonprofit budget and credit counseling agencies in that district are not reasonably able to provide adequate services to such individuals. Although such determination must be reviewed annually, the United States trustee or bankruptcy administrator may disapprove a nonprofit budget and credit counseling agency at any time.

A debtor may be temporarily exempted from this requirement if he or she submits to the court a certification that: (1) describes exigent circumstances meriting a waiver of this requirement; (2)

states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain such services within the five-day period beginning on the date the debtor made the request; and (3) is satisfactory to the court. This exemption terminates when the debtor meets the requirements for credit counseling participation, but not longer than 30 days after the case is filed, unless the court, for cause, extends this period up to an additional 15 days.

In addition, the mandatory credit counseling requirement does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone. Incapacity, under this provision, means the debtor is impaired by reason of mental illness or mental deficiency so that the debtor is incapable of realizing and making rational decisions with respect to his or her financial responsibilities. Disability, under this provision, means the debtor is so physically impaired as to be unable, after reasonable effort, to receive credit counseling whether by participating in person, or via telephone or Internet briefing.

Section 106(b) of the Act amends section 727(a) of the Bankruptcy Code to deny a discharge to a chapter 7 debtor who fails to complete a personal financial management instructional course. This provision, however, does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator. In addition, it does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.

Section 106(c) of the Act amends section 1328 of the Bankruptcy Code to deny a discharge to a chapter 13 debtor who fails to complete a personal financial management instructional course. This requirement does not apply if the debtor resides in a district where the United States trustee or bankruptcy administrator has determined that the approved instructional courses in that district are not adequate. Such determination must be reviewed annually by the United States trustee or bankruptcy administrator. In addition, it does not apply to a debtor whom the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.

Section 106(d) of the Act amends section 521 of the Bankruptcy Code to require a debtor who is an individual to file with the court: (1) a certificate from an approved nonprofit budget and credit counseling agency describing the services it provided the debtor pursuant to section 109(h); and (2) a copy of the repayment plan, if any, that was developed by the agency pursuant to section 109(h).

Section 106(e) of the Act adds section 111 to the Bankruptcy Code requiring the clerk to maintain a publicly available list of approved: (1) credit counseling agencies that provide the services described in section 109(h) of the Bankruptcy Code; and (2) personal financial management instructional courses. Section 106(e) further provides that the United States trustee or bankruptcy administrator may only approve an agency or course provider under this provision pursuant to certain specified criteria. These include, for example, if a fee is charged for such services by the agency or course provider, the fee must be reasonable and such services must be provided without regard to ability to pay the fee. If such agency or provider course is approved, the approval may only be for a probationary period of up to six months. At the conclusion of the probationary period, the United States trustee or bankruptcy administrator may only approve such agency or instructional course for an additional one-year period and, thereafter for successive one-year periods, which has demonstrated during such period that it met the standards set forth in this provision and can satisfy such standards in the future.

Within 30 days after any final decision occurring after the expiration of the initial probationary period or after any subsequent period, an interested person may seek judicial review of such decision in the appropriate United States district court. In addition, the district court, at any time, may investigate the qualifications of a credit counseling agency and request the production of documents to ensure the agency's integrity and effectiveness. The district court may remove a credit counseling agency that does not meet the specified qualifications from the approved list. The United States trustee or bankruptcy administrator must notify the clerk that a credit counseling agency or instructional course is no longer approved and the clerk must remove such entity from the approved list.

Section 106(e) prohibits a credit counseling agency from providing information to a credit reporting agency as to whether an individual debtor has received or sought personal financial management instruction. A credit counseling agency that willfully or negligently fails to comply with any requirement under the Bankruptcy Code with respect to a debtor shall be liable to the debtor for damages in an amount equal to: (1) actual damages sustained by the debtor as a result of the violation; and (2) any court costs or reasonable attorneys' fees incurred in an action to recover such damages.

Section 106(f) of the Act amends section 362 of the Bankruptcy Code to provide that if a chapter 7, 11, or 13 case is dismissed due to the creation of a debt repayment plan, the presumption that a case was not filed in good faith under section 362(c)(3) shall not apply to any subsequent bankruptcy case commenced by the debtor. It also provides that the court, on request of a party in interest, must issue an order under section 362(c) confirming that the automatic stay has terminated.

Sec. 107. Schedules of Reasonable and Necessary Expenses. For purposes of section 707(b) of the Bankruptcy Code, section 107 of the Act requires the Director of the Executive Office for United States Trustees to issue schedules of reasonable and necessary administrative expenses (including reasonable attorneys' fees) relating to the administration of a chapter 13 plan for each judicial district not later than 180 days after the date of enactment of the Act.

TITLE II. ENHANCED CONSUMER PROTECTION

Subtitle A. Penalties for Abusive Creditor Practices

Sec. 201. Promotion of Alternative Dispute Resolution. Subsection (a) of section 201 of the Act amends section 502 of the Bankruptcy Code to permit the court, after a hearing on motion of the debtor, to reduce a claim based in whole on an unsecured consumer debt by up to 20 percent if: (1) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency on behalf of the debtor; (2) the debtor's offer was made at least 60 days before the filing of the case; (3) the offer provided for payment of at least 60 percent of the debt over a period not exceeding the loan's repayment period or a reasonable extension thereof; and (4) no part of the debt is nondischargeable. The debtor has the burden of proving by clear and convincing evidence that: (1) the creditor unreasonably refused to consider the debtor's proposal; and (2) the proposed alternative repayment schedule was made prior to the expiration of the 60-day period. Section 201(b) amends section 547 of the Bankruptcy Code to prohibit the avoidance as a preferential transfer a payment by a debtor to a creditor pursuant to an alternative repayment plan created by an approved credit counseling agency.

Sec. 202. Effect of Discharge. Section 202 of the Act amends section 524 of the Bankruptcy Code in two respects. First, it provides that the willful failure of a creditor to credit payments received under a confirmed chapter 11, 12, or 13 plan constitutes a violation of the discharge injunction if the creditor's action to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor. This provision does not apply if the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner prescribed by the plan. Second, section 202 amends section 524 of the Bankruptcy Code to provide that the discharge injunction does not apply to a creditor having a claim secured by an interest in real property that is the debtor's principal residence if the creditor communicates with the debtor in the ordinary course of business between the creditor and the debtor and such communication is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of the pursuit of in rem relief to enforce the lien.

Sec. 203. Discouraging Abuse of Reaffirmation Agreement Practices. Section 203 of the Act effectuates a comprehensive overhaul of the law applicable to reaffirmation agreements. Subsection (a) amends section 524 of the Bankruptcy Code to mandate that certain specified disclosures be provided to a debtor at or before the time he or she signs a reaffirmation agreement. These specified disclosures, which are the only disclosures required in connection with a reaffirmation agreement, must be in writing and be made clearly and conspicuously. In addition, the disclosure must include certain advisories and explanations. At the election of the creditor, the disclosure statement may include a repayment schedule. If the debtor is represented by counsel, section 203(a) mandates that the attorney file a certification stating that the agreement represents a fully informed and voluntary agreement by the debtor, that the agreement does not impose an undue hardship on the debtor or any dependent of the debtor, and that the attorney fully advised the debtor of the legal effect and consequences of such agreement as well as of any default thereunder. In those instances where the presumption of undue hardship applies, the attorney must also certify that the debtor is able to make the payments required under the reaffirmation agreement. Further, the debtor must submit a statement setting forth the debtor's monthly income and actual current monthly expenditures. If the debtor is represented by counsel and the debt being reaffirmed is owed to a credit union, a modified version of this statement must be used.

Notwithstanding any other provision of the Bankruptcy Code, section 203(a) permits a creditor to accept payments from a debtor: (1) before and after the filing of a reaffirmation agreement with the court; or (2) pursuant to a reaffirmation agreement that the creditor believes in good faith to be effective. It further provides that the requirements specified in subsections (c)(2) and (k) of section 524 are satisfied if the disclosures required by these provisions are given in good faith.

Where the amount of the scheduled payments due on the reaffirmed debt (as disclosed in the debtor's statement) exceeds the debtor's available income, it is presumed for 60 days from the date on which the reaffirmation agreement is filed with the court that the agreement presents an undue hardship. The court must review such presumption, which can be rebutted by the debtor by a written statement explaining the additional sources of funds that would enable the debtor to make the required payments on the reaffirmed debt. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove the reaffirmation agreement. No reaffirmation agreement may be disapproved without notice and hearing to the debtor and creditor. The hearing must be concluded before the entry of the debtor's discharge. The requirements set forth in this paragraph do not apply to reaffirmation agreements if the creditor is a credit union.

Section 203(b) amends title 18 of the United States Code to require the Attorney General to designate a United States Attorney for each judicial district and to appoint a Federal Bureau of Investigation agent for each field office to have primary law enforcement responsibilities for violations of sections 152 and 157 of title 18 with respect to abusive reaffirmation agreements and materially fraudulent statements in bankruptcy schedules that are intentionally false or misleading. In addition, section 203(b) provides that the designated United States Attorney has primary responsibility with respect to bankruptcy investigations under section 3057 of title 18. Section 203(b) further provides that the bankruptcy courts must establish procedures for referring any case in which a materially fraudulent bankruptcy schedule has been filed.

Sec. 204. Preservation of Claims and Defenses Upon Sale of Predatory Loans. Section 204 of the Act adds a provision to section 363 of the Bankruptcy Code with respect to sales of any interest in a consumer transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations). It provides that the purchaser of such interest remains subject to all claims and defenses that are related to such assets to the same extent as that person would be subject to if the sale was not conducted under section 363.

Sec. 205. GAO Study and Report on Reaffirmation Agreement Process. Section 205 of the Act directs the Comptroller General of the United States to report to Congress on how consumers are treated in connection with the reaffirmation agreement process. This report must include: (1) the policies and activities of creditors with respect to reaffirmation agreements; and (2) whether such consumers are fully, fairly, and consistently informed of their rights under the Bankruptcy Code. The report, which must be completed not later than 18 months after the date of enactment of this Act, may include recommendations for legislation to address any abusive or coercive tactics found in connection with the reaffirmation process.

Subtitle B. Priority Child Support

Sec. 211. Definition of Domestic Support Obligation. Section 211 of the Act amends section 101 of the Bankruptcy Code to define a domestic support obligation as a debt that accrues before, on, or after the date of the order for relief and that it includes interest that accrues pursuant to applicable nonbankruptcy law. As defined in the Act, the term includes a debt owed to or recoverable by: (1) a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative; or (2) a governmental unit. To qualify as a domestic support obligation, the debt must be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit), without regard to whether such debt is expressly so designated. It must be established or subject to establishment before, on, or after the date of the order of relief pursuant to: (1) a separation agreement, divorce decree, or property settlement agreement; (2) an order of a court of record; or (3) a determination made in accordance with applicable nonbankruptcy law by a governmental unit. It does not apply to a debt assigned to a nongovernmental entity, unless it was assigned voluntarily by the spouse, former spouse, child, or parent solely for the purpose of collecting the debt.

Sec. 212. Priorities for Claims for Domestic Support Obligations. Section 212 of the Act amends section 507(a) of the Bankruptcy Code to accord first priority in payment to allowed unsecured claims for domestic support obligations that, as of the petition date, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such child, without regard to whether such claim is filed by the claimant or by a governmental unit on behalf of such claimant, on the condition that funds received by such unit under this provision be applied and distributed in accordance with nonbankruptcy law. Subject to these claims, section 212 accords the same payment priority to allowed unsecured claims for domestic support obligations that, as of the petition date, were assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless the claimant assigned the claim voluntarily for the purpose of collecting the debt), or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received by such unit under this provision be applied and distributed in accordance with nonbankruptcy law. Where a trustee administers assets that may be available for payment of domestic support obligations under section 507(a)(1) (as amended), administrative expenses of the trustee allowed under section 503(b)(1)(A), (2) and (6) of the Bankruptcy Code must be paid before such claims to the extent the trustee administers assets that are otherwise available for the payment of these claims.

Sec. 213. Requirements To Obtain Confirmation and Discharge in Cases Involving Domestic Support Obligations. With respect to chapter 11 cases, section 213(1) adds a condition for confirmation of a plan. It amends section 1129(a) of the Bankruptcy Code to provide that if a chapter 11 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay all amounts payable under such order or statute that became payable postpetition as a prerequisite for confirmation.

With respect to chapter 12 cases, section 213(2) of the Act amends section 1208(c) of the Bankruptcy Code to provide that the failure of a debtor to pay any domestic support obligation that first becomes payable postpetition is cause for conversion or dismissal of the case. Section 213(3) amends Bankruptcy Code section 1222(a) to permit a chapter 12 debtor to propose a plan paying less than full payment of all amounts owed for a claim entitled to priority under Bankruptcy Code section 507(a)(1)(B) if all of the debtor's projected disposable income for a five-year period is applied to make payments under the plan. Section 213(4) of the Act amends Bankruptcy Code section 1222(b) to permit a chapter 12 debtor to propose a plan that pays postpetition interest on claims that are nondischargeable under Section 1228(a), but only to the extent that the debtor has disposable income available to pay such interest after payment of all allowed claims in full. Section 213(5) amends Bankruptcy Code section 1225(a) to provide that if a chapter 12 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay such obligations pursuant to such order or statute that became payable postpetition as a condition of confirmation. Section 213(6) amends Bankruptcy Code section 1228(a) to condition the granting of a chapter 12 discharge upon the debtor's payment of certain postpetition domestic support obligations.

With respect to chapter 13 cases, section 213(7) of the Act amends Bankruptcy Code section 1307(c) to provide that the failure of a debtor to pay any domestic support obligation that first becomes payable postpetition is cause for conversion or dismissal of the debtor's case. Section 213(8) amends Bankruptcy Code section 1322(a) to permit a chapter 13 debtor to propose a plan paying less than the full amount of a claim entitled to priority under Bankruptcy Code section 507(a)(1)(B) if the plan provides that all of the debtor's projected disposable income over a five-year period will be applied to make payments under the plan. Section 213(9) amends Bankruptcy Code section 1322(b) to permit a chapter 13 debtor to propose a plan that pays postpetition interest on nondischargeable debts under section 1328(a), but only to the extent that the debtor has disposable income available to pay such interest after payment in full of all allowed claims. Section 213(10) amends Bankruptcy

Code section 1325(a) to provide that if a chapter 13 debtor is required by judicial or administrative order or statute to pay a domestic support obligation, then the debtor must pay all such obligations pursuant to such order or statute that became payable postpetition as a condition of confirmation. Section 213(11) amends Bankruptcy Code section 1328(a) to condition the granting of a chapter 13 discharge on the debtor's payment of certain postpetition domestic support obligations.

Sec. 214. Exceptions To Automatic Stay in Domestic Support Proceedings. Under current law, section 362(b)(2) of the Bankruptcy Code excepts from the automatic stay the commencement or continuation of an action or proceeding: (1) for the establishment of paternity; or (2) the establishment or modification of an order for alimony, maintenance or support. It also permits the collection of such obligations from property that is not property of the estate. Section 214 makes several revisions to Bankruptcy Code section 362(b)(2). First, it replaces the reference to "alimony, maintenance or support" with "domestic support obligations." Second, it adds to section 362(b)(2) actions or proceedings concerning: (1) child custody or visitation; (2) the dissolution of a marriage (except to the extent such proceeding seeks division of property that is property of the estate); and (3) domestic violence. Third, it permits the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order as well as the withholding, suspension, or restriction of a driver's license, or a professional, occupational or recreational license under state law, pursuant to section 466(a)(16) of the Social Security Act. Fourth, it authorizes the reporting of overdue support owed by a parent to any consumer reporting agency pursuant to section 466(a)(7) of the Social Security Act. Fifth, it permits the interception of tax refunds as authorized by sections 464 and 466(a)(3) of the Social Security Act or analogous state law. Sixth, it allows medical obligations, as specified under title IV of the Social Security Act, to be enforced notwithstanding the automatic stay.

Sec. 215. Nondischargeability of Certain Debts for Alimony, Maintenance, and Support. Section 215 of the Act amends Bankruptcy Code section 523(a)(5) to provide that a "domestic support obligation" (as defined in section 211 of the Act) is nondischargeable and eliminates Bankruptcy Code section 523(a)(18). Section 215(2) amends Bankruptcy Code section 523(c) to delete the reference to section 523(a)(15) in that provision. Section 215(3) amends section 523(a)(15) to provide that obligations to a spouse, former spouse, or a child of the debtor (not otherwise described in section 523(a)(5)) incurred in connection with a divorce or separation or related action are nondischargeable irrespective of the debtor's inability to pay such debts.

Sec. 216. Continued Liability of Property. Section 216(1) of the Act amends section 522(c) of the Bankruptcy Code to make exempt property liable for nondischargeable domestic support obligations notwithstanding any contrary provision of applicable nonbankruptcy law. Section 216(2) and (3) make conforming amendments to sections 522(f)(1)(A) and 522(g)(2) of the Bankruptcy Code.

Sec. 217. Protection of Domestic Support Claims Against Preferential Transfer Motions. Section 217 of the Act makes a conforming amendment to Bankruptcy Code section 547(c)(7) to provide that a bona fide payment of a debt for a domestic support obligation may not be avoided as a preferential transfer.

Sec. 218. Disposable Income Defined. Section 218 of the Act amends section 1225(b)(2)(A) of the Bankruptcy Code to provide that disposable income in a chapter 12 case does not include payments for postpetition domestic support obligations.

Sec. 219. Collection of Child Support. Section 219 amends sections 704, 1106, 1202, and 1302 of the Bankruptcy Code to require trustees in chapter 7, 11, 12, and 13 cases to provide certain notices to child support claimants and governmental enforcement agencies. In addition, the Act conforms internal statutory cross references to Bankruptcy Code section 523(a)(14A) and deletes the reference to Bankruptcy Code section 523(a)(14) with respect to chapter 13, as this provision is inapplicable to that chapter.

Section 219(a) requires a chapter 7 trustee to provide written notice to a domestic support claimant of the right to use the services of a state child support enforcement agency established under sections 464 and 466 of the Social Security Act in the state where the claimant resides for assistance in collecting child support during and after the bankruptcy case. The notice must include the agency's address and telephone number as well as explain the claimant's right to payment under the applicable chapter of the Bankruptcy Code. In addition, the trustee must provide written notice to the claimant and the agency of such claim and include the name, address, and telephone number of the child support claimant. At the time the debtor is granted a discharge, the trustee must notify both the child support claimant and the agency that the debtor was granted a discharge as well as supply them with the debtor's last known address, the last known name and address of the debtor's employer, and the name of each creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or holding a debt that was reaffirmed pursuant to Bankruptcy Code section 524. A claimant or agency may request the debtor's last known address from a creditor holding a debt that is not discharged under section 523(a)(2), (4) or (14A) or that is reaffirmed pursuant to section 524 of the Bankruptcy Code. A creditor who discloses such information, however, is not liable to the debtor or any other person by reason of such disclosure. Subsections (b), (c), and (d) of section 219 of the Act impose comparable requirements for chapter 11, 12, and 13 trustees.

Sec. 220. Nondischargeability of Certain Educational Benefits and Loans. Section 220 of the Act amends section 523(a)(8) of the Bankruptcy Code to provide that a debt for a qualified education loan (as defined in section 221(e)(1) of the Internal Revenue Code) is nondischargeable, unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

Subtitle C. Other Consumer Protections

Sec. 221. Amendments To Discourage Abusive Bankruptcy Filings. Section 221 of the Act makes a series of amendments to section 110 of the Bankruptcy Code. First, section 221 clarifies that the definition of a bankruptcy petition preparer does not include an attorney for a debtor or an employee of an attorney under the direct supervision of such attorney. Second, it amends subsections (b) and (c) of section 110 to provide that if a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the preparer must sign certain documents filed in connection with the bankruptcy case as well as state the person's name and address on such documents. Third, it requires a bankruptcy petition preparer to give the debtor written notice (as prescribed by the Judicial Conference of the United States) explaining that the preparer is not an attorney and may not practice law or give legal advice. The notice may include examples of legal advice that a preparer may not provide. Such notice must be signed by the preparer under penalty of perjury and the debtor and be filed with any document for filing. Fourth, the petition preparer is prohibited from giving legal advice, including with respect to certain specified items. Fifth, it permits the Supreme Court to promulgate rules or the Judicial Conference of the United States to issue guidelines for setting the maximum fees that a bankruptcy petition preparer may charge for services. Sixth, section 221 requires the preparer to notify the debtor of such maximum fees. Seventh, it specifies that the bankruptcy petition preparer must certify that it complied with this notification requirement. Eighth, it requires the court to order the turnover of any fees in excess of the value of the services rendered by the preparer within the 12-month period preceding the bankruptcy filing. Ninth, section 221 provides that all fees charged by a preparer may be forfeited if the preparer fails to comply with certain requirements specified in Bankruptcy Code section 110, as amended by this provision. Tenth, it allows a debtor to exempt fees recovered under this provision pursuant to Bankruptcy Code section 522(b). Eleventh, it specifically authorizes the court to enjoin a bankruptcy petition preparer who has violated a court order issued under section 110. Twelfth, it generally revises section 110's penalty provisions and requires such penalties to be paid into a special fund of the United States trustee for the purpose of funding the enforcement of section 110 on a national basis. With respect to Bankruptcy Administrator districts, the funds are to be deposited as offsetting receipts pursuant to section 1931 of title 28 of the United States Code.

Sec. 222. Sense of Congress. Section 222 of the Act expresses the sense of Congress that the states should develop personal finance curricula for use in elementary and secondary schools.

Sec. 223. Additional Amendments to Title 11, United States Code. Section 223 of the Act amends section 507(a) of the Bankruptcy Code to accord a tenth-level priority to claims for death or personal injuries resulting from the debtor's operation of a motor vehicle or vessel while intoxicated.

Sec. 224. Protection of Retirement Savings in Bankruptcy. The intent of section 224 is to expand the protection for tax-favored retirement plans or arrangements that may not be already protected under Bankruptcy Code section 541(c)(2) pursuant to *Patterson v.*

Shumate,[84] or other state or Federal law. Subsection (a) of section 224 of the Act amends section 522 of the Bankruptcy Code to permit a debtor to exempt certain retirement funds to the extent those monies are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code and that have received a favorable determination pursuant to Internal Revenue Code section 7805 that is in effect as of the date of the commencement of the case. If the retirement monies are in a retirement fund that has not received a favorable determination, those monies are exempt if the debtor demonstrates that no prior unfavorable determination has been made by a court or the Internal Revenue Service, and the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code. If the retirement fund fails to be in substantial compliance with applicable requirements of the Internal Revenue Code, the debtor may claim the retirement funds as exempt if he or she is not materially responsible for such failure. This section also applies to certain direct transfers and rollover distributions. In addition, this provision ensures that the specified retirement funds are exempt under state as well as Federal law.

Section 224(b) amends section 362(b) of the Bankruptcy Code to except from the automatic stay the withholding of income from a debtor's wages pursuant to an agreement authorizing such withholding for the benefit of a pension, profit-sharing, stock bonus, or other employer-sponsored plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(c) to the extent that the amounts withheld are used solely to repay a loan from a plan as authorized by section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or subject to Internal Revenue Code section 72(p) or with respect to a loan from certain thrift savings plans. Section 224(b) further provides that this exception may not be used to cause any loan made under a governmental plan under section 414(d) or a contract or account under section 403(b) of the Internal Revenue Code to be construed to be a claim or debt within the meaning of the Bankruptcy Code.

Section 224(c) amends Bankruptcy Code section 523(a) to except from discharge any amount owed by the debtor to a pension, profit-sharing, stock bonus, or other plan established under Internal Revenue Code section 401, 403, 408, 408A, 414, 457, or 501(c) under a loan authorized under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or subject to Internal Revenue Code section 72(p) or with respect to a loan from certain thrift savings plans. Section 224(c) further provides that this exception to discharge may not be used to cause any loan made under a governmental plan under section 414(d) or a contract or account under section 403(b) of the Internal Revenue Code to be construed to be a claim or debt within the meaning of the Bankruptcy Code.

Section 224(d) amends Bankruptcy Code section 1322 to provide that a chapter 13 plan may not materially alter the terms of a loan described in section 362(b)(19) and that any amounts required to repay such loan shall not constitute "disposable income" under section 1325 of the Bankruptcy Code.

[84] 504 U.S. 753 (1992).

Section 224(e) amends section 522 of the Bankruptcy Code to impose a $1 million cap (periodically adjusted pursuant to section 104 of the Bankruptcy Code to reflect changes in the Consumer Price Index) on the value of the debtor's interest in an individual retirement account established under either section 408 or 408A of the Internal Revenue Code (other than a simplified employee pension account under section 408(k) or a simple retirement account under section 408(p) of the Internal Revenue Code) that a debtor may claim as exempt property. This limit applies without regard to amounts attributable to rollover contributions made pursuant to section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), or 403(b)(8) of the Internal Revenue Code and earnings thereon. The cap may be increased if required in the interests of justice.

Sec. 225. Protection of Education Savings in Bankruptcy. Subsection (a) of section 225 of the Act amends section 541 of the Bankruptcy Code to provide that funds placed not later than 365 days before the filing of the bankruptcy case in an education individual retirement account are not property of the estate if certain criteria are met. First, the designated beneficiary of such account must be a child, stepchild, grandchild or step-grandchild of the debtor for the taxable year during which funds were placed in the account. A legally adopted child or a foster child, under certain circumstances, may also qualify as a designated beneficiary. Second, such funds may not be pledged or promised to an entity in connection with any extension of credit and they may not be excess contributions (as described in section 4973(e) of the Internal Revenue Code). Funds deposited between 720 days and 365 days before the filing date are protected to the extent they do not exceed $5,000. Similar criteria apply with respect to funds used to purchase a tuition credit or certificate or to funds contributed to a qualified state tuition plan under section 529(b)(1)(A) of the Internal Revenue Code. Section 225(b) amends Bankruptcy Code section 521 to require a debtor to file with the court a record of any interest that the debtor has in an education individual retirement account or qualified state tuition program.

Sec. 226. Definitions. Subsection (a) of section 226 of the Act amends section 101 of the Bankruptcy Code to add certain definitions with respect to debt relief agencies. Section 226(a)(1) defines an "assisted person" as a person whose debts consist primarily of consumer debts and whose nonexempt assets are less than $150,000. Section 226(a)(2) defines "bankruptcy assistance" as any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of giving information, advice, or counsel; preparing documents for filing; or attending a meeting of creditors pursuant to section 341; appearing in a case or proceeding on behalf of a person; or providing legal representation in a case or proceeding under the Bankruptcy Code. Section 226(a)(3) defines a "debt relief agency" as any person (including a bankruptcy petition preparer) who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration. The definition specifically excludes certain entities. First, it does not apply to a person who is an officer, director, employee, or agent of a person who provides bankruptcy assistance or of a bankruptcy petition preparer. Second, it is not applicable to a nonprofit organization exemption from taxation under section 501(c)(3) of the Internal Revenue Code. Third, it is inapplicable to a creditor who assisted such person to the extent the assistance pertained to the restructuring of any debt owed by the person to the creditor. Fourth, the definition does not apply to a depository institution (as defined in section 3 of the Federal Deposit Insurance Act), or any Federal or state credit union (as defined in section 101 of the Federal Credit Union Act), as well as any affiliate or subsidiary of such depository institution or credit union. Fifth, an author, publisher, distributor, or seller of works subject to copyright protection under title 17 of the United States Code when acting in such capacity is not within the ambit of this definition.

Section 226(b) amends section 104(B)(1) of the Bankruptcy Code to permit the monetary amount set forth in the definition of an "assisted person" to be automatically adjusted to reflect the change in the Consumer Price Index.

Sec. 227. Restrictions on Debt Relief Agencies. Section 227 of the Act creates a new provision in the Bankruptcy Code intended to proscribe certain activities of a debt relief agency. It prohibits such agency from: (1) failing to perform any service that it informed an assisted person it would provide; (2) advising an assisted person to make an untrue and misleading statement (or that upon the exercise of reasonable care, should have been known to be untrue or misleading) in a document filed in a bankruptcy case; (3) misrepresenting the services it provides and the benefits and risks of bankruptcy; and (4) advising an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case. Any waiver by an assisted person of the protections under this provision are unenforceable, except against a debt relief agency.

In addition, section 227 imposes penalties for the violation of section 526, 527 or 528 of the Bankruptcy Code. First, any contract between a debt relief agency and an assisted person that does not comply with these provisions is void and may not be enforced by any state or Federal court or by any person, except an assisted person. Second, a debt relief agency is liable to an assisted person, under certain circumstances, for any fees or charges paid by such person to the agency, actual damages, and reasonable attorneys' fees and costs. The chief law enforcement officer of a state who has reason to believe that a person has violated or is violating section 526 may seek to have such violation enjoined and recover actual damages. Third, section 227 provides that the United States district court has concurrent jurisdiction of certain actions under section 526. Fourth, section 227 provides that sections 526, 527 and 528 preempt inconsistent state law. In addition, it provides that these provisions do not limit or curtail the authority of a Federal court, a state, or a subdivision or instrumentality of a state, to determine and enforce qualifications for the practice of law before the Federal court or under the laws of that state.

Sec. 228. Disclosures. Section 228 of the Act requires a debt relief agency to provide certain specified written notices to an assisted person. These include the notice required under section 342(b)(1) (as amended by this Act) as well as a notice advising that: (1) all information the assisted person provides in connection with the case must be complete, accurate and truthful; (2) all assets and liabilities must be completely and accurately disclosed in the documents filed to commence the case, including the replacement value of each asset (if required) after reasonable inquiry to establish such value; (3) current monthly income, monthly expenses and, in a chapter 13 case, disposable income, must be stated after reasonable inquiry; and (4) the information an assisted person provides may be audited and that the failure to provide such information may result in dismissal of the case or other sanction including, in some instances, criminal sanctions. In addition, the agency must supply certain specified advisories and explanations regarding the bankruptcy process. Further, this provision requires the agency to advise an assisted person (to the extent permitted under nonbankruptcy law) concerning asset valuation, the calculation of disposable income, and the determination of exempt property.

Sec. 229. Requirements for Debt Relief Agencies. Section 229 adds a provision to the Bankruptcy Code requiring a debt relief agency—not later than five business days after the first date on which it provides any bankruptcy assistance services to an assisted person (but prior to such assisted person's bankruptcy petition being filed)—to execute a written contract with the assisted person. The contract must specify clearly and conspicuously the services the agency will provide, the basis on which fees will be charged for such services, and the terms of payment. The assisted person must be given a copy of the fully executed and completed. The debt relief agency must include certain specified mandatory statements in any advertisement of bankruptcy assistance services or regarding the benefits of bankruptcy that is directed to the general public whether through the general media, seminars, specific mailings, telephonic or electronic messages, or otherwise.

Sec. 230. GAO Study. Section 230 of the Act directs the Comptroller General of the United States to study and prepare a report on the feasibility, efficacy and cost of requiring trustees to supply certain specified information about a debtor's bankruptcy case to the Office of Child Support Enforcement for the purpose of determining whether a debtor has outstanding child support obligations.

Sec. 231. Protection of Personally Identifiable Information. Section 231 of the Act clarifies that it applies to personally identifiable information and does not preempt applicable nonbankruptcy law. In addition, the provision specifies that court approval must be preceded by the appointment of a privacy ombudsman to effectuate the intent of this provision.

Subsection (a) amends Bankruptcy Code section 363(b)(1) to provide that if a debtor, in connection with offering a product or service, discloses to an individual a policy prohibiting the transfer of personally identifiable information to persons unaffiliated with the debtor, and the policy is in effect at the time of the bankruptcy filing, then the trustee may not sell or lease such information unless either of the following conditions is satisfied: (1) the sale is consistent with such policy; or (2) the court, after appointment of a consumer privacy ombudsman (pursuant to section 332 of the Bankruptcy Code, as amended) and notice and hearing, the court approves the sale or lease upon due consideration of the facts, circumstances, and conditions of the sale or lease.

Section 231(b) amends Bankruptcy Code section 101 to add a definition of "personally identifiable information." The term applies to information provided by an individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes. It includes the individual's: (1) first name or initial and last name (whether given at birth or adoption or legally changed); (2) physical home address; (3) electronic address, including an e-mail address; (4) home telephone number; (5) Social Security account number; or (vi) credit card account number. The term also includes information if it is identified in connection with the above items: (1) an individual's birth date, birth or adoption certificate number, or place of birth; or (2) any other information concerning an identified individual that, if disclosed, will result in the physical or electronic contacting or identification of that person.

Sec. 232. Consumer Privacy Ombudsman. Section 232 implements the preceding provision of the Act with respect to the appointment and responsibilities of a consumer privacy ombudsman. It provides that if a hearing is required under section 363(b)(1)(B) (as amended), the court must order the United States trustee to appoint a disinterested person to serve as the consumer privacy ombudsman and to provide timely notice of the hearing to such person. It permits the ombudsman to appear and be heard at such hearing. The ombudsman must provide the court with information to assist its consideration of the facts, circumstances and conditions of the proposed sale or lease of personally identifiable information. The information may include a presentation of the debtor's privacy policy, potential losses or gains of privacy to consumers if the sale or lease is approved, potential costs or benefits to consumers if the sale or lease is approved, and possible alternatives that would mitigate potential privacy losses or costs to consumers. Section 232 prohibits the ombudsman from disclosing any personally identifiable information obtained in the case by such individual. In addition, the provision amends Bankruptcy Code section 330(a)(1) to permit an ombudsman to be compensated.

Sec. 233. Prohibition on Disclosure of Name of Minor Children. Section 233 of the Act adds a new provision to the Bankruptcy Code (section 112) specifying that a debtor may be required to provide information regarding his or her minor child in connection with the bankruptcy case, but such debtor may not be required to disclose the child's name in the public records. It provides, however, that the debtor may be required to disclose this information in a nonpublic record maintained by the court, which may be available for inspection by the United States trustee, trustee or an auditor, if any. Section 233 prohibits the court, United States trustee, trustee, or auditor from disclosing such minor child's name.

Sec. 234. Protection of Personal Information. Bankruptcy Code section 107, with certain exceptions, provides that all papers filed in a bankruptcy case are public records. Exceptions include trade secrets, confidential research, and scandalous or defamatory matter. Section 234(a) adds a new provision to section 107 that permits a bankruptcy court to prohibit the disclosure of certain types of information concerning an individual to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property. The protected information includes any means of identification as defined in 18 U.S.C. § 1028(d) that is contained in a document filed in a bankruptcy case. The bankruptcy court must provide access to information protected under this new provision to an entity acting pursuant to the police or regulatory power of a domestic governmental unit upon ex parte application demonstrating cause. The provision also provides that the United States trustee, bankruptcy administrator, trustee, and any auditor serving pursuant to section 586(f) of title 28 of the United States Code shall have access to all information contained in a bankruptcy case and that such persons shall not disclose information specifically protected by the court. Section 234(b) amends Bankruptcy Code section 342(c), which requires a debtor to disclose in any notice required by the debtor to be given to a creditor to include the debtor's taxpayer identification number. Section 234(b) requires the debtor only to supply the last four digits of the taxpayer identification number. If, however, the notice concerns an amendment that adds a creditor to the schedules of assets or liabilities, the debtor must include the full taxpayer identification number in the notice sent to such creditor. The notice filed with the court must only include the last four digits of such notice.

TITLE III. DISCOURAGING BANKRUPTCY ABUSE

Sec. 301. Technical Amendments. Section 301 of the Act makes a clarifying amendment to section 523(a)(17) of the Bankruptcy Code concerning the dischargeability of court fees incurred by prisoners. Section 523(a)(17) was added to the Bankruptcy Code by the Omnibus Consolidated Rescissions and Appropriations Act of 1996[85] to except from discharge the filing fees and related costs and expenses assessed by a court in a civil case or appeal. As the result of a drafting error, however, this provision might be construed to apply to filing fees, costs or expenses incurred by any debtor, not solely by those who are prisoners. The amendment eliminates this ambiguity and makes other conforming changes to narrow its application in accordance with its original intent.

Sec. 302. Discouraging Bad Faith Repeat Filings. Section 302 of the Act amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period. The provision does not apply to a case refiled under a chapter other than chapter 7 after dismissal of the prior chapter 7 case pursuant to section 707(b) of the Bankruptcy Code. Upon motion of a party in interest, the court may continue the automatic stay after notice and a hearing completed prior to the expiration of the 30-day period if such party demonstrates that the latter case was filed in good faith as to the creditors who are stayed by the filing.

For purposes of this provision, a case is presumptively not filed in good faith as to all creditors (but such presumption may be rebutted by clear and convincing evidence) if: (1) more than one

[85] PUB. L. NO. 104–134, § 804(b) (1996).

bankruptcy case under chapter 7, 11 or 13 was previously filed by the debtor within the preceding one-year period; (2) the prior chapter 7, 11, or 13 case was dismissed within the preceding year for the debtor's failure to (a) file or amend without substantial excuse a document required under the Bankruptcy Code or court order, (b) provide adequate protection ordered by the court, or (c) perform the terms of a confirmed plan; or (3) there has been no substantial change in the debtor's financial or personal affairs since the dismissal of the prior case, or there is no reason to conclude that the pending case will conclude either with a discharge (if a chapter 7 case) or confirmation (if a chapter 11 or 13 case). In addition, section 302 provides that a case is presumptively deemed not to be filed in good faith as to any creditor who obtained relief from the automatic stay in the prior case or sought such relief in the prior case and such action was pending at the time of the prior case's dismissal. The presumption may be rebutted by clear and convincing evidence. A similar presumption applies if two or more bankruptcy cases were pending in the one-year preceding the filing of the pending case.

Sec. 303. Curbing Abusive Filings. Section 303 of the Act is intended to reduce abusive filings. Subsection (a) amends Bankruptcy Code section 362(d) to add a new ground for relief from the automatic stay. Under this provision, cause for relief from the automatic stay may be established for a creditor whose claim is secured by an interest in real property, if the court finds that the filing of the bankruptcy case was part of a scheme to delay, hinder and defraud creditors that involved either: (1) a transfer of all or part of an ownership interest in real property without such creditor's consent or without court approval; or (2) multiple bankruptcy filings affecting the real property. If recorded in compliance with applicable state law governing notice of an interest in or a lien on real property, an order entered under this provision is binding in any other bankruptcy case for two years from the date of entry of such order. A debtor in a subsequent case may move for relief based upon changed circumstances or for good cause shown after notice and a hearing. Section 303(a) further provides that any federal, state or local governmental unit that accepts a notice of interest or a lien in real property, must accept a certified copy of an order entered under this provision.

Section 303(b) amends Bankruptcy Code section 362(b) to except from the automatic stay an act to enforce any lien against or security interest in real property within two years following the entry of an order entered under section 362(d)(4). A debtor, in a subsequent case, may move for relief from such order based upon changed circumstances or for other good cause shown after notice and a hearing. Section 303(b) also provides that the automatic stay does not apply in a case where the debtor: (1) is ineligible to be a debtor in a bankruptcy case pursuant to section 109(g) of the Bankruptcy Code; or (2) filed the bankruptcy case in violation of an order issued in a prior bankruptcy case prohibiting the debtor from being a debtor in a subsequent bankruptcy case.

Sec. 304. Debtor Retention of Personal Property Security. Section 304(1) of the Act amends section 521(a) of the Bankruptcy Code to provide that an individual who is a chapter 7 debtor may not retain possession of personal property securing, in whole or in part, a purchase money security interest unless the debtor, within 45 days after the first meeting of creditors, enters into a reaffirmation agreement with the creditor, or redeems the property. If the debtor fails to so act within the prescribed period, the property is not subject to the automatic stay and is no longer property of the estate. An exception applies if the court: (1) determines on motion of the trustee filed before the expiration of the 45-day period that the property has consequential value or would benefit the bankruptcy estate; (2) orders adequate protection of the creditor's interest; and (3) directs the debtor to deliver any collateral in the debtor's possession. Section 304(2) amends section 722 to clarify that a chapter 7 debtor must pay the redemption value in full at the time of redemption.

Sec. 305. Relief from the Automatic Stay When the Debtor Does Not Complete Intended Surrender of Consumer Debt Collateral. Paragraph (1) of section 305 of the Act amends Bankruptcy Code section 362 to terminate the automatic stay with respect to personal property of the estate or of the debtor in a chapter 7, 11, or 13 case (where the debtor is an individual) that secures a claim (in whole or in part) or is subject to an unexpired lease if the debtor fails to: (1) file timely a statement of intention as required by section 521(a)(2) of the Bankruptcy Code with respect to such property; or (2) indicate in such statement whether the property will be surrendered or retained, and if retained, whether the debtor will redeem the property or reaffirm the debt, or assume an unexpired lease, if the trustee does not. Likewise, the automatic stay is terminated if the debtor fails to take the action specified in the statement of intention in a timely manner, unless the statement specifies reaffirmation and the creditor refuses to enter into the reaffirmation agreement on the original contract terms. In addition to terminating the automatic stay, this provision renders such property to be no longer property of the estate. An exception pertains where the court determines, on the motion of the trustee made prior to the expiration of the applicable time period under section 521(a)(2), and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders adequate protection of the creditor's interest, and directs the debtor to deliver any collateral in the debtor's possession.

Section 305(2) amends section 521 of the Bankruptcy Code to make the requirement to file a statement of intention applicable to all secured debts, not just secured consumer debts. In addition, it requires the debtor to effectuate his or her stated intention within 30 days from the first date set for the meeting of creditors. If the debtor fails to timely undertake certain specified actions with respect to property that a lessor or bailor owns and has leased, rented or bailed to the debtor or in which a creditor has a security interest (not otherwise avoidable under section 522(f), 544, 545, 547, 548 or 549 of the Bankruptcy Code), then nothing in the Bankruptcy Code shall prevent or limit the operation of a provision in a lease or agreement that places the debtor in default by reason of the debtor's bankruptcy or insolvency.

Sec. 306. Giving Secured Creditors Fair Treatment in Chapter 13. Subsection (a) of section 306 of the Act amends Bankruptcy Code section 1325(a)(5)(B)(i) to require—as a condition of confirmation—that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of when the underlying debt is paid or the debtor receives a discharge. If the case is dismissed or converted prior to completion of the plan, the secured creditor is entitled to retain its lien to the extent recognized under applicable nonbankruptcy law.

Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case.

Section 306(c)(1) amends section 101 of the Bankruptcy Code to define the term "debtor's principal residence" as a residential structure (including incidental property) without regard to whether or not such structure is attached to real property. The term includes an individual condominium or cooperative unit as well as a mobile or manufactured home, or a trailer.

Section 306(c)(2) amends section 101 of the Bankruptcy Code to define the term "incidental property" as property commonly conveyed with a principal residence in the area where the real property is located. The term includes all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, and insurance proceeds. Further, the term encompasses all replacements and additions.

Sec. 307. Domiciliary Requirements for Exemptions. Section 307 of the Act amends section 522(b)(2)(A) of the Bankruptcy Code to extend the time that a debtor must be domiciled in a state from 180 days to 730 days before he or she may claim that state's exemptions. If the debtor's domicile has not been located in a single state for the 730-day period, then the state where the debtor was domiciled in the 180-day period preceding the 730-day period (or the longer portion of such 180-day period) controls. If the effect of this provision is to render the debtor ineligible for any exemption, the debtor may elect to exempt property of the kind described in the Federal exemption notwithstanding the state has opted out of the Federal exemption allowances.

Sec. 308. Reduction of Homestead Exemption for Fraud. Section 308 amends section 522 of the Bankruptcy Code to reduce the value of a debtor's interest in the following property that may be claimed as exempt under certain circumstances: (i) real or personal property that the debtor or a dependent of the debtor uses as a residence, (ii) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, (iii) a burial plot, or (iv) real or personal property that the debtor or dependent of the debtor claims as a homestead. Where nonexempt property is converted to the above-specified exempt property within the ten-year period preceding the filing of the bankruptcy case, the exemption must be reduced to the extent such value was acquired with the intent to hinder, delay or defraud a creditor.

Sec. 309. Protecting Secured Creditors in Chapter 13 Cases. Section 309(a) of the Act amends Bankruptcy Code section 348(f)(1)(B) to provide that valuations of property and allowed secured claims in a chapter 13 case only apply if the case is subsequently converted to one under chapter 11 or 12. If the chapter 13 case is converted to one under chapter 7, then the creditor holding security as of the petition date shall continue to be secured unless its claim was paid in full as of the conversion date. In addition, unless a prebankruptcy default has been fully cured at the time of conversion, then the default in any bankruptcy proceeding shall have the effect given under applicable nonbankruptcy law.

Section 309(b) amends section 365 of the Bankruptcy Code to provide that if a lease of personal property is rejected or not assumed by the trustee in a timely manner, such property is no longer property of the estate and the automatic stay under Bankruptcy Code section 362 with respect to such property is terminated. With regard to a chapter 7 case in which the debtor is an individual, the debtor may notify the creditor in writing of his or her desire to assume the lease. Upon being so notified, the creditor may, at its option, inform the debtor that it is willing to have the lease assumed and condition such assumption on cure of any outstanding default on terms set by the contract. If within 30 days after such notice the debtor gives written notice to the lessor that the lease is assumed, the debtor (not the bankruptcy estate) assumes the liability under the lease. Section 309(b) provides that the automatic stay of section 362 and the discharge injunction of section 524 are not violated if the creditor notifies the debtor and negotiates a cure under section 365(p)(2) (as amended). In a chapter 11 or 13 case where the debtor is an individual lessee with respect to a personal property lease and the lease is not assumed in the confirmed plan, the lease is deemed rejected as of the conclusion of the confirmation hearing. If the lease is rejected, the automatic stay under section 362 as well as the chapter 13 codebtor stay under section 1301 are automatically terminated with respect to such property.

Section 309(c)(1) amends Bankruptcy Code section 1325(a)(5)(B) to require that periodic payments pursuant to a chapter 13 plan with respect to a secured claim be made in equal monthly installments. Where the claim is secured by personal property, the amount of such payments shall not be less than the amount sufficient to provide adequate protection to the holder of such claim. Section 309(c)(2) amends section 1326(a) of the Bankruptcy Code to require a chapter 13 debtor to commence making payments within 30 days after the filing of the plan or the order for relief, whichever is earlier. The amount of such payment must be the amount proposed in the plan, scheduled in a personal property lease for that portion of the obligation that becomes due postpetition (which amount shall reduce the payment required to be made to such lessor pursuant to the plan), and provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property (which amount shall reduce the payment required to be made to such secured creditor pursuant to the plan). Payments made pursuant to a plan must be retained by the chapter 13 trustee until confirmation or denial of confirmation. Section 309(c)(2) provides that if the plan is confirmed, the trustee must distribute payments received from the debtor as soon as practicable in accordance with the plan. If the plan is not confirmed, the trustee must return to the debtor payments not yet due and owing to creditors. Pending confirmation and subject to section 363, the court, after notice and a hearing, may modify the payments required under this provision. Section 309(c)(2) requires the debtor, within 60 days following the filing of the bankruptcy case, to provide reasonable evidence of any required insurance coverage with respect to the use or ownership of leased personal property or property securing, in whole or in part, a purchase money security interest.

Sec. 310. Limitation on Luxury Goods. Section 310 amends section 523(a)(2)(C) of the Bankruptcy Code. Under current law, consumer debts owed to a single creditor that, in the aggregate, exceed $1,075 for luxury goods or services incurred within 60 days before the commencement of the case are presumed to be nondischargeable. As amended, the presumption applies if the aggregate amount of consumer debts for luxury goods or services is more than $500 for luxury goods or services incurred by an individual debtor within 90 days before the order for relief. With respect to cash advances, current law provides that cash advances aggregating more than $1,075 that are extensions of consumer credit under an open-end credit plan obtained by an individual debtor within 60 days before the case is filed are presumed to be nondischargeable. As amended, section 523(a)(2)(C) presumes that cash advances aggregating more than $750 and that are incurred within 70 days are nondischargeable. The term, "luxury goods or services," does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor. In addition, "an extension of consumer credit under an open-end credit plan" has the same meaning as this term has under the Consumer Credit Protection Act.

Sec. 311. Automatic Stay. Section 311 of the Act amends section 362(b) of the Bankruptcy Code to except from the automatic stay a judgment of eviction with respect to a residential leasehold under certain circumstances. It is the intent of this provision to create an exception to the automatic stay of section 362(a)(3) to permit the recovery of possession by rental housing providers of their property in certain circumstances where a judgment for possession has been obtained against a debtor/resident before the filing of the petition for bankruptcy. Section 311 is intended to apply to manufactured housing communities, where tenants own their own homes and pay monthly rent to community owners for the land upon which their home sits. Tenants who fail to pay rent for the land beneath their homes located in manufactured housing communities would no longer be able to avoid their rental obligations under the protection of the automatic stay. It is also the intent of this section to permit eviction actions based on illegal use of controlled substances or endangering property in certain circumstances.

Section 311 gives tenants a reasonable amount of time after filing the petition to cure the default giving rise to the judgment for possession as long as there are circumstances in which applicable nonbankruptcy law allows a default to be cured after a judgment has been obtained. Where nonbankruptcy law applicable in the jurisdiction does not permit a tenant to cure a monetary default after the judgment for possession has been obtained, the automatic stay of section 362(a)(3) does not operate to limit action by a rental housing provider to proceed with, or a marshal, sheriff, or similar local officer to execute, the judgment for possession. Where the debtor claims that applicable law permits a tenant to cure after the judgment for possession has been obtained, the automatic stay operates only where the debtor files a certification with the bankruptcy petition asserting that applicable law permits such action and that the debtor or an adult dependent of the debtor has paid to the court all rent that will come due during the 30 days following the filing of the petition. If, within thirty days following the filing of the petition, the debtor or an adult dependent of the debtor certifies that the entire monetary default that gave rise to the judgment for possession has been cured, the automatic stay remains in effect. If a lessor has filed or wishes to file an eviction action based on the use of illegal controlled substances or property endangerment, the section allows the lessor in certain cases to file a certification of such circumstance with the court and obtain an exception to the stay.

For both the judgment based on monetary default and the controlled substance or endangerment exceptions, the section provides an opportunity for challenge by either the lessor or the tenant to certifications filed by the other party and a timely hearing for the court to resolve any disputed facts and rule on the factual or legal sufficiency of the certifications. Where the court finds for the lessor, the clerk shall immediately serve upon the parties a copy of the court's order confirming that an exception to the automatic stay is applicable. Where the court finds for the tenant, the stay shall remain in effect. It is the intent of this section that the clerk's certified copy of the docket or order shall be sufficient evidence that the exception under paragraph 22 or paragraph 23 is applicable for a marshal, sheriff, or similar local officer to proceed immediately to execute the judgment for possession if applicable law otherwise permits such action, or for an eviction action for use of illegal controlled substances or property endangerment to proceed. This section does not provide any new right to either landlords or tenants relating to evictions or defenses to eviction under otherwise applicable law.

Section 311 also excepts from the automatic stay a transfer that is not avoidable under Bankruptcy Code section 544 and that is not avoidable under Bankruptcy Code section 549. This amendment responds to a 1997 Ninth Circuit case in which two purchase money lenders (without knowledge that the debtor had recently filed an undisclosed chapter 11 case that was later converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors.[86]

[86] *Thompson v. Margen* (*In re* McConville), 110 F.3d 47 (9th Cir.), *cert. denied,* 522 U.S. 966 (1997). The bankruptcy trustee sought to avoid the lien created by the lenders' deed of trust by asserting that the deed was an unauthorized, postpetition transfer under Bankruptcy Code section 549(a). The lenders claimed that the voluntary transfer to them was a transfer of real

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Sec. 312. Extension of Period Between Bankruptcy Discharges. Section 312 of the Act amends section 727(a)(8) of the Bankruptcy Code to extend the period before which a chapter 7 debtor may receive a subsequent chapter 7 discharge from six to eight years. It also amends section 1328 to prohibit the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a prior chapter 7, 11, or 12 case within four years preceding the filing of the subsequent chapter 13 case. In addition, it prohibits the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a chapter 13 case filed during the two-year period preceding the date of the filing of the subsequent chapter 13 case.

Sec. 313. Definition of Household Goods and Antiques. Subsection (a) of section 313 of the Act amends section 522(f) of the Bankruptcy Code to codify a modified version of the Federal Trade Commission's definition of "household goods" for purposes of the avoidance of a nonpossessory, nonpurchase money lien in such property. It also specifies various items that are expressly not household goods. Section 313 specifies a monetary threshold for the exclusions pertaining to electronic entertainment equipment, antiques, and jewelry. In addition, it provides that works of art are not household goods, unless by or of the debtor or by any relative of the debtor. Section 313(b) requires the Director of the Executive Office for United States Trustees to prepare a report containing findings with respect to the use of this definition. The report may include recommendations for amendments to the definition of "household goods" as codified in section 522(f)(4).

Sec. 314. Debt Incurred To Pay Nondischargeable Debts. Subsection (a) of section 314 of the Act amends section 523(a) of the Bankruptcy Code to make a debt incurred to pay a nondischargeable tax owed to a governmental unit (other than a tax owed to the United States) nondischargeable. Section 314(b) amends section 1328(a) of the Bankruptcy Code to make the following additional debts nondischargeable in a chapter 13 case: (1) debts for money, property, services, or extensions of credit obtained through fraud or by a false statement in writing under section 523(a)(2)(A) and (B) of the Bankruptcy Code; (2) consumer debts owed to a single creditor that aggregate to more than $500 for luxury goods or services incurred by an individual debtor within 90 days before the filing of the bankruptcy case, and cash advances aggregating more than $750 that are extensions of consumer credit obtained by a debtor under an open-end credit plan within 70 days before the order for relief under section 523(a)(2)(C) (as amended); (3) pursuant to section

property to good faith purchasers for value, which thereby excepted it, under Bankruptcy Code section 549(c) from avoidance. The bankruptcy court held that the postpetition recordation of the lenders' deed of trust was without authorization under the Bankruptcy Code or by the court and was therefore avoidable under section 549(a) and that the lenders did not qualify under the section 549(c) exception as good faith purchasers of real property for value. The District Court subsequently affirmed the bankruptcy court's ruling granting the trustee the authority to avoid the lenders' lien. *McConville v. David Margen and Lawton Associates* (*In re* McConville), No. C 94–3308, 1994 U.S. Dist. LEXIS 18095 (N.D. Cal. Dec. 14, 1994). On appeal, the lower court's decision in *McConville* was initially affirmed. *Thompson v. Margen* (*In re* McConville), 84 F.3d 340 (9th Cir. 1996). The Ninth Circuit, however, subsequently issued an amended opinion, also affirming the lower court, *Thompson v. Margen* (*In re* McConville), 97 F.3d 316 (9th Cir. 1996), and finally issued an opinion withdrawing its prior opinion and deciding the case on other grounds. It held that by obtaining secured credit from the lenders after filing but before the appointment of a trustee, the debtors violated their fiduciary responsibility to their creditors. *Thompson v. Margen* (*In re* McConville), 110 F.3d 47 (9th Cir. 1997).

523(a)(3) of the Bankruptcy Code, debts that require a timely request for a dischargeability determination, if the creditor lacks notice or does not have actual knowledge of the case in time to make such request; (4) debts resulting from fraud or defalcation by the debtor acting as a fiduciary under section 523(a)(4) of the Bankruptcy Code; and (5) debts for restitution or damages, awarded in a civil action against the debtor as a result of willful or malicious conduct by the debtor that caused personal injury to an individual or the death of an individual.

Sec. 315. Giving Creditors Fair Notice in Chapters 7 and 13 Cases. Section 315 of the Act amends several provisions of the Bankruptcy Code. Subsection (a) amends Bankruptcy Code section 342(c) to delete the provision specifying that the failure of a notice to include certain information required to be given by a debtor to a creditor does not invalidate the notice's legal effect. It adds a provision requiring a debtor to send any notice he or she must provide under the Bankruptcy Code to the address stated by the creditor and to include in such notice the current account number, if within 90 days prior to the date that the debtor filed for bankruptcy relief the creditor in at least two communications sent to the debtor set forth such address and account number. If the creditor would be in violation of applicable nonbankruptcy law by sending any such communication during this time period, then the debtor must send the notice to the address provided by the creditor stated in the last two communications containing the creditor's address and such notice shall include the current account number. Section 315(a) also permits a creditor in a chapter 7 or 13 case (where the debtor is an individual) to file with the court and serve on the debtor the address to be used to notify such creditor in that case. Five days after receipt of such notice, the court and the debtor, respectively, must use the address so specified to provide notice to such creditor.

In addition, section 315(a) specifies that an entity may file a notice with the court stating an address to be used generally by all bankruptcy courts for chapter 7 and 13 cases, or by particular bankruptcy courts, as specified by such entity. This address must be used by the court to supply notice in such cases within 30 days following the filing of such notice where the entity is a creditor. Notice given other than as provided in section 342 is not effective until it has been brought to the creditor's attention. If the creditor has designated a person or organizational subdivision to be responsible for receiving notices concerning bankruptcy cases and has established reasonable procedures so that these notices will be delivered to such person or subdivision, a notice will not be considered to have been brought to the attention of such creditor until it has been received by such person or subdivision. This provision also prohibits the imposition of any monetary penalty for violation of the automatic stay or for the failure to comply with the Bankruptcy Code sections 542 and 543 unless the creditor has received effective notice under section 342.

Section 315(b) amends section 521 to specify additional duties of a debtor. This provision requires the debtor to file a certificate executed by the debtor's attorney or bankruptcy petition preparer stating that the attorney or preparer supplied the debtor with the notice required under Bankruptcy Code section 342(b). If the debtor is not represented by counsel and did not use the services of a bankruptcy petition preparer, then the debtor must sign a certificate stating that he or she obtained and read such notice. In addition, the debtor must file: (1) copies of all payment advices or other evidence of payment, if any, from any employer within 60 days preceding the bankruptcy filing; (2) a statement of the amount of monthly net income, itemized to show how such amount is calculated; and (3) a statement disclosing any reasonably anticipated increase in income or expenditures in the 12-month period following the date of filing. Upon request of a creditor, section 315(b) of the Act requires the court to make the petition, schedules, and statement of financial affairs of an individual who is a chapter 7 or 13 debtor available to such creditor.

In addition, section 315(b) requires such debtor to provide the trustee not later than seven days before the date first set for the meeting of creditors a copy of his or her Federal income tax return or transcript (at the election of the debtor) for the latest taxable period ending prior to the filing of the bankruptcy case for which a tax return was filed. Should the debtor fail to comply with this requirement, the case must be dismissed unless the debtor demonstrates that such failure was due to circumstances beyond the debtor's control. Upon request, the debtor must provide a copy of the tax return or transcript to the requesting creditor at the time the debtor supplies the return or transcript to the trustee. A creditor in a chapter 13 case may, at any time, file a notice with the court requesting a copy of the plan. The court must supply a copy of the chapter 13 plan at a reasonable cost not later than 5 days after such request. In addition, the Act clarifies that this provision applies to Federal income tax returns.

During the pendency of a chapter 7, 11 or 13 case, the debtor must file with the court, at the request of the judge, United States trustee, or any party in interest, at the time filed with the taxing authority, copies of any Federal income tax returns (or transcripts thereof) that were not filed for the three-year period preceding the date on which the order for relief was entered. In addition, the debtor must file copies of any amendments to such tax returns.

In a chapter 13 case, the debtor must file a statement, under penalty of perjury, of income and expenditures in the preceding tax year and monthly income showing how the amounts were calculated. The statement must be filed on the date that is the later of 90 days after the close of the debtor's tax year or one year after the order for relief, unless a plan has been confirmed. Thereafter, the statement must be filed on or before the date that is 45 days before the anniversary date of the plan's confirmation, until the case is closed. The statement must disclose the amount and sources of the debtor's income, the identity of any person responsible with the debtor for the support of the debtor's dependents, the identity of any person who contributed to the debtor's household expenses, and the amount of any such contributions.

Section 315(b)(2) mandates that the tax returns, amendments thereto, and the statement of income and expenditures of an individual who is a chapter 7 or chapter 13 debtor be made available to the United States trustee or bankruptcy administrator, the trustee, and any party in interest for inspection and copying, subject to procedures established by the Director of the Administrative Office for United States Courts within 180 days from the date of enactment of this Act. The procedures must safeguard the confidentiality of any tax information required under this provision and include restrictions on creditor access to such information. In addition, the Director must, within 540 days from the Act's enactment date, prepare and submit to Congress a report that assesses the effectiveness of such procedures and, if appropriate, includes recommendations for legislation to further protect the confidentiality of such tax information and to impose penalties for its improper use. If requested by the United States trustee or trustee, the debtor must provide a document establishing the debtor's identity, which may include a driver's license, passport, or other document containing a photograph of the debtor, and such other personal identifying information relating to the debtor.

Sec. 316. Dismissal for Failure To Timely File Schedules or Provide Required Information. Section 316 of the Act amends section 521 of the Bankruptcy Code to provide that if an individual debtor in a voluntary chapter 7 or chapter 13 case fails to file all of the information required under section 521(a)(1) within 45 days of the date on which the case is filed, the case must be automatically dismissed, effective on the 46th day. The 45-day period may be extended for an additional 45-day period providing the debtor requests such extension prior to the expiration of the original 45-day period and the court finds justification for such extension. Upon request of a party in interest, the court must enter an order of dismissal within 5 days of such request. Section 316 provides that a court may decline to dismiss the case if: (1) the trustee files a motion before the stated time periods; (2) the court finds, after notice and a hearing, that the debtor in good faith attempted to file all the information required under section 521(a)(1)(B)(iv); and (3) the court finds that the best interests of creditors would be served by continued administration of the case.

Sec. 317. Adequate Time To Prepare for Hearing on Confirmation of the Plan. Section 317 of the Act amends section 1324 of the Bankruptcy Code to require the chapter 13 confirmation hearing to be held not earlier than 20 days following the first date set for the meeting of creditors and not later than 45 days from this date, unless the court determines that it would be in the best interests of creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.

Sec. 318. Chapter 13 Plans To Have a 5-Year Duration in Certain Cases. Paragraph (1) of section 318 of the Act amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor's spouse fall below these thresholds, then the duration of the plan may not be longer than three years, unless the court, for cause, approves a longer period up to five years. The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period. Section 318(2), (3), and (4) make conforming amendments to sections 1325(b) and 1329(c) of the Bankruptcy Code.

Sec. 319. Sense of Congress Regarding Expansion of Rule 9011 of the Federal Rules of Bankruptcy Procedure. Section 319 of the Act expresses a sense of the Congress that Federal Rule of Bankruptcy Procedure 9011 be modified to require that all documents (including schedules), whether signed or unsigned, supplied to the court or the trustee by a debtor may be submitted only after the debtor or the debtor's attorney has made reasonable inquiry to verify that the information contained in such documents is well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Sec. 320. Prompt Relief from Stay in Individual Cases. Section 320 of the Act amends section 362(e) of the Bankruptcy Code to terminate the automatic stay in a chapter 7, 11, or 13 case of an individual debtor within 60 days following a request for relief from the stay, unless the bankruptcy court renders a final decision prior to the expiration of the 60-day time period, such period is extended pursuant to agreement of all parties in interest, or a specific extension of time is required for good cause as described in findings made by the court.

Sec. 321. Chapter 11 Cases Filed by Individuals. Section 321(a) of the Act creates a new provision under chapter 11 of the Bankruptcy Code specifying that property of the estate of an individual debtor includes, in addition to that identified in section 541 of the Bankruptcy Code, all property of the kind described in section 541 that the debtor acquires after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13 (whichever occurs first). In addition, it includes earnings from services performed by the debtor after commencement of the case, but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13. Except as provided in section 1104 of the Bankruptcy Code or the order confirming a chapter 11 plan, section 321(a) provides that the debtor remains in possession of all property of the estate.

Section 321(b) amends Bankruptcy Code section 1123 to require the chapter 11 plan of an individual debtor to provide for the payment to creditors of all or such portion of the debtor's earnings from personal services performed after commencement of the case or other future income that is necessary for the plan's execution.

Section 321(c) amends Bankruptcy Code section 1129(a) to include an additional requirement for confirmation in a chapter 11 case of an individual debtor upon objection to confirmation by a holder of an allowed unsecured claim. In such instance, the value of property to be distributed under the plan on account of such claim, as of the plan's effective date, must not be less than the amount of such claim; or be not less than the debtor's projected disposable income (as defined in section 1325(b)(2)) to be received during the five-year period beginning on the date that the first payment is due under the plan or during the plan's term, whichever is longer. Section 321(c) also amends section 1129(b)(2)(B)(ii) of the Bankruptcy Code to provide that an individual chapter 11 debtor may retain property included in the estate under section 1115 (as added by the Act), subject to section 1129(a)(14).

Section 321(d)(1) amends Bankruptcy Code section 1141(d) to provide that a discharge under chapter 11 does not discharge a debtor who is an individual from any debt excepted from discharge under Bankruptcy Code section 523. Section 321(d)(2) of the Act provides that in a chapter 11 individual debtor is not discharged until all plan payments have been made. The court may grant a hardship discharge if the value of property actually distributed under the plan—as of the plan's effective date—is not less than the amount that would have been available for distribution if the case was liquidated under chapter 7 on such date, and modification of the plan is not practicable.

Section 321(e) of the Act amends section 1127 to permit a plan in a chapter 11case of an individual debtor to be modified postconfirmation for the purpose of increasing or reducing the amount of payments, extending or reducing the time period for such payments, or altering the amount of distribution to a creditor whose claim is provided for by the plan. Such modification may be made at any time on request of the debtor, trustee, United States trustee, or holder of an allowed unsecured claim. The provision specifies that sections 1121 through 1129 apply to such modification. In addition, it provides that the modified plan shall become the confirmed plan only if: (1) there has been disclosure pursuant to section 1125 (as the court directs); (2) notice and a hearing; and (3) such modification is approved.

Sec. 322. Limitations on Homestead Exemption. Section 322(a) amends section 522 of the Bankruptcy Code to impose an aggregate monetary limitation of $125,000, subject to Bankruptcy Code sections 544 and 548, on the value of property that the debtor may claim as exempt under State or local law pursuant to section 522(b)(3)(A) under certain circumstances. The monetary cap applies if the debtor acquired such property within the 1,215-day period preceding the filing of the petition and the property consists of any of the following: (1) real or personal property of the debtor or that a dependent of the debtor uses as a residence; (2) an interest in a cooperative that owns property, which the debtor or the debtor's dependent uses as a residence; (3) a burial plot for the debtor or the debtor's dependent; or (4) real or personal property that the debtor or dependent of the debtor claims as a homestead. This limitation does not apply to a principal residence claimed as exempt by a family farmer. In addition, the limitation does not apply to any interest transferred from a debtor's principal residence (which was acquired prior to the beginning of the specified time period) to the debtor's current principal residence, if both the previous and current residences are located in the same State.

Section 322(a) further amends section 522 to add a provision that does not allow a debtor to exempt any amount of an interest in property described in the preceding paragraph in excess of $125,000 if any of the following applies:

1. The court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstance demonstrates that the filing of the case was an abuse of the provisions of the Bankruptcy Code; or
2. debtor owes a debt arising from:
    a. any violation of the Federal securities laws defined in section 3(a)(47) of the Securities and Exchange Act of

1934, any state securities laws, or any regulation or order issued under Federal securities laws or state securities laws;

b. fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934, or under section 6 of the Securities Act of 1933;

c. any civil remedy under section 1964 of title 18 of the United States Code; or

d. any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

An exception to the monetary limit applies to the extent the value of the homestead property is reasonably necessary for the support of the debtor and any dependent of the debtor. The monetary limitation set forth in section 322(a) is subject to automatic adjustment pursuant to section 104 of the Bankruptcy Code.

Sec. 323. Excluding Employee Benefit Plan Participant Contributions and Other Property from the Estate. Section 323 of the Act amends section 541(b) of the Bankruptcy Code to exclude as property of the estate funds withheld or received by an employer from its employees' wages for payment as contributions to specified employee retirement plans, deferred compensation plans, and tax-deferred annuities. Such contributions do not constitute disposable income as defined in section 1325(b)(2) of the Bankruptcy Code. Section 323 also excludes as property of the estate funds withheld by an employer from the wages of its employees for payment as contributions to health insurance plans regulated by State law.

Sec. 324. Exclusive Jurisdiction in Matters Involving Bankruptcy Professionals. Section 324 of the Act amends section 1334 of title 28 of the United State Code to give a district court exclusive jurisdiction of all claims or causes of action involving the construction of section 327 of the Bankruptcy Code or rules relating to disclosure requirements under such provision.

Sec. 325. United States Trustee Program Filing Fee Increase. Section 325(a) of the Act amends section 1930(a) of title 28 of the United States Code to increase the chapter 7 filing fee from $155 to $200 and decrease the chapter 13 filing fee from $155 to $150. It also increases the chapter 11 filing fee from $800 to $1,000. Subsection 325(b) amends section 589a of title 28 of the United States Code to reallocate the percentage of certain filing fees collected for the United States Trustee Fund. Subsection 325(c) amends section 406(b) of the Judiciary Appropriations Act of 1990 to reallocate the percentage of certain filing fees collected under section 1930 of title 28 of the United States Code to fund the operation and maintenance of the Federal court system. Section 325(d) provides that the amendments made by subsections (b) and (c) are effective for the two-year period beginning on the Act's date of enactment. Section 325(e)(1) mandates that the amount of fees collected under 28 U.S.C. § 1930(a)(1) (chapter 7 filing fees) and 28 U.S.C. § 1930(a)(3) (chapter 11 filing fees) that is greater than the amount that would have been collected if these provisions were not amended by section

325 be allocated to the extent necessary to pay for the salaries and benefits of judges appointed pursuant to section 1223 of this Act. Section 325(e)(2) provides that any amount of fees in excess of that used to pay the salaries and benefits of judges appointed pursuant to section 1223 be deposited in the Treasury to the extent necessary to offset the decrease in governmental receipts resulting from the amendments made by section 325(b) (United States Trustee Fund) and section 325(c) (federal court system fund).

Sec. 326. Sharing of Compensation. Section 326 amends Bankruptcy Code section 504 to create a limited exception to the prohibition against fee sharing. The provision allows the sharing of compensation with bona fide public service attorney referral programs that operate in accordance with non-federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

Sec. 327. Fair Valuation of Collateral. Section 327 of the Act amends section 506(a) of the Bankruptcy Code to provide that the value of an allowed claim secured by personal property that is an asset in an individual debtor's chapter 7 or 13 case is determined based on the replacement value of such property as of the filing date of the bankruptcy case without deduction for selling or marketing costs. With respect to property acquired for personal, family, or household purposes, replacement value is the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time its value is determined.

Sec. 328. Defaults Based on Nonmonetary Obligations. Subsection (a)(1) of section 328 of the Act amends section 365(b) to provide that a trustee does not have to cure a default that is a breach of a provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform a nonmonetary obligation under an unexpired lease of real property, if it is impossible for the trustee to cure the default by performing such nonmonetary act at and after the time of assumption. If the default arises from a failure to operate in accordance with a nonresidential real property lease, the default must be cured by performance at and after the time of assumption in accordance with the lease. Pecuniary losses resulting from such default must be compensated pursuant to section 365(b)(1). In addition, section 328(a)(1) amends section 365(b)(2)(D) to clarify that it applies to penalty provisions. Section 328(a)(2) through (4) make technical revisions to section 365(c), (d) and (f) by deleting language that is no longer effective pursuant to the Rail Safety Enforcement and Review Act.[87]

Section 328(b) amends section 1124(2)(A) of the Bankruptcy Code to clarify that a claim is not impaired if section 365(b)(2) (as amended by this Act) expressly does not require a default with respect to such claim to be cured. In addition, it provides that any claim or interest that arises from the failure to perform a nonmonetary obligation (other than a default arising from the failure to operate a nonresidential real property lease subject to section 365(b)(1)(A)), is impaired unless the holder of such claim or interest (other than the debtor or an insider) is compensated for any actual pecuniary loss incurred by the holder as a result of such failure.

[87] Pub. L. No. 102–365, 106 Stat. 972 (1992).

Sec. 329. Clarification of Postpetition Wages and Benefits. Section 329 amends Bankruptcy Code section 503(b)(1)(A) to accord administrative expense status to certain back pay awards. This provision applies to a back pay award attributable to any period of time occurring postpetition as a result of a violation of Federal or state law by the debtor pursuant to an action brought in a court or before the National Labor Relations Board, providing the bankruptcy court determines that the award will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations.

Sec. 330. Delay of Discharge During Pendency of Certain Proceedings. Section 330(a) of the Act amends section 727(a) of the Bankruptcy Code to require the court to withhold the entry of a debtor's discharge order if the court, after notice and a hearing, finds that there is reasonable cause to believe that there is a pending proceeding in which the debtor may be found guilty of a felony of the kind described in Bankruptcy Code section 522(q)(1) or liable for a debt of the kind described in Bankruptcy Code section 522(q)(2). Subsections (b), (c), and (d) make comparable revisions to the discharge provisions under chapter 11, 12, and 13, respectively.

Sec. 331. Limitation on Retention Bonuses, Severance Pay, and Certain Other Payments. Section 331 amends Bankruptcy Code section 503 to prohibit the allowance or payment of certain transfers or obligations, unless otherwise authorized by the court. It applies to transfers made to or obligations incurred for the benefit of an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, unless the court makes certain specified findings. In addition, it prohibits a severance payment to an insider of a debtor, unless it satisfies certain criteria. Further, it prohibits the payment of other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, mangers, or consultants hired after the date of the filing of the petition.

Sec. 332. Fraudulent Involuntary Bankruptcy. Bankruptcy Code section 303 permits a creditor to force an individual or business into bankruptcy by filing an involuntary bankruptcy petition against such entity. Before an order for relief is entered in the case, the court must make certain findings that support granting such relief (e.g., the debtor is generally not paying debts as they become due; or a custodian was appointed within the 120-day period preceding the filing of the petition). If such findings are not made, the court may dismiss the case. As with most documents filed in connection with a bankruptcy case, the filing of an involuntary bankruptcy petition is a matter of public record and is open for examination by any entity.[88] In addition, the Fair Credit Reporting Act[89] permits credit reporting agencies to note the involuntary bankruptcy filing on a person's credit report for up to ten years.[90] Although the Fair Credit Reporting Act permits a consumer to have his or her credit report revised to reflect the fact, for instance, that the involuntary bankruptcy case was dismissed

[88] 11 U.S.C. § 107(a).
[89] 15 U.S.C. § 1681.
[90] 15 U.S.C. § 1681c(a)(1).

prior to the entry of an order for relief, the report may, nevertheless, still refer to the filing of the case.[91]

Unfortunately, tax protesters and other extremists, in addition to other forms of obstreperous litigation (such as filing false liens), are now resorting to filing fraudulent involuntary bankruptcy petitions against public officials and other innocent parties. In 2002, for example, one tax protester filed fraudulent involuntary bankruptcy petitions against 36 local public officials in Wisconsin,[92] some of whom did not find out about the petitions until "they attempted to use a credit card or execute some other financial transaction."[93] These fraudulent involuntary petition filings were subsequently dismissed by the bankruptcy court, which found that they were filed in bad faith without legal basis and were commenced "for the sole purpose of harassment of the named public officials."[94] Nevertheless, "[d]espite the fact that the [fraudulent involuntary bankruptcy] petitions are often dismissed," as one State assistant attorney general observed, "the filings continue to cause financial problems for the victims."[95] The devastating effect of a fraudulent involuntary bankruptcy filing on an innocent person's credit rating is illustrated by what occurred in Wisconsin and its aftermath. Although the bankruptcy court in dismissing these cases also directed all credit reporting agencies to expunge any record of these filings from the officials' credit reports,[96] the bankruptcy petition filings nevertheless "caused some officials' credit cards to be canceled, almost caused the sale of one supervisor's house to be stopped, and caused continuing credit problems for other officials."[97]

Section 332 responds to these concerns by permitting the court to seal and subsequently expunge all records pertaining to a fraudulent involuntary petition. Section 332(a) sets forth the short title of the section as the "Involuntary Bankruptcy Improvement Act of 2005." Section 332(b) amends Bankruptcy Code section 303 to permit the court, upon motion of the debtor, to seal all court records pertaining to an involuntary bankruptcy petition if: (1) the petition is false or contains any materially false, fictitious, or fraudulent statement; (2) the debtor is an individual; and (3) the court dismisses the petition. The provision further permits the court, if the debtor is an individual, to prohibit any consumer reporting agency from making any consumer report that contains any information relating to such petition or to the case commenced by the filing of such petition. It further provides that upon the expiration of the statute of limitations described in 18 U.S.C. § 3282 for a violation

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[91] *See, e.g.,* 15 U.S.C. Sec. 1681i (2000); Letter from Ronald G. Isaac, Attorney, Federal Trade Commission—Division of Financial Practices/Bureau of Consumer Protection, to Anonymous (Nov. 5, 1999), available at *http://www.ftc.gov/os/statutes/frca/anon.htm.*

[92] *See In re* Kenealy, No. 02–26100–MDM (Bankr. E.D. Wis. May 21, 2002). Involuntary petitions "were filed against all but one of the County Board supervisors," the county corporation counsel, county sheriff, clerk of courts, and county circuit judge. Jeff Cole, *Paperwork Used for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit,* MILWAUKEE J. SENTINEL, June 6, 2002, at 1B. The protester also filed numerous liens in the amount of $15 million against these individuals as well. Jeff Cole, *Man Charged with Filing False Documents; Town of Fredonia Protester's Case is 5th Brought by State,* MILWAUKEE J. SENTINEL, May 21, 2002, at 1B.

[93] Jeff Cole, *Paperwork Used for Revenge; Protester's Bogus Bankruptcy Petitions Temporarily Disrupt Officials' Credit,* MILWAUKEE J. SENTINEL, June 6, 2002, at 1B.

[94] *In re* Kenealy, No. 02–26100–MDM (Bankr. E.D. Wis. May 21, 2002).

[95] Roy Korte, Terrorism: A Law Enforcement Perspective, Anti-Defamation League (2002), *available at http://www.adl.org/learn/columns/roy5%5korte.asp.*

[96] *In re* Kenealy, No. 02–26100–MDM (Bankr. E.D. Wis. May 21, 2002).

[97] Jeff Cole, *"Paper Terrorist" Gets Five Years in Prison,* MILWAUKEE J. SENTINEL, Jan. 18, 2003, at 1B.

of 18 U.S.C. § 152 (concerning crimes for concealment of assets, false oaths and claims, and bribery) and 18 U.S.C. § 157 (bankruptcy fraud), the court may, upon motion of the debtor and for good cause, expunge any records pertaining to such petition. Section 332(c) amends section 157 of title 18 to make it a criminal offense to file a fraudulent involuntary bankruptcy petition. Section 332 is similar to legislation considered by the House in the 108th Congress.[98]

TITLE IV. GENERAL AND SMALL BUSINESS BANKRUPTCY PROVISIONS

Subtitle A. General Business Bankruptcy Provisions

Sec. 401. Adequate Protection for Investors. Subsection (a) of section 401 of the Act amends section 101 of the Bankruptcy Code to define "securities self regulatory organization" as a securities association or national securities exchange registered with the Securities and Exchange Commission. Section 401(b) amends section 362 of the Bankruptcy Code to except from the automatic stay certain enforcement actions by a securities self regulatory organization.

Sec. 402. Meetings of Creditors and Equity Security Holders. Section 402 amends section 341 of the Bankruptcy Code to permit a court, on request of a party in interest and after notice and a hearing, to order the United States trustee not to convene a meeting of creditors or equity security holders if a debtor has filed a plan for which the debtor solicited acceptances prior to the commencement of the case.

Sec. 403. Protection of Refinance of Security Interest. Section 403 amends section 547(e)(2) of the Bankruptcy Code to increase the perfection period from ten to 30 days for the purpose of determining whether a transfer is an avoidable preference.

Sec. 404. Executory Contracts and Unexpired Leases. Subsection (a) of section 404 of the Act amends section 365(d)(4) of the Bankruptcy Code to establish a firm, bright line deadline by which an unexpired lease of nonresidential real property must be assumed or rejected. If such lease is not assumed or rejected by such deadline, then such lease shall be deemed rejected, and the trustee shall immediately surrender such property to the lessor. Section 404(a) permits a bankruptcy trustee to assume or reject a lease on a date which is the earlier of the date of confirmation of a plan or the date which is 120 days after the date of the order for relief. An extension of time may be granted, within the 120 day period, for an additional 90 days, for cause, upon motion of the trustee or lessor. Any subsequent extension can only be granted by the judge upon the prior written consent of the lessor either by the lessor's motion for an extension or on motion of the trustee, provided that the trustee has the prior written approval of the lessor. This provision is designed to remove the bankruptcy judge's discretion to grant extensions of the time for the retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order of relief. Beyond that maximum

[98] H.R. 1529, 108th Cong. (2003). The bill was ordered favorably reported without amendment by the House Judiciary Committee, H.R. REP. NO. 108–110 (2003), and passed by voice vote by the House. 149 CONG. REC. H5104 (daily ed. June 10, 2003). The principal difference between this legislation and section 332 of the Act is that the bill would have permitted the court to expunge the case upon dismissal of the fraudulent involuntary petition.

period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension.

Section 404(b) amends section 365(f)(1) to assure that section 365(f) does not override any part of section 365(b). Thus, section 404(b) makes a trustee's authority to assign an executory contract or unexpired lease subject not only to section 365(c), but also to section 365(b), which is given full effect. Therefore, for example, assumption or assignment of a lease of real property in a shopping center must be subject to the provisions of the lease, such as use clauses.

Sec. 405. Creditors and Equity Security Holders Committees. Subsection (a) of section 405 of the Act amends section 1102(a)(2) of the Bankruptcy Code to permit, after notice and a hearing, a court, on request of a party in interest, to order a change in a committee's membership if necessary to ensure adequate representation of creditors or equity security holders in a chapter 11 case. It specifies that the court may direct the United States trustee to increase the membership of a committee for the purpose of including a small business concern if the court determines that such creditor's claim is of the kind represented by the committee and that, in the aggregate, is disproportionately large when compared to the creditor's annual gross revenue.

Section 405(b) requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments from these creditors and, pursuant to court order, make additional reports or disclosures available to them.

Sec. 406. Amendment to Section 546 of Title 11, United States Code. Section 406 of the Act corrects an erroneous subsection designation in section 546 of the Bankruptcy Code. It redesignates the second subsection (g) as subsection (i). In addition, section 406 amends section 546(i) (as redesignated) to subject that provision to the prior rights of security interest holders. Further, section 406 adds a new provision to section 546 that prohibits a trustee from avoiding a warehouse lien for storage, transportation, or other costs incidental to the storage and handling of goods. It specifies that this prohibition must be applied in a manner consistent with any applicable state statute that is similar to section 7–209 of the Uniform Commercial Code.

Sec. 407. Amendments to Section 330(a) of Title 11, United States Code. Section 407 amends section 330(a)(3) of the Bankruptcy Code to clarify that this provision applies to examiners, chapter 11 trustees, and professional persons. This section also amends section 330(a) to add a provision that requires a court, in determining the amount of reasonable compensation to award to a trustee, to treat such compensation as a commission pursuant to section 326 of the Bankruptcy Code.

Sec. 408. Postpetition Disclosure and Solicitation. Section 408 amends section 1125 of the Bankruptcy Code to permit an acceptance or rejection of a chapter 11 plan to be solicited from the holder of a claim or interest if the holder was solicited before the commencement of the case in a manner that complied with applicable nonbankruptcy law.

Sec. 409. Preferences. Section 409 amends section 547(c)(2) of the Bankruptcy Code to provide that a trustee may not avoid a transfer to the extent such transfer was in payment of a debt incurred by the debtor in the ordinary course of the business or financial affairs of the debtor and the transferee and such transfer was made either: (1) in the ordinary course of the debtor's and the transferee's business or financial affairs; or (2) in accordance with ordinary business terms. Present law requires the recipient of a preferential transfer to establish both of these grounds in order to sustain a defense to a preferential transfer proceeding. In a case in which the debts are not primarily consumer debts, section 409 provides that a transfer may not be avoided if the aggregate amount of all property constituting or affected by the transfer is less than $5,000.

Sec. 410. Venue of Certain Proceedings. Section 1409(b) of title 28 of the United States Code provides that a proceeding to recover a money judgment of, or property worth less than, certain specified amounts must be commenced in the district where the defendant resides. Section 410 amends section 1409(b) to provide that a proceeding to recover a debt (excluding a consumer debt) against a noninsider of the debtor that is less than $10,000 must be commenced in the district where the defendant resides. In addition, section 410 increases the $5,000 threshold for a consumer debt[99] to $15,000.

Sec. 411. Period for Filing Plan under Chapter 11. Section 411 amends section 1121(d) of the Bankruptcy Code to mandate that a debtor's exclusive period for filing a plan may not be extended beyond a date that is 18 months after the order for relief in the chapter 11 case. In addition, it provides that the debtor's exclusive period for obtaining acceptances of the plan may not be extended beyond 20 months after the order for relief.

Sec. 412. Fees Arising from Certain Ownership Interests. Section 412 amends section 523(a)(16) of the Bankruptcy Code to broaden the protections accorded to community associations with respect to fees or assessments arising from the debtor's interest in a condominium, cooperative, or homeowners' association. Irrespective of whether or not the debtor physically occupies such property, fees or assessments that accrue during the period the debtor or the trustee has a legal, equitable, or possessory ownership interest in such property are nondischargeable.

Sec. 413. Creditor Representation at First Meeting of Creditors. Section 413 amends section 341(c) of the Bankruptcy Code to permit a creditor holding a consumer debt or any representative of such creditor, notwithstanding any local court rule, provision of a state constitution, or any otherwise applicable nonbankruptcy law, or any other requirement that such creditor must be represented by counsel, to appear at and participate in a section 341 meeting of creditors in chapter 7 and chapter 13 cases either alone or in conjunction with an attorney. In addition, the provision clarifies that it cannot be construed to require a creditor to be represented by counsel at any meeting of creditors.

[99] A consumer debt is defined as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8).

Sec. 414. Definition of Disinterested Person. Section 414 amends section 101(14) of the Bankruptcy Code to eliminate the requirement that an investment banker be a disinterested person.

Sec. 415. Factors for Compensation of Professional Persons. Section 415 amends section 330(a)(3) of the Bankruptcy Code to permit the court to consider, in awarding compensation to a professional person, whether such person is board certified or otherwise has demonstrated skill and experience in the practice of bankruptcy law.

Sec. 416. Appointment of Elected Trustee. Section 416 of the Act amends section 1104(b) of the Bankruptcy Code to clarify the procedure for the election of a trustee in a chapter 11 case. Section 1104(b) permits creditors to elect an eligible, disinterested person to serve as the trustee in the case, provided certain conditions are met. Section 416 amends this provision to require the United States trustee to file a report certifying the election of a chapter 11 trustee. Upon the filing of the report, the elected trustee is deemed to be selected and appointed for purposes of section 1104 and the service of any prior trustee appointed in the case is terminated. Section 416 also clarifies that the court shall resolve any dispute arising out of a chapter 11 trustee election.

Sec. 417. Utility Service. Section 417 amends section 366 of the Bankruptcy Code to provide that assurance of payment, for purposes of this provision, includes a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or other form of security that is mutually agreed upon by the debtor or trustee and the utility. It also specifies that an administrative expense priority does not constitute an assurance of payment. With respect to chapter 11 cases, section 417 permits a utility to alter, refuse or discontinue service if it does not receive adequate assurance of payment that is satisfactory to the utility within 30 days of the filing of the petition. The court, upon request of a party in interest, may modify the amount of this payment after notice and a hearing. In determining the adequacy of such payment, a court may not consider: (1) the absence of security before the case was filed; (2) the debtor's timely payment of utility service charges before the case was filed; or (3) the availability of an administrative expense priority. Notwithstanding any other provision of law, section 417 permits a utility to recover or set off against a security deposit provided prepetition by the debtor to the utility without notice or court order.

Sec. 418. Bankruptcy Fees. Section 418 of the Act amends section 1930 of title 28 of the United States Code to permit a district court or a bankruptcy court, pursuant to procedures prescribed by the Judicial Conference of the United States, to waive the chapter 7 filing fee for an individual and certain other fees under subsections (b) and (c) of section 1930 if such individual's income is less than 150 percent of the official poverty level (as defined by the Office of Management and Budget) and the individual is unable to pay such fee in installments. Section 418 also clarifies that section 1930, as amended, does not prevent a district or bankruptcy court from waiving other fees for creditors and debtors, if in accordance with Judicial Conference policy.

Sec. 419. More Complete Information Regarding Assets of the Estate. Section 419 of the Act directs the Judicial Conference of the United States, after consideration of the views of the Director of the Executive Office for United States Trustees, to propose official rules and forms directing chapter 11 debtors to disclose information concerning the value, operations, and profitability of any closely held corporation, partnership, or other entity in which the debtor holds a substantial or controlling interest. Section 419 is intended to ensure that the debtor's interest in any of these entities is used for the payment of allowed claims against debtor.

Subtitle B. Small Business Bankruptcy Provisions

Sec. 431. Flexible Rules for Disclosure Statement and Plan. Section 431 of the Act amends section 1125 of the Bankruptcy Code to streamline the disclosure statement process and to provide for more flexibility. Section 431(1) amends section 1125(a)(1) of the Bankruptcy Code to require a bankruptcy court, in determining whether a disclosure statement supplies adequate information, to consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing such additional information. With regard to a small business case, section 431(2) amends section 1125(f) to permit the court to dispense with a disclosure statement if the plan itself supplies adequate information. In addition, it provides that the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28 of the United States Code. Further, section 431(2) provides that the court may conditionally approve a disclosure statement, subject to final approval after notice and a hearing, and allow the debtor to solicit acceptances of the plan based on such disclosure statement. The hearing on the disclosure statement may be combined with the confirmation hearing.

Sec. 432. Definitions. Section 432 of the Act amends section 101 of the Bankruptcy Code to define a "small business case" as a chapter 11 case in which the debtor is a small business debtor. Section 432, in turn, defines a "small business debtor" as a person engaged in commercial or business activities (including an affiliate of such person that is also a debtor, but excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) having aggregate noncontingent, liquidated secured and unsecured debts of not more than $2 million (excluding debts owed to affiliates or insiders of the debtor) as of the date of the petition or the order for relief. This monetary definition applies only in a case where the United States trustee has not appointed a creditors' committee or where the court has determined that the creditors' committee is not sufficiently active and representative to provide effective oversight of the debtor. It does not apply to any member of a group of affiliated debtors that has aggregate noncontingent, liquidated secured and unsecured debts in excess of $2 million (excluding debts owed to one or more affiliates or insiders). This provision also requires this monetary figure to be periodically adjusted for inflation pursuant to section 104 of the Bankruptcy Code.

Sec. 433. Standard Form Disclosure Statement and Plan. Section 433 of the Act directs the Judicial Conference of the United States to propose for adoption standard form disclosure statements and reorganization plans for small business debtors. The provision requires the forms to achieve a practical balance between the needs of the court, case administrators, and other parties in interest to have reasonably complete information as well as the debtor's need for economy and simplicity.

Sec. 434. Uniform National Reporting Requirements. Subsection (a) of section 434 of the Act adds a provision to the Bankruptcy Code mandating additional reporting requirements for small business debtors. It requires a small business debtor to file periodic financial reports and other documents containing the following information with respect to the debtor's business operations: (1) profitability; (2) reasonable approximations of projected cash receipts and disbursements; (3) comparisons of actual cash receipts and disbursements with projections in prior reports; (4) whether the debtor is complying with postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure; (5) whether the debtor is timely filing tax returns and other government filings; and (6) whether the debtor is paying taxes and other administrative expenses when due. In addition, the debtor must report on such other matters that are in the best interests of the debtor and the creditors and in the public interest. If the debtor is not in compliance with any postpetition requirements pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, or is not filing tax returns or other required governmental filings, paying taxes and other administrative expenses when due, the debtor must report: (1) what the failures are, (2) how they will be cured; (3) the cost of their cure; and (4) when they will be cured. Section 434(b) specifies that the effective date of this provision is 60 days after the date on which the rules required under this provision are promulgated.

Sec. 435. Uniform Reporting Rules and Forms for Small Business Cases. Subsection (a) of section 435 of the Act directs the Judicial Conference of the United States to propose official rules and forms with respect to the periodic financial reports and other information that a small business debtor must file concerning its profitability, cash receipts and disbursements, filing of its tax returns, and payment of its taxes and other administrative expenses.

Section 435(b) requires the rules and forms to achieve a practical balance between the need for reasonably complete information by the bankruptcy court, United States trustee, creditors and other parties in interest, and the small business debtor's interest in having such forms be easy and inexpensive to complete. The forms should also be designed to help the small business debtor better understand its financial condition and plan its future.

Sec. 436. Duties in Small Business Cases. Section 436 of the Act is intended to implement greater administrative oversight and controls over small business chapter 11. The provision requires a chapter 11 trustee or debtor to:

1. file with a voluntary petition (or in an involuntary case, within seven days from the date of the order for relief) the

debtor's most recent financial statements (including a balance sheet, statement of operations, cash flow statement, and Federal income tax return) or a statement explaining why such information is not available;

2. attend, through its senior management personnel and counsel, meetings scheduled by the bankruptcy court or the United States trustee (including the initial debtor interview and meeting of creditors pursuant to section 341 of the Bankruptcy Code), unless the court waives this requirement after notice and a hearing upon a finding of extraordinary and compelling circumstances;
3. timely file all requisite schedules and the statement of financial affairs, unless the court, after notice and a hearing, grants an extension of up to 30 days from the order of relief, absent extraordinary and compelling circumstances;
4. file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;
5. maintain insurance that is customary and appropriate for the industry, subject to section 363(c)(2);
6. timely file tax returns and other required government filings;
7. timely pay all administrative expense taxes (except for certain contested claims), subject to section 363(c)(2); and
8. permit the United States trustee to inspect the debtor's business premises, books, and records at reasonable hours after appropriate prior written notice, unless notice is waived by the debtor.

Sec. 437. Plan Filing and Confirmation Deadlines. Section 437 of the Act amends section 1121(e) of the Bankruptcy Code with respect to the period of time within which a small business debtor must file and confirm a plan of reorganization. This provision provides that a small business debtor's exclusive period to file a plan is 180 days from the date of the order for relief, unless the period is extended after notice and a hearing, or the court, for cause, orders otherwise. It further provides that a small business debtor must file a plan and any disclosure statement not later than 300 days after the order for relief. These time periods and the time fixed in section 1129(e) may be extended only if: (1) the debtor, after providing notice to parties in interest, demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time; (2) a new deadline is imposed at the time the extension is granted; and (3) the order granting such extension is signed before the expiration of the existing deadline.

Sec. 438. Plan Confirmation Deadline. Section 438 of the Act amends Bankruptcy Code section 1129 to require the court to confirm a plan not later than 45 days after it is filed if the plan complies with the applicable provisions of the Bankruptcy Code, unless this period is extended pursuant to section 1121(e)(3).

Sec. 439. Duties of the United States Trustee. Section 439 of the Act amends section 586(a) of title 28 of the United States Code to require the United States trustee to perform the following additional duties with respect to small business debtors:

1. conduct an initial debtor interview before the meeting of creditors for the purpose of (a) investigating the debtor's viability, (b) inquiring about the debtor's business plan, (c) explaining the debtor's obligation to file monthly operating reports, (d) attempting to obtain an agreed scheduling order setting various time frames (such as the date for filing a plan and effecting confirmation), and (e) informing the debtor of other obligations;
2. if determined to be appropriate and advisable, inspect the debtor's business premises for the purpose of reviewing the debtor's books and records and verifying that the debtor has filed its tax returns;
3. review and monitor diligently the debtor's activities to determine as promptly as possible whether the debtor will be unable to confirm a plan; and
4. promptly apply to the court for relief in any case in which the United States trustee finds material grounds for dismissal or conversion of the case.

Sec. 440. Scheduling Conferences. Section 440 amends section 105(d) of the Bankruptcy Code to mandate that a bankruptcy court hold status conferences as are necessary to further the expeditious and economical resolution of a bankruptcy case.

Sec. 441. Serial Filer Provisions. Paragraph (1) of section 441 of the Act amends section 362 of the Bankruptcy Code to provide that a court may award only actual damages for a violation of the automatic stay committed by an entity in the good faith belief that subsection (h) of section 362 (as amended) applies to the debtor. Section 441(2) adds a new subsection to section 362 of the Bankruptcy Code specifying that the automatic stay does not apply where the chapter 11 debtor: (1) is a debtor in a small business case pending at the time the subsequent case is filed; (2) was a debtor in a small business case dismissed for any reason pursuant to an order that became final in the two-year period ending on the date of the order for relief entered in the pending case; (3) was a debtor in small business case in which a plan was confirmed in the two-year period ending on the date of the order for relief entered in the pending case; or (4) is an entity that has acquired substantially all of the assets or business of a small business debtor described in the preceding paragraphs, unless such entity establishes by a preponderance of the evidence that it acquired the assets or business in good faith and not for the purpose of evading this provision.

An exception to this provision applies to a chapter 11 case that is commenced involuntarily and involves no collusion between the debtor and the petitioning creditors. Also, it does not apply if the debtor proves by a preponderance of the evidence that: (1) the filing of the subsequent case resulted from circumstances beyond the debtor's control and which were not foreseeable at the time the prior case was filed; and (2) it is more likely than not that the court will confirm a feasible plan of reorganization (but not a liquidating plan) within a reasonable time.

Sec. 442. Expanded Grounds for Dismissal or Conversion and Appointment of Trustee. Subsection (a) of section 442 of the Act amends section 1112(b) of the Bankruptcy Code to mandate that the court convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, if the movant establishes cause, absent unusual circumstances. In this regard, the court must specify the circumstances that support the court's finding that conversion or dismissal is not in the best interests of creditors and the estate.

In addition, the provision specifies an exception to the provision's mandatory requirement applies if: (1) the debtor or a party in interest objects and establishes that there is a reasonable likelihood that a plan will be confirmed within the time periods set forth in sections 1121(e) and 1129(e), or if these provisions are inapplicable, within a reasonable period of time; (2) the grounds for granting such relief include an act or omission of the debtor for which there exists a reasonable justification for such act or omission; and (3) such act or omission will be cured within a reasonable period of time.

The court must commence the hearing on a section 1112(b) motion within 30 days of its filing and decide the motion not later than 15 days after commencement of the hearing unless the movant expressly consents to a continuance for a specified period of time or compelling circumstances prevent the court from meeting these time limits. Section 442 provides that the term "cause" under section 1112(b), as amended by this provision, includes the following:

1. substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
2. gross mismanagement of the estate;
3. failure to maintain appropriate insurance that poses a material risk to the estate or the public;
4. unauthorized use of cash collateral that is harmful to one or more creditors;
5. failure to comply with a court order;
6. unexcused failure to timely satisfy any filing or reporting requirement under the Bankruptcy Code or applicable rule;
7. failure to attend the section 341 meeting of creditors or an examination pursuant to rule 2004 of the Federal Rules of Bankruptcy Procedure, without good cause shown by the debtor;
8. failure to timely provide information or to attend meetings reasonably requested by the United States trustee or bankruptcy administrator;
9. failure to timely pay taxes owed after the order for relief or to file tax returns due postpetition;
10. failure to file a disclosure statement or to confirm a plan within the time fixed by the Bankruptcy Code or pursuant to court order;
11. failure to pay any requisite fees or charges under chapter 123 of title 28 of the United States Code;

12. revocation of a confirmation order;
13. inability to effectuate substantial consummation of a confirmed plan;
14. material default by the debtor with respect to a confirmed plan;
15. termination of a plan by reason of the occurrence of a condition specified in the plan; and
16. the debtor's failure to pay any domestic support obligation that first becomes payable postpetition

Section 442(b) creates an additional ground for the appointment of a chapter 11 trustee or examiner under section 1104(a). It provides that should the bankruptcy court determine cause exists to convert or dismiss a chapter 11 case, it may appoint a trustee or examiner if it is in the best interests of creditors and the bankruptcy estate.

Section 442(b) is designed to benefit creditors when a chapter 11 case would otherwise be dismissed or converted to a chapter 7 case pursuant to section 1112 of the Bankruptcy Code. Section 442(b) allows the court to appoint a chapter 11 trustee or examiner, as an alternative to dismissing or converting the case to chapter 7, if in the best interest of creditors and the bankruptcy estate. Section 442(b) is not intended to ease the standards for appointing chapter 11 trustees. Practice under Chapter X of the Bankruptcy Act of 1898 demonstrated that routine appointment of trustees deters the use of reorganization statutes and increases the likelihood that by the time a company resorts to bankruptcy relief, it must liquidate. It is therefore important for section 442(b) to be used only for cases that would otherwise be dismissed or converted to chapter 7, and not as an alternative method for attaining the appointment of a chapter 11 trustee.

Sec. 443. Study of Operation of Title 11, United States Code, with Respect to Small Businesses. Section 443 of the Act directs the Administrator of the Small Business Administration, in consultation with the Attorney General, the Director of the Executive Office for United States Trustees, and the Director of the Administrative Office of the United States Courts, to conduct a study to determine: (1) the internal and external factors that cause small businesses (particularly sole proprietorships) to seek bankruptcy relief and the factors that cause small businesses to successfully complete their chapter 11 cases; and (2) how the bankruptcy laws may be made more effective and efficient in assisting small business to remain viable.

Sec. 444. Payment of Interest. Paragraph (1) of section 444 of the Act amends section 362(d)(3) of the Bankruptcy Code to require a court to grant relief from the automatic stay within 30 days after it determines that a single asset real estate debtor is subject to this provision. Section 444(2) amends section 362(d)(3)(B) to specify that relief from the automatic stay shall be granted unless the single asset real estate debtor has commenced making monthly payments to each creditor secured by the debtor's real property (other than a claim secured by a judgment lien or unmatured statutory lien) in an amount equal to the interest at the then applicable non-default contract rate of interest on the value of the creditor's interest in the real estate. It allows a debtor in its sole discretion to make the requisite interest payments out of rents or other proceeds generated by the real property, notwithstanding section 363(c)(2).

Sec. 445. Priority for Administrative Expenses. Section 445 of the Act amends section 503(b) of the Bankruptcy Code to add a new administrative expense priority for a nonresidential real property lease that is assumed under section 365 and then subsequently rejected. The amount of the priority is the sum of all monetary obligations due under the lease (excluding penalties and obligations arising from or relating to a failure to operate) for the two-year period following the rejection date or actual turnover of the premises (whichever is later), without reduction or setoff for any reason, except for sums actually received or to be received from a nondebtor. Any remaining sums due for the balance of the term of the lease are treated as a claim under section 502(b)(6) of the Bankruptcy Code.

Sec. 446. Duties with Respect to a Debtor Who Is a Plan Administrator of an Employee Benefit Plan. Subsection (a) of section 446 of the Act amends Bankruptcy Code section 521(a) to require a debtor, unless a trustee is serving in the case, to serve as the administrator (as defined in the Employee Retirement Income Security Act of 1974) of an employee benefit plan if the debtor served in such capacity at the time the case was filed. Section 446(b) amends Bankruptcy Code section 704 to require the chapter 7 trustee to perform the obligations of such administrator in a case where the debtor or an entity designated by the debtor was required to perform such obligations. Section 446(c) amends Bankruptcy Code section 1106(a) to require a chapter 11 trustee to perform these obligations.

Sec. 447. Appointment of Committee of Retired Employees. This provision amends section 1114(d) of the Bankruptcy Code to clarify that it is the responsibility of the United States trustee to appoint members to a committee of retired employees.

TITLE V. MUNICIPAL BANKRUPTCY PROVISIONS

Sec. 501. Petition and Proceedings Related to Petition. Section 501 amends sections 921(d) and 301 of the Bankruptcy Code to clarify that the court must enter the order for relief in a chapter 9 case.

Sec. 502. Applicability of Other Sections to Chapter 9. Section 502 of the of the Act amends section 901 of the Bankruptcy Code to make the following sections applicable to chapter 9 cases:

1. section 555 (contractual right to liquidate, terminate or accelerate a securities contract);
2. section 556 (contractual right to liquidate, terminate or accelerate a commodities or forward contract);
3. section 559 (contractual right to liquidate, terminate or accelerate a repurchase agreement);
4. section 560 (contractual right to liquidate, terminate or accelerate a swap agreement);
5. section 561 (contractual right to liquidate, terminate, accelerate, or offset under a master netting agreement and across contracts); and

6. section 562 (damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreement).

TITLE VI. BANKRUPTCY DATA

Sec. 601. Improved Bankruptcy Statistics. This provision amends chapter 6 of title 28 of the United States Code to require the clerk for each district (or the bankruptcy court clerk if one has been certified pursuant to section 156(b) of title 28 of the United States Code) to collect certain statistics for chapter 7, 11, and 13 cases in a standardized format prescribed by the Director of the Administrative Office of the United States Courts and to make this information available to the public. Not later than July 1, 2008, the Director must submit a report to Congress concerning the statistical information collected and then must report annually thereafter. The statistics must be itemized by chapter of the Bankruptcy Code and be presented in the aggregate for each district. The specific categories of information that must be gathered include the following:

1. scheduled total assets and liabilities of debtors who are individuals with primarily consumer debts under chapters 7, 11 and 13 by category;
2. such debtors' current monthly income, average income, and average expenses;
3. the aggregate amount of debts discharged during the reporting period based on the difference between the total amount of scheduled debts and by categories that are predominantly nondischargeable;
4. the average time between the filing of the bankruptcy case and the closing of the case;
5. the number of cases in which reaffirmation agreements were filed, the total number of reaffirmation agreements filed, the number of cases in which the debtor was pro se and a reaffirmation agreement was filed, and the number of cases in which the reaffirmation agreement was approved by the court;
6. for chapter 13 cases, information on the number of: (a) final orders determining the value of secured property in an amount less than the amount of the secured claim, (b) final orders that determined the value of property securing a claim, (c) cases dismissed, (d) cases dismissed for failure to make payments under the plan, (e) cases refiled after dismissal, (f) cases in which the plan was completed (separately itemized with respect to the number of modifications made before completion of the plan, and (g) cases in which the debtor had previously sought bankruptcy relief within the six years preceding the filing of the present case;
7. the number of cases in which creditors were fined for misconduct and the amount of any punitive damages awarded for creditor misconduct; and
8. the number of cases in which sanctions under rule 9011 of the Federal Rules of Bankruptcy Procedure were imposed

against a debtor's counsel and the damages awarded under this rule.

Section 601 provides that the amendments in this provision take effect 18 months after the date of enactment of this Act.

Sec. 602. Uniform Rules for the Collection of Bankruptcy Data. Section 602 of the Act amends chapter 39 of title 28 of the United States Code to require the Attorney General to promulgate rules mandating the establishment of uniform forms for final reports in chapter 7, 12 and 13 cases and periodic reports in chapter 11 cases. This provision also specifies that these reports be designed to facilitate compilation of data and to provide maximum public access by physical inspection at one or more central filing locations and by electronic access through the Internet or other appropriate media. The information should enable an evaluation of the efficiency and practicality of the bankruptcy system. In issuing rules, the Attorney General must consider: (1) the reasonable needs of the public for information about the Federal bankruptcy system; (2) the economy, simplicity, and lack of undue burden on persons obligated to file the reports; and (3) appropriate privacy concerns and safeguards.

Section 602 provides that final reports by trustees in chapter 7, 12, and 13 cases include the following information: (1) the length of time the case was pending; (2) assets abandoned; (3) assets exempted; (4) receipts and disbursements of the estate; (5) administrative expenses, including those associated with section 707(b) of the Bankruptcy Code, and the actual costs of administering chapter 13 cases; (6) claims asserted; (7) claims allowed; and (8) distributions to claimants and claims discharged without payment. With regard to chapter 11 cases, section 602 provides that periodic reports include the following information regarding:

1. the industry classification for businesses conducted by the debtor, as published by the Department of Commerce;
2. the length of time that the case was pending;
3. the number of full-time employees as of the date of the order for relief and at the end of each reporting period;
4. cash receipts, cash disbursements, and profitability of the debtor for the most recent period and cumulatively from the date of the order for relief;
5. the debtor's compliance with the Bankruptcy Code, including whether tax returns have been filed and taxes have been paid;
6. professional fees approved by the court for the most recent period and cumulatively from the date of the order for relief; and
7. plans filed and confirmed, including the aggregate recoveries of holders by class and as a percentage of total claims of an allowed class.

Sec. 603. Audit Procedures. Subsection (a)(1) of section 603 of the Act requires the Attorney General (for judicial districts served by United States trustees) and the Judicial Conference of the United States (for judicial districts served by bankruptcy administrators) to establish procedures to determine the accuracy, veracity, and completeness of petitions, schedules and other information filed by debtors pursuant to sections 111, 521 and 1322 of the Bankruptcy Code. Section 603(a)(1) requires the audits to be conducted in accordance with generally accepted auditing standards and performed by independent certified public accountants or independent licensed public accountants. It permits the Attorney General and the Judicial Conference to develop alternative auditing standards not later than two years after the date of enactment of this Act. Section 603(a)(2) requires these procedures to: (1) establish a method of selecting appropriate qualified contractors to perform these audits; (2) establish a method of randomly selecting cases for audit, and that a minimum of at least one case out of every 250 cases be selected for audit; (3) require audits in cases where the schedules of income and expenses reflect greater than average variances from the statistical norm for the district if they occur by reason of higher income or higher expenses than the statistical norm in which the schedules were filed; and (4) require the aggregate results of such audits, including the percentage of cases by district in which a material misstatement of income or expenditures is reported, to be made available to the public on an annual basis.

Section 603(b) amends section 586 of title 28 of the United States Code to require the United States trustee to submit reports as directed by the Attorney General, including the results of audits performed under section 603(a). In addition, it authorizes the United States trustee to contract with auditors to perform the audits specified in this provision. Further, it requires the report of each audit to be filed with the court and transmitted to the United States trustee. The report must specify material misstatements of income, expenditures or assets. In a case where a material misstatement has been reported, the clerk must provide notice of such misstatement to creditors and the United States trustee must report it to the United States Attorney, if appropriate, for possible criminal prosecution. If advisable, the United States trustee must also take appropriate action, such as revoking the debtor's discharge.

Section 603(c) amends section 521 of the Bankruptcy Code to make it a duty of the debtor to cooperate with an auditor. Section 603(d) amends section 727 of the Bankruptcy Code to add, as a ground for revocation of a chapter 7 discharge the debtor's failure to: (a) satisfactorily explain a material misstatement discovered as the result of an audit pursuant to this provision; or (b) make available for inspection all necessary documents or property belonging to the debtor that are requested in connection with such audit. Section 603(e) provides that the amendments made by this provision take effect 18 months after the Act's date of enactment.

Sec. 604. Sense of Congress Regarding Availability of Bankruptcy Data. Section 604 expresses a sense of the Congress that it is a national policy of the United States that all data collected by bankruptcy clerks in electronic form (to the extent such data relates to public records pursuant to section 107 of the Bankruptcy Code) should be made available to the public in a useable electronic form in bulk, subject to appropriate privacy concerns and safeguards as determined by the Judicial Conference of the United States. It also states that a uniform bankruptcy data system should be established that uses a single set of data definitions and forms to collect such data and that data for any particular bankruptcy case should be aggregated in electronic format.

TITLE VII. BANKRUPTCY TAX PROVISIONS

Sec. 701. Treatment of Certain Tax Liens. Subsection (a) of section 701 of the Act makes several amendments to section 724 of the Bankruptcy Code to provide greater protection for holders of tax liens on real or personal property of the estate, particularly holders of *ad valorem* tax liens. Many school boards obtain liens on real property to ensure collection of unpaid *ad valorem* taxes. Under current law, local governments are sometimes unable to collect these taxes despite the presence of a lien because they may be subordinated to certain claims and expenses as a result of section 724. Pursuant to section 701(a), subordination of *ad valorem* tax liens is still possible under section 724(b), but limited to the payment of: (1) claims for wages, salaries, and commissions entitled to priority under section 507(a)(4); and (2) claims for contributions to employee benefit plans entitled to priority under section 507(a)(5). Section 701(a) will also protect the holders of these tax liens as well as Federal tax liens from erosion of their claims' status by expenses incurred under chapter 11 of the Bankruptcy Code. Before a tax lien on real or personal property may be subordinated pursuant to section 724, the chapter 7 trustee must exhaust all other unencumbered estate assets and, consistent with section 506, recover reasonably necessary costs and expenses of preserving or disposing of such property.

Section 701(b) amends section 505(a)(2) of the Bankruptcy Code to prevent a bankruptcy court from determining the amount or legality of an *ad valorem* tax on real or personal property if the applicable period for contesting or redetermining the amount of the claim under nonbankruptcy law has expired.

Sec. 702. Treatment of Fuel Tax Claims. Section 702 of the Act amends section 501 of the Bankruptcy Code to simplify the process for filing of claims by states for certain fuel taxes. Rather than requiring each state to file a claim for these taxes (as is the case under current law), section 702 permits the designated "base jurisdiction" under the International Fuel Tax Agreement to file a claim on behalf of all states, which would then be allowed as a single claim.

Sec. 703. Notice of Request for a Determination of Taxes. Under current law, a trustee or debtor in possession may request a governmental unit to determine administrative tax liabilities in order to receive a discharge of those liabilities. There are no requirements as to the content or form of such notice to the government. Section 703 of the Act amends section 505(b) of the Bankruptcy Code to require the clerk of each district to maintain a list of addresses designated by governmental units for service of section 505 requests. In addition, the list may also include information concerning filing requirements specified by such governmental units. If a governmental entity does not designate an address and provide that address to the bankruptcy court clerk, any request made under section 505(b) of the Bankruptcy Code may be served at the address for the filing of a tax return or protest of the appropriate taxing authority of that governmental unit.

Sec. 704. Rate of Interest on Tax Claims. Under current law, there is no uniform rate of interest applicable to tax claims. As a result, varying standards have been used to determine the applicable rate. Section 704 of the Act amends the Bankruptcy Code to add section 511 for the purpose of simplifying the interest rate calculation. It provides that for all tax claims (federal, state, and local), including administrative expense taxes, the interest rate shall be determined in accordance with applicable nonbankruptcy law. With respect to taxes paid under a confirmed plan, the rate of interest is determined as of the calendar month in which the plan is confirmed.

Sec. 705. Priority of Tax Claims. Under current law, a tax claim is entitled to be treated as a priority claim if it arises within certain specified time periods. In the case of income taxes, a priority arises, among other time periods, if the tax return was due within three years of the filing of the bankruptcy petition or if the assessment of the tax was made within 240 days of the filing of the petition. The 240-day period is tolled during the time that an offer in compromise is pending (plus 30 days). Though the statute is silent, the Supreme Court in *Young v. United States,* 535 U.S. 93 (2002) held that the three-year period is tolled during the pendency of a previous bankruptcy case. Section 705 amends section 507(a)(8) of the Bankruptcy Code to codify the rule tolling priority periods during the pendency of a previous bankruptcy case during that three-year or 240-day period together with an additional 90 days. It also includes tolling provisions to adjust for the collection due process rights provided by the Internal Revenue Service Restructuring and Reform Act of 1998. During any period in which the government is prohibited from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken against the debtor, the priority is tolled, plus 90 days. Also, during any time in which there was a stay of proceedings in a prior bankruptcy case or collection of an income tax was precluded by a confirmed bankruptcy plan, the priority is tolled, plus 90 days.

Sec. 706. Priority Property Taxes Incurred. Under current law, many provisions of the Bankruptcy Code are keyed to the word "assessed." While this term has an accepted meaning in the Federal system, it is not used in many state and local statutes and has created some confusion. To eliminate this problem with respect to real property taxes, section 706 amends section 507(a)(8)(B) of the Bankruptcy Code by replacing the word "assessed" with "incurred."

Sec. 707. No Discharge of Fraudulent Taxes in Chapter 13. Under current law, a debtor's ability to discharge tax debts varies depending on whether the debtor is in chapter 7 or chapter 13. In a chapter 7 case, taxes that are not dischargeable include taxes from a return due within three years of the petition date, taxes assessed within 240 days, or taxes related to an unfiled return or false return. Chapter 13, on the other hand, allows these obligations to be discharged. Section 707 of the Act amends Bankruptcy Code section 1328(a)(2) to prohibit the discharge of tax claims described in section 523(a)(1)(B) and (C) as well as claims for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity pursuant to section 507(a)(8)(C).

Sec. 708. No Discharge of Fraudulent Taxes in Chapter 11. Under current law, the confirmation of a chapter 11 plan discharges a corporate debtor from most debts. Section 708 amends section 1141(d) of the Bankruptcy Code to except from discharge in a corporate chapter 11 case a debt specified in subsections 523(a)(2)(A) or (B) of the Bankruptcy Code owed to a domestic governmental unit. In addition, it excepts from discharge a debt owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code or any similar state statute. Section 708 excepts from discharge a debt for a tax or customs duty with respect to which the debtor made a fraudulent tax return or willfully attempted in any manner to evade or defeat such tax.

Sec. 709. Stay of Tax Proceedings Limited to Prepetition Taxes. Under current law, the filing of a petition for relief under the Bankruptcy Code activates an automatic stay that enjoins the commencement or continuation of a case in the United States Tax Court. This rule was arguably extended in *Halpern v. Commissioner,*[100] which held that the tax court did not have jurisdiction to hear a case involving a postpetition year. To address this issue, section 709 of the Act amends section 362(a)(8) of the Bankruptcy Code to specify that the automatic stay is limited to an individual debtor's prepetition taxes (taxes incurred before entering bankruptcy). The amendment clarifies that the automatic stay does not apply to an individual debtor's postpetition taxes. In addition, section 709 provides that the stay applies to both prepetition and postpetition tax liabilities of a corporation so long as it is a liability that the bankruptcy court may determine.

Sec. 710. Periodic Payment of Taxes in Chapter 11 Cases. Section 710 of the Act amends section 1129(a)(9) of the Bankruptcy Code to provide that the allowed amount of priority tax claims (as of the plan's effective date) must be paid in regular cash installments within five years from the entry of the order for relief. The manner of payment may not be less favorable than that accorded the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)). In addition, it requires the same payment treatment to be accorded to a secured claim that would otherwise meet the description of an unsecured claim under section 507(a)(8).

Sec. 711. Avoidance of Statutory Liens Prohibited. The Internal Revenue Code gives special protections to certain purchasers of securities and motor vehicles notwithstanding the existence of a filed tax lien. Section 711 of the Act amends section 545(2) of the Bankruptcy Code to prevent that provision's special protections from being used to avoid an otherwise valid lien. Specifically, it prevents the avoidance of unperfected liens against a bona fide purchaser, if the purchaser qualifies as such under section 6323 of the Internal Revenue Code or a similar provision under state or local law.

Sec. 712. Payment of Taxes in the Conduct of Business. Although current law generally requires trustees and receivers to pay taxes in the ordinary course of the debtor's business, the payment of administrative expenses must first be authorized by the court. Section 712(a) of the Act amends section 960 of title 28 of the United

[100] 96 T.C. 895 (1991).

States Code to clarify that postpetition taxes in the ordinary course of business must be paid on or before when such tax is due under applicable nonbankruptcy law, with certain exceptions. This requirement does not apply if the obligation is a property tax secured by a lien against property that is abandoned under section 554 within a reasonable time after the lien attaches. In addition, the requirement does not pertain where the payment is excused under the Bankruptcy Code. With respect to chapter 7 cases, section 712(a) provides that the payment of a tax claim may be deferred until final distribution pursuant to section 726 if the tax was not incurred by a chapter 7 trustee or if the court, prior to the due date of the tax, finds that the estate has insufficient funds to pay all administrative expenses in full. Section 712(b) amends section 503(b)(1)(B)(i) of the Bankruptcy Code to clarify that this provision applies to secured as well as unsecured tax claims, including property taxes based on liability that is *in rem, in personam* or both. Section 712(c) amends section 503(b)(1) to exempt a governmental unit from the requirement to file a request for payment of an administrative expense. Section 712(d)(1) amends section 506(b) to provide that to the extent that an allowed claim is oversecured, the holder is entitled to interest and any reasonable fees, costs, or charges provided for under state law. Section 712(d)(2), in turn, amends section 506(c) to permit a trustee to recover from a secured creditor the payment of all *ad valorem* property taxes.

Sec. 713. Tardily Filed Priority Tax Claims. Section 713 of the Act amends section 726(a)(1) of the Bankruptcy Code to require a claim under section 507 that is not timely filed pursuant to section 501 to be entitled to a distribution if such claim is filed the earlier of the date that is ten days following the mailing to creditors of the summary of the trustee's final report or before the trustee commences final distribution.

Sec. 714. Income Tax Returns Prepared by Tax Authorities. Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).

Sec. 715. Discharge of the Estate's Liability for Unpaid Taxes. Under the Bankruptcy Code, a trustee or debtor in possession may request a prompt audit to determine postpetition tax liabilities incurred by the bankruptcy estate. If the government does not make a determination or request an extension of time to audit, then the trustee or debtor in possession is discharged from any such tax liability. Several court cases have held that while this protects the debtor and the trustee, it does not necessarily protect the estate. Section 715 of the Act amends section 505(b) of the Bankruptcy Code to clarify that the estate is also protected if the government does not make a determination or request an extension of time to audit the debtor's tax returns. Therefore, if the government does not make a determination of postpetition tax liabilities or request extension of time to audit, then the estate's liability for unpaid taxes is discharged.

Sec. 716. Requirement to File Tax Returns to Confirm Chapter 13 Plans. Under current law, a debtor may enjoy the benefits of chapter 13 even if delinquent in the filing of tax returns. Section 716 of the Act responds to this problem. Subsection (a) amends section 1325(a) of the Bankruptcy Code to require a chapter 13 debtor to file all applicable Federal, state, and local tax returns as a condition of confirmation as required by section 1308 (as added by section 716(b)). Section 716(b) adds section 1308 to chapter 13 to require a chapter 13 debtor to be current on the filing of tax returns for the four-year period preceding the filing of the case. If the returns are not filed by the date on which the meeting of creditors is first scheduled, the trustee may hold open that meeting for a reasonable period of time to allow the debtor to file any unfiled returns. The additional period of time may not extend beyond 120 days after the date of the meeting of the creditors or beyond the date on which the return is due under the last automatic extension of time for filing. The debtor, however, may obtain an extension of time from the court if the debtor demonstrates by a preponderance of the evidence that the failure to file was attributable to circumstances beyond the debtor's control.

Section 716(c) amends section 1307 of the Bankruptcy Code to provide that if a chapter 13 debtor fails to file a tax return as required by section 1308, the court must dismiss the case or convert it to one under chapter 7 (whichever is in the best interests of creditors and the estate) on request of a party in interest or the United States trustee after notice and a hearing.

Section 716(d) amends section 502(b)(9) of the Bankruptcy Code to provide that in a chapter 13 case, a governmental unit's tax claim based on a return filed under section 1308 shall be deemed to be timely filed if the claim is filed within 60 days from the date on which such return is filed. Section 716(e) states the sense of the Congress that the Judicial Conference of the United States should propose for adoption official rules with respect an objection by a governmental unit to confirmation of a chapter 13 plan when such claim pertains to a tax return filed pursuant to section 1308.

Sec. 717. Standards for Tax Disclosure. Before creditors and stockholders may be solicited to vote on a chapter 11 plan, the plan proponent must file a disclosure statement that provides adequate information to holders of claims and interests so they can make a decision as to whether or not to vote in favor of the plan. As the tax consequences of a plan can have a significant impact on the debtor's reorganization prospects, section 717 amends section 1125(a) of the Bankruptcy Code to require that a chapter 11 disclosure statement discuss the plan's potential material Federal tax consequences to the debtor, any successor to the debtor, and to a hypothetical investor that is representative of the claimants and interest holders in the case.

Sec. 718. Setoff of Tax Refunds. Under current law, the filing of a bankruptcy petition automatically stays the setoff of a prepetition tax refund against a prepetition tax obligation unless the bankruptcy court approves the setoff. Interest and penalties that may continue to accrue may also be nondischargeable pursuant to section 523(a)(1) of the Bankruptcy Code and cause individual debtors undue hardship. Section 718 of the Act amends section 362(b) of the Bankruptcy Code to create an exception to the automatic stay whereby such setoff could occur without court order unless it would not be permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of the tax liability. In that circumstance, the governmental authority may hold the refund pending resolution of the action, unless the court, on motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection pursuant to section 361.

Sec. 719. Special Provisions Related to the Treatment of State and Local Taxes. Section 719 of the Act conforms state and local income tax administrative issues to the Internal Revenue Code. For example, under Federal law, a bankruptcy petitioner filing on March 5 has two tax years (January 1 to March 4, and March 5 to December 31). Under the Bankruptcy Code, however, state and local tax years are divided differently (January 1 to March 5, and March 6 to December 31). Section 719 requires the states to follow the Federal convention. It conforms state and local tax administration to the Internal Revenue Code in the following areas: division of tax liabilities and responsibilities between the estate and the debtor, tax consequences with respect to partnerships and transfers of property, and the taxable period of a debtor. Section 719 does not conform state and local tax rates to Federal tax rates.

Sec. 720. Dismissal for Failure to Timely File Tax Returns. Under existing law, there is no definitive rule with respect to whether a bankruptcy court may dismiss a bankruptcy case if the debtor fails to file returns for taxes incurred postpetition. Section 720 of the Act amends section 521 of the Bankruptcy Code to allow a taxing authority to request that the court dismiss or convert a bankruptcy case if the debtor fails to file a postpetition tax return or obtain an extension. If the debtor does not file the required return or obtain the extension within 90 days from the time of the request by the taxing authority to file the return, the court must convert or dismiss the case, whichever is in the best interest of creditors and the estate.

TITLE VIII. ANCILLARY AND OTHER CROSS-BORDER CASES

Title VIII of the Act adds a new chapter to the Bankruptcy Code for transnational bankruptcy cases. It incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. Title VIII is intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross-border insolvencies, which protects the interests of creditors and other interested parties, including the debtor. In addition, it serves to protect and maximize the value of the debtor's assets.

Sec. 801. Amendment to Add Chapter 15 to Title 11, United States Code. Section 801 introduces chapter 15 to the Bankruptcy Code, which is the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") at its Thirtieth Session on May 12–30, 1997.[101] Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.[102] If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives. In any case, an order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative.

Sec. 1501. Purpose and scope of application. Section 1501 combines the Preamble to the Model Law (subsection (1)) with its article 1 (subsections (2) and (3)).[103] It largely tracks the language of the Model Law with appropriate United States references. However, it adds in subsection (3) an exclusion of certain natural persons who may be considered ordinary consumers. Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that such exclusion would be necessary in countries like the United States where there are special provisions for consumer debtors in the insolvency laws.[104]

The reference to section 109(e) essentially defines "consumer debtors" for purposes of the exclusion by incorporating the debt limitations of that section, but not its requirement of regular income. The exclusion adds a requirement that the debtor or debtor couple be citizens or long-term legal residents of the United States. This ensures that residents of other countries will not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere.

The first exclusion in subsection (c) constitutes, for the United States, the exclusion provided in article 1, subsection (2), of the Model Law.[105] Foreign representatives of foreign proceedings which are excluded from the scope of chapter 15 may seek comity from courts other than the bankruptcy court since the limitations of section 1509(b)(2) and (3) would not apply to them.

The reference to section 109(b) interpolates into chapter 15 the entities governed by specialized insolvency regimes under United States law which are currently excluded from liquidation proceedings under title 11. Section 1501 contains an exception to the section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under chapter 15 as they had been under section 304. However, section 1501(d) has the effect of leaving to State regulation any deposit, es-

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[101] The text of the Model Law and the Report of UNCITRAL on its adoption are found at U.N. G.A., 52d Sess., Supp. No. 17 (A/52/17) ("Report"). That Report and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess. U.N. Doc. A/CN.9/442 (1997) ("Guide"), which was discussed in the negotiations leading to the Model Law and published by UNCITRAL as an aid to enacting countries, should be consulted for guidance as to the meaning and purpose of its provisions. The development of the provisions in the negotiations at UNCITRAL, in which the United States was an active participant, is recounted in the interim reports of the Working Group that are cited in the Report.

[102] *See* section 1529 and commentary.

[103] Guide at 16–19.

[104] *See id.* at 18, ¶60; 19 ¶66.

[105] *Id.* at 17.

crow, trust fund or the like posted by a foreign insurer under State law.

Sec. 1502. Definitions. "Debtor" is given a special definition for this chapter. This definition does not come from the Model Law, but is necessary to eliminate the need to refer repeatedly to "the same debtor as in the foreign proceeding." With certain exceptions, the term "person" used in the Model Law has been replaced with "entity," which is defined broadly in section 101(15) to include natural persons and various legal entities, thus matching the intended breadth of the term "person" in the Model Law. The exceptions include contexts in which a natural person is intended and those in which the Model Law language already refers to both persons and entities other than persons. The definition of "trustee" for this chapter ensures that debtors in possession and debtors, as well as trustees, are included in the term.[106]

The definition of "within the territorial jurisdiction of the United States" in subsection (7) is not taken from the Model Law. It has been added because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state. In addition, a definition of "recognition" supplements the Model Law definitions and merely simplifies drafting of various other sections of chapter 15.

Two key definitions of "foreign proceeding" and "foreign representative," are found in sections 101(23) and (24), which have been amended consistent with Model Law article 2.[107] The definitions of "establishment," "foreign court," "foreign main proceeding," and "foreign non-main proceeding" have been taken from Model Law article 2, with only minor language variations necessary to comport with United States terminology. Additionally, defined terms have been placed in alphabetical order.[108] In order to be recognized as a foreign non-main proceeding, the debtor must at least have an establishment in that foreign country.[109]

Sec. 1503. International obligations of the United States. This section is taken exactly from the Model Law with only minor adaptations of terminology.[110] Although this section makes an international obligation prevail over chapter 15, the courts will attempt to read the Model Law and the international obligation so as not to conflict, especially if the international obligation addresses a subject matter less directly related than the Model Law to a case before the court.

Sec. 1504. Commencement of ancillary case. Article 4 of the Model Law is designed for designation of the competent court which will exercise jurisdiction under the Model Law. In United States law, section 1334(a) of title 28 gives exclusive jurisdiction to the district

[106] *See* section 1505.
[107] Guide at 19–21, ¶¶67–68.
[108] *See* Guide at 19, (Model Law) 21 ¶75 (concerning establishment); 21 ¶74 (concerning foreign court); 21 ¶¶72, 73 and 75 (concerning foreign main and non-main proceedings).
[109] *See id.* at 21, ¶75.
[110] *See id.* at 22, Art. 3.

courts in a "case" under this title.[111] Therefore, since the competent court has been determined in title 28, this section instead provides that a petition for recognition commences a "case," an approach that also invokes a number of other useful procedural provisions. In addition, a new subsection (P) to section 157 of title 28 makes cases under this chapter part of the core jurisdiction of bankruptcy courts if referred by the district courts, thus completing the designation of the competent court. Finally, the particular bankruptcy court that will rule on the petition is determined pursuant to a revised section 1410 of title 28 governing venue and transfer.[112]

The title "ancillary" in the title of this section and in the title of this chapter emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called "secondary" proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States, the court will have the power to suspend or dismiss such cases where appropriate under section 305.

Sec. 1505. Authorization to act in a foreign country. The language in this section varies from the wording of article 5 of the Model Law as necessary to comport with United States law and terminology. The slight alteration to the language in the last sentence is meant to emphasize that the identification of the trustee or other entity entitled to act is under United States law, while the scope of actions that may be taken by the trustee or other entity under foreign law is limited by the foreign law.[113]

The related amendment to section 586(a)(3) of title 28 makes acting pursuant to authorization under this section an additional power of a trustee or debtor in possession. While the Model Law automatically authorizes an administrator to act abroad, this section requires all trustees and debtors to obtain court approval before acting abroad. That requirement is a change from the language of the Model Law, but one that is purely internal to United States law.[114] Its main purpose is to ensure that the court has knowledge and control of possibly expensive activities, but it will have the collateral benefit of providing further assurance to foreign courts that the United States debtor or representative is under judicial authority and supervision. This requirement means that the

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[111] *See id.* at 23, Art. 4.

[112] New section 1410 of title 28 provides as follows:

A case under chapter 15 of title 11 may be commenced in the district court for the district——

(1) in which the debtor has its principal place of business or principal assets in the United States;

(2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding or enforcement of judgment in a Federal or State court; or

(3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative.

[113] *See* Guide at 24.

[114] *See id.* at 24, Art. 5.

first-day orders in reorganization cases should include authorization to act under this section where appropriate.

This section also contemplates the designation of an examiner or other natural person to act for the estate in one or more foreign countries where appropriate. One instance might be a case in which the designated person had a special expertise relevant to that assignment. Another might be where the foreign court would be more comfortable with a designated person than with an entity like a debtor in possession. Either are to be recognized under the Model Law.[115]

Sec. 1506. Public policy exception. This provision follows the Model Law article 5 exactly, is standard in UNCITRAL texts, and has been narrowly interpreted on a consistent basis in courts around the world. The word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.[116]

Sec. 1507. Additional assistance. Subsection (1) follows the language of Model Law article 7.[117] Subsection (2) makes the authority for additional relief (beyond that permitted under sections 1519–1521, below) subject to the conditions for relief heretofore specified in United States law under section 304, which is repealed. This section is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter. The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law. The references to "estate" in section 304 have been changed to refer to the debtor's property, because many foreign systems do not create an estate in insolvency proceedings of the sort recognized under this chapter. Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.[118]

Sec. 1508. Interpretation. This provision follows conceptually Model Law article 8 and is a standard one in recent UNCITRAL treaties and model laws. Changes to the language were made to express the concepts more clearly in United States vernacular.[119] Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties,

[115] *See id.* at 23–24, ¶82.
[116] *See id.* at 25.
[117] *Id.* at 26.
[118] *Id.*
[119] *Id.* at 26, ¶91.

model laws, and other text promulgated by UNCITRAL. Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.

Sec. 1509. Right of direct access. This section implements the purpose of article 9 of the Model Law, enabling a foreign representative to commence a case under this chapter by filing a petition directly with the court without preliminary formalities that may delay or prevent relief. It varies the language to fit United States procedural requirements and it imposes recognition of the foreign proceeding as a condition to further rights and duties of the foreign representative. If recognition is granted, the foreign representative will have full capacity under United States law (subsection (b)(1)), may request such relief in a state or Federal court other than the bankruptcy court (subsection (b)(2)), and shall be granted comity or cooperation by such non-bankruptcy court (subsection (b)(3) and (c)). Subsections (b)(2), (b)(3), and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a Federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the Model Law ("competent court") as well as article 9.[120]

Although a petition under current section 304 is the proper method for achieving deference by a United States court to a foreign insolvency proceeding under present law, some cases in state and Federal courts under current law have granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.[121]

Subsection (d) has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied recognition by the court under this chapter. Subsection (e) makes activities in the United States by a foreign representative subject to applicable United States law, just as 28 U.S.C. section 959 does for a domestic trustee in bankruptcy.[122] Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for exam-

[120] *See id.* at 23, Art. 4, ¶¶79–83; 27 Art. 9, ¶93.
[121] *See id.* at 27, Art. 9; 34–35, Art. 15 and ¶¶116–119; 39–40, Art. 18, ¶¶133–134; *see also* sections 1515(3), 1518.
[122] *Id.* at 27, ¶93.

ple an account receivable, by a foreign representative may proceed without commencement of a case or recognition under this chapter.

Sec. 1510. Limited jurisdiction. Section 1510, article 10 of the Model Law, is modeled on section 306 of the Bankruptcy Code. Although the language referring to conditional relief in section 306 is not included, the court has the power under section 1522 to attach appropriate conditions to any relief it may grant. Nevertheless, the authority in section 1522 is not intended to permit the imposition of jurisdiction over the foreign representative beyond the boundaries of the case under this chapter and any related actions the foreign representative may take, such as commencing a case under another chapter of this title.

Sec. 1511. Commencement of Case Under Section 301 or 303. This section reflects the intent of article 11 of the Model Law, but adds language that conforms to United States law or that is otherwise necessary in the United States given its many bankruptcy court districts and the importance of full information and coordination among them.[123] Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding.[124] Subsection 1(a)(2) goes farther and permits a voluntary filing, with its much simpler requirements, if the foreign proceeding that has been recognized is a main proceeding.

Sec. 1512. Participation of a foreign representative in a case under this title. This section tracks article 12 of the Model Law with a slight alteration to tie into United States procedural terminology.[125] The effect of this section is to make the recognized foreign representative a party in interest in any pending or later commenced United States bankruptcy case.[126] Throughout this chapter, the word "case" has been substituted for the word "proceeding" in the Model Law when referring to cases under the United States Bankruptcy Code, to conform to United States usage.

Sec. 1513. Access of foreign creditors to a case under this title. This section mandates nondiscriminatory or "national" treatment for foreign creditors, except as provided in subsection (b) and section 1514. It follows the intent of Model Law article 13, but the language required alteration to fit into the Bankruptcy Code.[127] The law as to priority for foreign claims that fit within a class given priority treatment under section 507 (for example, foreign employees or spouses) is unsettled. This section permits the continued development of case law on that subject and its general principle of national treatment should be an important factor to be considered. At a minimum, under this section, foreign claims must receive the treatment given to general unsecured claims without priority, unless they are in a class of claims in which domestic creditors would also be subordinated.[128] The Model Law allows for an exception to the policy of nondiscrimination as to foreign revenue and other

[123] *See id.* at 28, Art. 11.
[124] *Id.* at 38, ¶¶97–99.
[125] *Id.* at 29, Art. 12.
[126] *Id.* at 29, ¶¶10–102.
[127] *Id.* at 30, ¶103.
[128] *See id.* at 30, ¶104.

public law claims.[129] Such claims (such as tax and Social Security claims) have been traditionally denied enforcement in the United States, inside and outside of bankruptcy. The Bankruptcy Code is silent on this point, so the rule is purely a matter of traditional case law. It is not clear if this policy should be maintained or modified, so this section leaves this question to developing case law. It also allows the Department of the Treasury to negotiate reciprocal arrangements with our tax treaty partners in this regard, although it does not mandate any restriction of the evolution of case law pending such negotiations.

Sec. 1514. Notification of foreign creditors concerning a case under title 11. This section ensures that foreign creditors receive proper notice of cases in the United States.[130] As "foreign creditor" is not a defined term, foreign addresses are used as the distinguishing factor. The Federal Rules of Bankruptcy Procedure ("Rules") should be amended to conform to the requirements of this section, including a special form for initial notice to such creditors. In particular, the Rules must provide additional time for such creditors to file proofs of claim where appropriate and require the court to make specific orders in that regard in proper circumstances. The notice must specify that secured claims must be asserted, because in many countries such claims are not affected by an insolvency proceeding and need not be filed.[131] If a foreign creditor has made an appropriate request for notice, it will receive notices in every instance where notices would be sent to other creditors who have made such requests. Subsection (d) replaces the reference to "a reasonable time period" in Model Law article 14(3)(a).[132] It makes clear that the Rules, local rules, and court orders must make appropriate adjustments in time periods and bar dates so that foreign creditors have a reasonable time within which to receive notice or take an action.

Sec. 1515. Application for recognition of a foreign proceeding. This section follows article 15 of the Model Law with minor changes.[133] The Rules will require amendment to provide forms for some or all of the documents mentioned in this section, to make necessary additions to Rules 1000 and 2002 to facilitate appropriate notices of the hearing on the petition for recognition, and to require filing of lists of creditors and other interested persons who should receive notices. Throughout the Model Law, the question of notice procedure is left to the law of the enacting state.[134]

Sec. 1516. Presumptions concerning recognition. This section follows article 16 of the Model Law with minor changes.[135] Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may hear proof on any element stated. The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word "proof" in subsection (3) has been changed to "evidence" to make it clearer using United

[129] *See id.* at 31, ¶105.
[130] *See* Model Law, Art. 14; Guide at 31–32, ¶¶106–109.
[131] Guide at 33, ¶111.
[132] *Id.* at 31, Art. 14(3)(a).
[133] *Id.* at 33.
[134] *See id.* at 36, ¶121.
[135] *Id.* at 36

States terminology that the ultimate burden is on the foreign representative.[136] "Registered office" is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person.[137] The presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy.

Sec. 1517. Order granting recognition. This section closely tracks article 17 of the Model Law, with a few exceptions.[138] The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) of the Bankruptcy Code. The requirements of this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition. Reciprocity was specifically suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law. It was rejected by overwhelming consensus each time. The United States was one of the leading countries opposing the inclusion of a reciprocity requirement.[139] In this regard, the Model Law conforms to section 304, which has no such requirement.

The drafters of the Model Law understood that only a main proceeding or a non-main proceeding meeting the standards of section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition under this section. The Model Law has been slightly modified to make this point clear by referring to the section 1502 definition of main and non-main proceedings, as well as to the general definition of a foreign proceeding in section 101(23). A petition under section 1515 must show that proceeding is a main or a qualifying non-main proceeding in order to obtain recognition under this section.

Consistent with the position of various civil law representatives in the drafting of the Model Law, recognition creates a status with the effects set forth in section 1520, so those effects are not viewed as orders to be modified, as are orders granting relief under sections 1519 and 1521. Subsection (4) states the grounds for modifying or terminating recognition. On the other hand, the effects of recognition (found in section 1520 and including an automatic stay) are subject to modification under section 362(d), made applicable by section 1520(2), which permits relief from the automatic stay of section 1520 for cause.

Paragraph 1(d) of section 17 of the Model Law has been omitted as an unnecessary requirement for United States purposes, because a petition submitted to the wrong court will be dismissed or transferred under other provisions of United States law.[140] The reference to section 350 refers to the routine closing of a case that has been completed and will invoke requirements including a final re-

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[136] *Id.* at 36, Art. 16(3).
[137] *Id.*
[138] *Id.* at 37.
[139] Report of the Working Group on Insolvency Law on the Work of Its Twentieth Session (Vienna, 7–18 Oct. 1996), at 6, ¶¶16–20.
[140] Guide at 37, Art. 17(1)(d).

port from the foreign representative in such form as the Rules may provide or a court may order.[141]

Sec. 1518. Subsequent information. This section follows the Model Law, except to eliminate the word "same," which is rendered unnecessary by the definition of "debtor" in section 1502, and to provide for a formal document to be filed with the court.[142] Judges in several jurisdictions, including the United States, have reported a need for a requirement of complete and candid reports to the court of all proceedings, worldwide, involving the debtor. This section will ensure that such information is provided to the court on a timely basis. Any failure to comply with this section will be subject to the sanctions available to the court for violations of the statute. The section leaves to the Rules the form of the required notice and related questions of notice to parties in interest, the time for filing, and the like.

Sec. 1519. Relief may be granted upon petition for recognition of a foreign proceeding. This section generally follows article 19 of the Model Law.[143] The bankruptcy court will have jurisdiction to grant emergency relief under Rule 7065 pending a hearing on the petition for recognition. This section does not expand or reduce the scope of section 105 as determined by cases under section 105 nor does it modify the sweep of sections 555 to 560. Subsection (d) precludes injunctive relief against police and regulatory action under section 1519, leaving section 105 as the only avenue for such relief. Subsection (e) makes clear that this section contemplates injunctive relief and that such relief is subject to specific rules and a body of jurisprudence. Subsection (f) was added to complement amendments to the Bankruptcy Code provisions dealing with financial contracts.

Sec. 1520. Effects of recognition of a foreign main proceeding. In general, this chapter sets forth all the relief that is available as a matter of right based upon recognition hereunder, although additional assistance may be provided under section 1507 and this chapter has no effect on any relief currently available under section 105. The stay created by article 20 of the Model Law is imported to chapter 15 from existing provisions of the Code. Subsection (a)(1) combines subsections 1(a) and (b) of article 20 of the Model Law, because section 362 imposes the restrictions required by those two subsections as well as additional restrictions.[144]

Subsections (a)(2) and (4) apply the Bankruptcy Code sections that impose the restrictions called for by subsection 1(c) of the Model Law. In both cases, the provisions are broader and more complete than those contemplated by the Model Law, but include all the restraints the Model Law provisions would impose.[145] As the foreign proceeding may or may not create an "estate" similar to that created in cases under this title, the restraints are applicable to actions against the debtor under section 362(a) and with respect to the property of the debtor under the remaining sections. The only property covered by this section is property within the

[141] *Id.*
[142] *Id.* at 39–40, ¶¶133, 134.
[143] *Id.* at 40.
[144] *Id.* at 42, Art. 20 1(a), (b).
[145] *Id.* at 42, 45.

territorial jurisdiction of the United States as defined in section 1502. To achieve effects on property of the debtor which is not within the territorial jurisdiction of the United States, the foreign representative would have to commence a case under another chapter of this title.

By applying sections 361 and 362, subsection (a) makes applicable the United States exceptions and limitations to the restraints imposed on creditors, debtors, and other in a case under this title, as stated in article 20(2) of the Model Law.[146] It also introduces the concept of adequate protection provided in sections 362 and 363. These exceptions and limitations include those set forth in sections 362(b), (c) and (d). As a result, the court has the power to terminate the stay pursuant to section 362(d), for cause, including a failure of adequate protection.[147]

Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor's business and exercise the power of a trustee under sections 363 and 542, unless the court orders otherwise. A foreign representative of a foreign main proceeding may need to continue a business operation to maintain value and granting that authority automatically will eliminate the risk of delay. If the court is uncomfortable about this authority in a particular situation, it can "order otherwise" as part of the order granting recognition.

Two special exceptions to the automatic stay are embodied in subsections (b) and (c). To preserve a claim in certain foreign countries, it may be necessary to commence an action. Subsection (b) permits the commencement of such an action, but would not allow for its further prosecution. Subsection (c) provides that there is no stay of the commencement of a full United States bankruptcy case. This essentially provides an escape hatch through which any entity, including the foreign representative, can flee into a full case. The full case, however, will remain subject to subchapters IV and V on cooperation and coordination of proceedings and to section 305 providing for stay or dismissal. Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3), so no exception is necessary for claims that might be extinguished under United States law.[148]

Sec. 1521. Relief that may be granted upon recognition of a foreign proceeding. This section follows article 21 of the Model Law, with detailed changes to conform to United States law.[149] The exceptions in subsection (a)(7) relate to avoiding powers. The foreign representative's status as to such powers is governed by section 1523 below. The avoiding power in section 549 and the exceptions to that power are covered by section 1520(a)(2). The word "adequately" in the Model Law, articles 21(2) and 22(1), has been changed to "sufficiently" in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, "adequate protection."[150] Subsection (c) is designed to limit relief to assets having some direct connection with a non-main proceeding, for ex-

[146] *Id.* at 42, Art. 20(2); 44, ¶¶ 148, 150.
[147] *Id.* at 42, Art. 20(3); 44–45, ¶¶ 151 152.
[148] *Id.*
[149] *Id.* at 45–46, Art. 21.
[150] *Id.* at 46, Art. 21(2); 47, Art. 22(1).

ample where they were part of an operating division in the jurisdiction of the non-main proceeding when they were fraudulently conveyed and then brought to the United States.[151] Subsections (d), (e) and (f) are identical to those same subsections of section 1519. This section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304 nor does it modify the sweep of sections 555 through 560.

Sec. 1522. Protection of creditors and other interested persons. This section follows article 22 of the Model Law with changes for United States usage and references to relevant Bankruptcy Code sections.[152] It gives the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors. For a response to a showing that the conditions necessary to recognition did not actually exist or have ceased to exist, see section 1517. Concerning the change of "adequately" in the Model Law to "sufficiently" in this section, see section 1521. Subsection (d) is new and simply makes clear that Bankruptcy Code section 1104(d) shall apply to the appointment of an examiner appointed in a case under chapter 15 and such examiner shall be subject to certain duties and bonding requirements based on those imposed on trustees and examiners under other chapters of this title.

Sec. 1523. Actions to avoid acts detrimental to creditors. This section follows article 23 of the Model Law, with wording to fit it within procedure under this title.[153] It confers standing on a recognized foreign representative to assert an avoidance action but only in a pending case under another chapter of this title. The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.[154] The courts will determine the nature and extent of any such action and what national law may be applicable to such action.

Sec. 1524. Intervention by a foreign representative. The wording is the same as the Model Law, except for a few clarifying words.[155] This section gives the foreign representative whose foreign proceeding has been recognized the right to intervene in United States cases, state or federal, where the debtor is a party. Recognition being an act under Federal bankruptcy law, it must take effect in state as well as Federal courts. This section does not require substituting the foreign representative for the debtor, although that result may be appropriate in some circumstances.

[151] *See id.* at 46–47, ¶¶ 158, 160.
[152] *Id.* at 47.
[153] *Id.* at 48–49.
[154] *See id.* at 49, ¶166.
[155] *Id.* at 49.

Sec. 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives. The wording of this provision is nearly identical to that of the Model Law.[156] The right of courts to communicate with other courts in worldwide insolvency cases is of central importance. This section authorizes courts to do so. This right must be exercised, however, with due regard to the rights of the parties. Guidelines for such communications are left to the Federal rules of bankruptcy procedure.

Sec. 1526 Cooperation and direct communication between the trustee and foreign courts or foreign representatives. This section closely tracks the Model Law.[157] The language in Model Law article 26 concerning the trustee's function was eliminated as unnecessary because it is always implied under United States law. The section authorizes the trustee, including a debtor in possession, to cooperate with other proceedings.

Sec. 1527. Forms of cooperation. This section is identical to the Model Law.[158] United States bankruptcy courts already engage in most of the forms of cooperation described here, but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases.[159]

Sec. 1528. Commencement of a case under title 11 after recognition of a foreign main proceeding. This section follows the Model Law, with specifics of United States law replacing the general clause at the end of the section to cover assets normally included within the jurisdiction of the United States courts in bankruptcy cases, except where assets are subject to the jurisdiction of another recognized proceeding.[160] In a full bankruptcy case, the United States bankruptcy court generally has jurisdiction over assets outside the United States. Here that jurisdiction is limited where those assets are controlled by another recognized proceeding, if it is a main proceeding.

The court may use section 305 of this title to dismiss, stay, or limit a case as necessary to promote cooperation and coordination in a cross-border case. In addition, although the jurisdictional limitation applies only to United States bankruptcy cases commenced after recognition of a foreign proceeding, the court has ample authority under the next section and section 305 to exercise its discretion to dismiss, stay, or limit a United States case filed after a petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.

Sec. 1529. Coordination of a case under title 11 and a foreign proceeding. This section follows the Model Law almost exactly, but subsection (4) adds a reference to section 305 to make it clear the bankruptcy court may continue to use that section, as under present law, to dismiss or suspend a United States case as part of coordination and cooperation with foreign proceedings.[161] This provision is consistent with United States policy to act ancillary to a foreign main proceeding whenever possible.

[156] *Id.* at 50.
[157] *Id.* at 51.
[158] Guide at 51, 53.
[159] *See e.g., In re* Maxwell Communication Corp., 93 F.2d 1036 (2d Cir. 1996).
[160] Guide at 54–55.
[161] *Id.* at 55–56.

Sec. 1530. Coordination of more than one foreign proceeding. This section follows article 30 of the Model Law exactly.[162] It ensures that a foreign main proceeding will be given primacy in the United States, consistent with the overall approach of the United States favoring assistance to foreign main proceedings.

Sec. 1531. Presumption of insolvency based on recognition of a foreign main proceeding. This section follows the Model Law exactly, inserting a reference to the standard for an involuntary case under this title.[163] Where an insolvency proceeding has begun in the home country of the debtor, and in the absence of contrary evidence, the foreign representative should not have to make a new showing that the debtor is in the sort of financial distress requiring a collective judicial remedy. The word "proof" in this provision here means "presumption." The presumption does not arise for any purpose outside this section.

Sec. 1532. Rule of payment in concurrent proceeding. This section follows the Model Law exactly and is very similar to prior section 508(a), which is repealed. The Model Law language is somewhat clearer and broader than the equivalent language of prior section 508(a).[164]

Sec. 802. Other Amendments to Titles 11 and 28, United States Code. Section 802(a) amends section 103 of the Bankruptcy Code to clarify the provisions of the Code that apply to chapter 15 and to specify which portions of chapter 15 apply in cases under other chapters of title 11. Section 802(b) amends the Bankruptcy Code's definitions of foreign proceeding and foreign representative in section 101. The new definitions are nearly identical to those contained in the Model Law but add to the phrase "under a law relating to insolvency" the words "or debt adjustment." This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24).[165]

Section 802(c) amends section 157(b)(2) of title 28 to provide that proceedings under chapter 15 will be core proceedings while other amendments to title 28 provide that the United States trustee's standing extends to cases under chapter 15 and that the United States trustee's duties include acting in chapter 15 cases. Although the United States will continue to assert worldwide jurisdiction over property of a domestic or foreign debtor in a full bankruptcy case under chapters 7 and 13 of this title, subject to deference to foreign proceedings under chapter 15 and section 305, the situation is different in a case commenced under chapter 15. There the United States is acting solely in an ancillary position, so jurisdiction over property is limited to that stated in chapter 15.

Section 802(d) amends section 109 of the Bankruptcy Code to permit recognition of foreign proceedings involving foreign insurance companies and involving foreign banks which do not have a branch or agency in the United States (as defined in 12 U.S.C.

[162] *Id.* at 57.
[163] *Id.* at 58.
[164] *Id.* at 59.
[165] *Id.* at 51–52, 71.

3101). While a foreign bank not subject to United States regulation will be eligible for chapter 15 as a consequence of the amendment to section 109, section 303 prohibits the commencement of a full involuntary case against such a foreign bank unless the bank is a debtor in a foreign proceeding.

While section 304 is repealed and replaced by chapter 15, access to the jurisprudence which developed under section 304 is preserved in the context of new section 1507. On deciding whether to grant the additional assistance contemplated by section 1507, the court must consider the same factors specified in former section 304. The venue provisions for cases ancillary to foreign proceedings have been amended to provide a hierarchy of choices beginning with principal place of business in the United States, if any. If there is no principal place of business in the United States, but there is litigation against a debtor, then the district in which the litigation is pending would be the appropriate venue. In any other case, venue must be determined with reference to the interests of justice and the convenience of the parties.

TITLE IX. FINANCIAL CONTRACT PROVISIONS

Sec. 901. Treatment of Certain Agreements by Conservators of Receivers of Insured Depository Institutions. Subsections (a) through (f) of section 901 of the Act amend the definitions of "qualified financial contract," "securities contract," "commodity contract," "forward contract," "repurchase agreement" and "swap agreement" contained in the Federal Deposit Insurance Act (FDIA) and the Federal Credit Union Act (FCUA) to make them consistent with the definitions in the Bankruptcy Code and to reflect the enactment of the Commodity Futures Modernization Act of 2000 (CFMA). It is intended that the legislative history and case law surrounding those terms, to the date of this amendment, be incorporated into the legislative history of the FDIA and the FCUA.

Subsection (b) amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans," such as credit permitted in a margin account under the Federal Reserve Board's Regulation T (whether or not effected in that account) or arrangements where a financial intermediary—a stockbroker, financial institution, financial participant, or securities agency—extends credit in connection with the purchase, sale, carrying, or trading of securities. "Margin loans" do not include, however, other loans that happen to be secured by securities collateral. The reference in subsection (b) to a "guarantee by or to any securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under the qualified financial contract provisions of the FDIA or FCUA as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the FDIA (and a regulation of the Federal Deposit Insurance Corporation (FDIC)). Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract." Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase, sale or repurchase of a participation may constitute a "securities contract," the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a "securities contract."

A number of terms used in the qualified financial contract provisions, but not defined therein, are intended to have the meanings set forth in the analogous provisions of the Bankruptcy Code or Federal Deposit Insurance Corporation Improvement Act ("FDICIA"), such as, for example, "securities clearing agency." The term "person," however, is not intended to be so interpreted. Instead, "person" is intended to have the meaning set forth in section 1 of title 1 of the United States Code.

Section 901(c) amends with respect the definition of "commodity contract" in section 11(e)(8)(D)(iii) of the FDIA and in section 207(c)(8)(D)(iii) of the FCUA. Section 901(d) amends section 11(e)(8)(D)(iv) of the FDIA and section 207(c)(8)(D)(iv) of the FCUA with respect to the definition of a "forward contract."

Subsection (e) amends the definition of "repurchase agreement" in the FDIA and the FCUA to codify the substance of the FDIC's 1995 regulation defining repurchase agreement to include those on qualified foreign government securities.[166] The term "qualified foreign government securities" is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD), as determined by rule, of the appropriate Federal banking agency. Subsection (e) reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow.

Subsection (e) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and expressly to include principal and interest-only U.S. government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act. This amendment is not intended to affect the status of repos involving securities or

[166] *See* 12 C.F.R. § 360.5.

commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under the qualified financial contract provisions. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the FDIA or FCUA, even if not a "repurchase agreement" as defined in the FDIA or FCUA. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as defined in the FDIA or FCUA, would continue to be a forward contract for purposes of the FDIA or FCUA.

Subsection (e), like subsection (b) for "securities contracts," specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." A repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer, however, would constitute a "repurchase agreement" as well as a "securities contract."

Section 901(f) of the Act amends the definition of "swap agreement" to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions that are the subject of recurring dealings in the swap agreements.

The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract" for the same reason.) To clarify this, subsection (f) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 11(e)(8)(D)(vi) of the FDIA] and is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets . . . and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement," however, should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under the FDIA, the FCUA, or the Bankruptcy Code simply because the parties purport to document or label the transactions as "swap agreements." In addition, these definitions apply only for purposes of the FDIA, the FCUA, and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f). Similarly, Section 17 and a new paragraph of Section 11(e) of the FDIA provide that the definitions of "securities contract," "repurchase agreement," "forward contract," and "commodity contract," and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the FDIA, FCUA, and the Bankruptcy Code. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

Section 901(g) amends the definition of "transfer" in the FDIA and FCUA, which is a key term used in both, to ensure that it is broadly construed to encompass dispositions of property or interests in property. The definition tracks the Bankruptcy Code's definition of this term in Bankruptcy Code section 101.

Section 901(h) makes clarifying technical changes to conform the receivership and conservatorship provisions of the FDIA and the FCUA. It also clarifies that the FDIA and the FCUA expressly protect rights under security agreements, arrangements or other credit enhancements related to one or more qualified financial contracts (QFCs). An example of a security arrangement is a right of setoff, and examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Section 901(i) of the Act clarifies that no provision of Federal or state law relating to the avoidance of preferential or fraudulent transfers (including the anti-preference provision of the National Bank Act) can be invoked to avoid a transfer made in connection with any QFC of an insured depository institution in conservatorship or receivership, absent actual fraudulent intent on the part of the transferee.

Sec. 902. Authority of the FDIC and NCUAB with Respect to Failed and Failing Institutions. Section 902 of the Act provides that no provision of law, including FDICIA, shall be construed to limit the power of the FDIC or the NCUAB to transfer or to repudiate any QFC in accordance with its powers under the FDIA or FCUA, respectively. As discussed below, there has been some uncertainty regarding whether or not FDICIA limits the authority of the FDIC or the NCUAB to transfer or to repudiate QFCs of an insolvent financial institution. Section 902, as well as other provisions in the Act, clarify that FDICIA does not limit the transfer powers of the FDIC or the NCUAB with respect to QFCs. Section 902 denies enforcement to "walkaway" clauses in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party's position or an amount due to or from one of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a non-defaulting party.

Sec. 903. Amendments Relating to Transfers of Qualified Financial Contracts. Section 903 of the Act amends the FDIA and the FCUA to expand the transfer authority of the FDIC and the NCUAB, respectively to permit transfers of QFCs to "financial institutions" as defined in FDICIA or in regulations. This provision will allow the FDIC and NCUAB to transfer QFCs to a non-depository financial institution, provided the institution is not subject to bankruptcy or insolvency proceedings.

The new FDIA and FCUA provisions specify that when the FDIC and NCUAB transfer QFCs that are cleared on or subject to the rules of a particular clearing organization, the transfer will not require the clearing organization to accept the transferee as a member of the organization. This provision gives the FDIC and NCUAB flexibility in resolving QFCs cleared on or subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements. The amendment does not require the clearing organization to accept for clearing any QFCs from the transferee, except on the terms and conditions applicable to other parties permitted to clear through that clearing organization. "Clearing organization" is defined to mean a "clearing organization" within the meaning of FDICIA (as amended both by the CFMA and by Section 906 of the Act).

The new FDIA and FCUA provisions also permit transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person or a U.S. financial institution that is not an FDIC-insured institution if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA and the FCUA. It is expected that neither the FDIC nor the NCUAB would transfer QFCs to such a financial institution if there were an impending change of law that would impair the enforceability of the parties' contractual rights.

Section 903 amends the notification requirements following a transfer of the QFCs of a failed depository institution to require the FDIC and NCUAB to notify any party to a transferred QFC of such transfer by 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the FDIC acting as receiver or following the date of such transfer by the FDIC or NCUAB acting as a conservator. This amendment is consistent with the policy statement on QFCs issued by the FDIC on December 12, 1989.

Section 903 amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment of the FDIC as receiver until 5:00 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, notwithstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly resolution of the insured depository institution. Section 903 makes a similar change to the FCUA.

Section 903 also prohibits the enforcement of rights of termination or liquidation that arise solely because of the insolvency of the institution or are based on the "financial condition" of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be rendered ineffective if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC or NCUAB receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver, or from taking actions based upon a receivership or other financial condition-triggered default in the absence of a transfer (as contemplated in Section 11(e)(10) of the FDIA). The amendment allows the FDIC or NCUAB to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Finally, the amendment permits the FDIC or NCUAB to transfer QFCs of a failed depository institution to a bridge bank or a depository institution organized by the FDIC or NCUAB for which a conservator is appointed either (i) immediately upon the organization of such institution or (ii) at the time of a purchase and assumption transaction between the FDIC or NCUAB and the institution. This provision clarifies that such institutions are not to be considered financial institutions that are ineligible to receive such transfers under FDIA section 11(e)(9). This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Sec. 904. Amendments Relating to Disaffirmance or Repudiation of Qualified Financial Contracts. Section 904 of the Act limits the disaffirmance and repudiation authority of the FDIC and NCUAB with respect to QFCs so that such authority is consistent with their transfer authority under FDIA section 11(e)(9) or FCUA section 207(c). This ensures that no disaffirmance, repudiation or transfer authority of the FDIC or NCUAB may be exercised to "cherry-pick" or otherwise treat independently all the QFCs between a depository institution in default and a person or any affiliate of such person. The FDIC has announced that its policy is not to repudiate or disaffirm QFCs selectively. This unified treatment is fundamental to the reduction of systemic risk.

Sec. 905. Clarifying Amendment Relating to Master Agreements. Section 905 of the Act specifies that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA or the FCUA (but only with respect to the underlying agreements are themselves QFCs). This provision ensures that cross-product netting pursuant to a master agreement, or pursuant to an umbrella agreement for separate master agreements between the same parties, each of which is used to document one or more qualified financial contracts, will be enforceable under the FDIA and the FCUA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant.

Sec. 906. Federal Deposit Insurance Corporation Improvement Act of 1991. Subsection (a)(1) of section 906 of the Act amends the definition of "clearing organization" in section 402 of the FDICIA to include clearinghouses that are subject to exemptions pursuant to orders of the Securities and Exchange Commission or the Commodity Futures Trading Commission and to include multilateral clearing organizations (the definition of which was added to FDICIA by the CFMA).

FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. The current netting provisions of FDICIA, however, limit this protection to "financial institutions," which include depository institutions. Section 906(a)(2) amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group, or only the foreign bank parent of a branch or agency). The latter change will extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the Act, thereby enhancing the safety and soundness of these arrangements. It is intended that a non-defaulting foreign bank and its branches and agencies be considered to be a single financial institution for purposes of the bilateral netting provisions of FDICIA (except to the extent that the non-defaulting foreign bank and its branches and agencies on the one hand, and the defaulting financial institution, on the other, have entered into agreements that clearly evidence an intention that the non-defaulting foreign bank and its branches and agencies be treated as separate financial institutions for purposes of the bilateral netting provisions of FDICIA).

Subsection (a)(3) amends the FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered "members" of each other. This assures the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organizations, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Section 906(a)(4) of the Act amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. Many of these agreements, however, particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of "netting contract" to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract not be invalid under, or precluded by, Federal law.

Section 906(b) and (c) establish two exceptions to FDICIA's protection of the enforceability of the provisions of netting contracts between financial institutions and among clearing organization members. First, the termination provisions of netting contracts will not be enforceable based solely on (i) the appointment of a conservator for an insolvent depository institution under the FDIA or FCUA, or (ii) the appointment of a receiver or liquidating agent for such institution under the FDIA or FCUA, if such receiver or liquidating agent transfers or repudiates QFCs in accordance with the FDIA or FCUA and gives notice of a transfer by 5:00 p.m. on the business day following such appointment. This change is made to confirm the FDIC's and FCUA's flexibility to transfer or repudiate the QFCs of an insolvent depository institution in accordance with the terms of the FDIA or FCUA. This modification also provides important legal certainty regarding the treatment of QFCs under the FDIA and FCUA, because the current relationship between these statutes and FDICIA is unclear.

The second exception provides that FDICIA does not override a stay order under SIPA with respect to foreclosure on securities (but not cash) collateral of a debtor (section 911 of the Act makes a conforming change to SIPA). There is also an exception relating to insolvent commodity brokers. Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract.

Section 906(d) of the Act adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks, uninsured Federal branches or agencies, or Edge Act corporations, or uninsured State member banks that operate, or operate as, a multilateral clearing organization and that are placed in receivership or conservatorship will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with these institutions will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or conservator for such an institution to those contained in 12 U.S.C. §§ 1821(e)(8), (9), (10), and (11), which address QFCs.

While the amendment would apply the same rules that apply to insured institutions, the provision would not change the rules that apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receiverships of insured national banks or Federal branches.

Sec. 907. Bankruptcy Law Amendments. Section 907 of the Act makes a series of amendments to the Bankruptcy Code. Subsection (a)(1) amends the Bankruptcy Code definitions of "repurchase agreement" and "swap agreement" to conform with the amendments to the FDIA contained in sections 901(e) and (f) of the Act.

In connection with the definition of "repurchase agreement," the term "qualified foreign government securities" is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow.

Subsection (a)(1) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and to include principal and interest-only U.S. government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act.

This amendment is not intended to affect the status of repos involving securities or commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under other provisions of the Bankruptcy Code. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the Bankruptcy Code and thus also would be subject to the Bankruptcy Code provisions pertaining to securities contracts, even if not a "repurchase agreement" as defined in the Bankruptcy Code. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as defined in the Bankruptcy Code, would continue to be a forward contract for purposes of the Bankruptcy Code and would be subject to the Bankruptcy Code provisions pertaining to forward contracts.

Subsection (a)(1) specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." These repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a "repurchase agreement" (as well as a "securities contract").

The definition of "swap agreement" is amended to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions.

The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract" for the same reason.) To clarify this, subsection (a)(1) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [Section 101(53B) of the Bankruptcy Code] and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets" and [that] is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement" in this subsection should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under the FDIA, the FCUA, or the Bankruptcy Code because the parties purport to document or label the transactions as "swap agreements." These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (a)(1)(C). Similarly, the definitions of "securities contract," "repurchase agreement," and "commodity contract" and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instrument under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code, the FDIA and the FCUA. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract." An example of a security arrangement is a right of setoff; examples of other credit enhancements are letters of credit and other similar agreements. A security agreement or arrangement or guarantee or reimbursement obligation related to a "swap agreement," "forward contract," "commodity contract," "repurchase agreement" or "securities contract" will be such an agreement or contract only to the extent of the damages in connection with such agreement measured in accordance with Section 562 of the Bankruptcy Code (added by the Act). This limitation does not affect, however, the other provisions of the Bankruptcy Code (including Section 362(b)) relating to security arrangements in connection with agreements or contracts that otherwise qualify as "swap agreements," "forward contracts," "commodity contracts," "repurchase agreements" or "securities contracts."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of "securities contract" and "commodity contract," respectively, to conform them to the definitions in the FDIA.

Subsection (a)(2), like the amendments to the FDIA and the FCUA, amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans," such as credit permitted in a margin account under the Federal Reserve Board's Regulation T (whether or not effected in that account) or arrangements where a financial intermediary—a stockbroker, financial institution, financial participant, or securities clearing agency—extends credit in connection with the purchase, sale, carrying, or trading of securities. "Margin loans" do not include, however, other loans that happen to be secured by securities collateral. The reference in subsection (b) to a "guarantee" by or to a "securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under section 555 and related provisions as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the Bankruptcy Code. Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract." A repurchase or reverse repurchase transaction which is a "securities contract" but not a "repurchase agreement" would thus be subject to the "counterparty limitations" contained in section 555 of the Bankruptcy Code (i.e., only stockbrokers, financial institutions, securities clearing agencies and financial participants can avail themselves of section 555 and related provisions).

Subsection (a)(2) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase, sale or repurchase of a participation may constitute a "securities contract," the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a "securities contract." Section 907(a) clarifies the reference to guarantee or reimbursement obligation.

Section 907(b) amends the Bankruptcy Code definitions of "financial institution" and "forward contract merchant." The definition for "financial institution" includes Federal Reserve Banks and the receivers or conservators of insolvent depository institutions. With respect to securities contracts, the definition of "financial institution" expressly includes investment companies registered under the Investment Company Act of 1940.

Subsection (b) also adds a new definition of "financial participant" to limit the potential impact of insolvencies upon other major market participants. This definition will allow such market participants to close-out and net agreements with insolvent entities under sections 362(b)(6), 555, and 556 even if the creditor could not qualify as, for example, a commodity broker. Sections 362(b)(6), 555 and 556 preserve the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code's counterparty limitations. However, where the counterparty has transactions with a total gross dollar value of at least $1 billion in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least $100 million (aggregated across counterparties) in one or more agreements or transactions on any day during the previous 15-month period, sections 362(b)(6), 555 and 556 and corresponding amendments would permit it to exercise netting and related rights irrespective of its inability otherwise to satisfy those counterparty limitations. This change will help prevent systemic impact upon the markets from a single failure, and is derived from threshold tests contained in Regulation EE promulgated by the Federal Reserve Board in implementing the netting provisions of the Federal Deposit Insurance Corporation Improvement Act. It is intended that the 15-month period be measured with reference to the 15 months preceding the filing of a petition by or against the debtor.

"Financial participant" is also defined to include "clearing organizations" within the meaning of FDICIA (as amended by the CFMA and Section 906 of the Act). This amendment, together with the inclusion of "financial participants" as eligible counterparties in connection with "commodity contracts," "forward contracts" and "securities contracts" and the amendments made in other Sections of the Act to include "financial participants" as counterparties eligible for the protections in respect of "swap agreements" and "repurchase agreements," take into account the CFMA and will allow clearing organizations to benefit from the protections of all of the provisions of the Bankruptcy Code relating to these contracts and agreements. This will further the goal of promoting the clearing of derivatives and other transactions as a way to reduce systemic risk. The definition of "financial participant" (as with the other provisions of the Bankruptcy Code relating to "securities contracts," "forward contracts," "commodity contracts," "repurchase agreements" and "swap agreements") is not mutually exclusive, i.e., an entity that qualifies as a "financial participant" could also be a "swap participant," "repo participant," "forward contract merchant," "commodity broker," "stockbroker," "securities clearing agency" and/or "financial institution."

Section 907(c) of the Act adds to the Bankruptcy Code new definitions for the terms "master netting agreement" and "master netting agreement participant." The definition of "master netting agreement" is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used: (i) to document a wide variety of securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements, or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions). A "master netting agreement participant" is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

Subsection (d) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements. This provision parallels the other provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts, forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the references to "setoff" in these provisions, as well as in section 362(b)(6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against obligations to return, collateral securing swap agreements, master netting agreements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. Collateral may be pledged to cover the cost of replacing the defaulted transactions in the relevant market, as well as other costs and expenses incurred or estimated to be incurred for the purpose of hedging or reducing the risks arising out of such termination. Enforcement of these agreements and arrangements free from the automatic stay is consistent with the policy goal of minimizing systemic risk.

Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor but that cannot technically be "held by" the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor and securities re-sold pursuant to repurchase agreements.

Subsections (e) and (f) of section 907 of the Act amend sections 546 and 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud and not taken in good faith. This amendment provides the same protections for a transfer made under, or in connection with, a master netting agreement as currently is provided for margin payments, settlement payments and other transfers received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participants under sections 546 and 548(d), except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

Subsections (g), (h), (i), and (j) of section 907 clarify that the provisions of the Bankruptcy Code that protect: (i) rights of liquidation under securities contracts, commodity contracts, forward contracts and repurchase agreements also protect rights of termination or acceleration under such contracts, and (ii) rights to terminate under swap agreements also protect rights of liquidation and acceleration.

Section 907(k) of the Act adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. These rights include rights arising: (i) from the rules of a derivatives clearing organization, multilateral clearing organization, securities clearing agency, securities exchange, securities association, contract market, derivatives transaction execution facility or board of trade; (ii) under common law, law merchant; or (iii) by reason of normal business practice. This reflects the enactment of the CFMA and the current treatment of rights under swap agreements under section 560 of the Bankruptcy Code. Similar changes to reflect the enactment of the CFMA have been made to the definition of "contractual right" for purposes of Sections 555, 556, 559, and 560 of the Bankruptcy Code.

Subsections (b)(2)(A) and (b)(2)(B) of new Section 561 limit the exercise of contractual rights to net or to offset obligations where the debtor is a commodity broker and one leg of the obligations sought to be netted relates to commodity contracts traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act. Under subsection (b)(2)(A) netting or offsetting is not permitted in these circumstances if the party seeking to net or to offset has no positive net equity in the commodity accounts at the debtor. Subsection (b)(2)(B) applies only if the debtor is a commodity broker, acting on behalf of its own customer, and is in turn a customer of another commodity broker. In that case, the latter commodity broker may not net or offset obligations under such commodity contracts with other claims against its customer, the debtor. Subsections (b)(2)(A) and (b)(2)(B) limit the depletion of assets available for distribution to customers of commodity brokers. Subsection (b)(2)(C) provides an exception to subsections (b)(2)(A) and (b)(2)(B) for cross-margining and other similar arrangements approved by, or submitted to and not rendered ineffective by, the Commodity Futures Trading Commission, as well as certain other netting arrangements.

For the purposes of Bankruptcy Code sections 555, 556, 559, 560, and 561, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party. The protection of netting and offset rights in sections 560 and 561 is in addition to the protections afforded in sections 362(b)(6), (b)(7), (b)(17), and (b)(28) of the Bankruptcy Code.

Under the Act, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the SEC. In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or set off rights. Similarly, a waiver by a bank or a counterparty of netting or set off rights in connection with QFCs would be enforceable under the FDIA.

New section 561 of the Bankruptcy Code clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a proceeding ancillary to a foreign insolvency proceeding under new section 304 of the Bankruptcy Code.

Subsections (l) and (m) of section 907 of the Act clarify that the exercise of termination and netting rights will not otherwise affect the priority of the creditor's claim after the exercise of netting, foreclosure and related rights.

Subsection (n) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of setoff rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference. This subsection also adds setoff of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of setoff excepted from section 553(b).

Section 907(o), as well as other subsections of the Act, adds references to "financial participant" in all the provisions of the Bankruptcy Code relating to securities, forward and commodity contracts and repurchase and swap agreements.

Sec. 908. Recordkeeping Requirements. Section 908 of the Act amends section 11(e)(8) of the Federal Deposit Insurance Act to explicitly authorize the FDIC, in consultation with appropriate Federal banking agencies, to prescribe regulations on recordkeeping by any insured depository institution with respect to QFCs only if the insured financial institution is in a troubled condition (as such term is defined in the FDIA).

Sec. 909. Exemptions from Contemporaneous Execution Requirement. Section 909 of the Act amends FDIA section 13(e)(2) to provide that an agreement for the collateralization of governmental deposits, bankruptcy estate funds, Federal Reserve Bank or Federal Home Loan Bank extensions of credit or one or more QFCs shall not be deemed invalid solely because such agreement was not entered into contemporaneously with the acquisition of the collateral or because of pledges, delivery or substitution of the collateral made in accordance with such agreement.

The amendment codifies portions of policy statements issued by the FDIC regarding the application of section 13(e), which codifies the "D'Oench Duhme" doctrine. With respect to QFCs, this codification recognizes that QFCs often are subject to collateral and other security arrangements that may require posting and return of collateral on an ongoing basis based on the mark-to-market values of the collateralized transactions. The codification of only portions of the existing FDIC policy statements on these and related issues should not give rise to any negative implication regarding the continued validity of these policy statements.

Sec. 910. Damage Measure. Section 910 of the Act adds a new section 562 to the Bankruptcy Code providing that damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement or master netting agreement will be calculated as of the earlier of: (i) the date of rejection of such agreement by a trustee, or (ii) the date or dates of liquidation, termination or acceleration of such contract or agreement.

Section 562 provides an exception to the rules in (i) and (ii) if there are no commercially reasonable determinants of value as of such date or dates, in which case damages are to be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value. Although it is expected that in most circumstances damages would be measured as of the date or dates of either rejection or liquidation, termination or acceleration, in certain unusual circumstances, such as dysfunctional markets or liquidation of very large portfolios, there may be no commercially reasonable determinants of value for liquidating any such agreements or contracts or for liquidating all such agreements and contracts in a large portfolio on a single day. It is expected that measuring damages as of a date or dates before the date of liquidation, termination, or acceleration will occur only in very unusual circumstances.

The party determining damages is given limited discretion to determine the dates as of which damages are to be measured. Its actions are circumscribed unless there are no "commercially reasonable" determinants of value for it to measure damages on the date or dates of either rejection or liquidation, termination or acceleration. The references to "commercially reasonable" are intended to reflect existing state law standards relating to a creditor's actions in determining damages. New section 562 provides that if damages are not measured as of either the date of rejection or the date or dates of liquidation, termination or acceleration and the trustee challenges the timing of the measurement of damages by the non-defaulting party determining the damages, then the non-defaulting party, rather than the trustee, has the burden of proving the absence of any commercially reasonable determinants of value.

New section 562 is not intended to have any impact on the determination under the Bankruptcy Code of the timing of damages for contracts and agreements other than those specified in section 562. Also, section 562 does not apply to proceedings under the FDIA, and it is not intended that Section 562 have any impact on the interpretation of the provisions of the FDIA relating to timing of damages in respect of QFCs or other contracts.

Sec. 911. SIPC Stay. Section 911 of the Act amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on or dispose of securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement or lent by the debtor under a securities lending agreement. A corresponding amendment to FDICIA is made by section 906. A creditor that was stayed in exercising rights against such securities would be entitled to post-insolvency interest to the extent of the value of such securities.

TITLE X. PROTECTION OF FAMILY FARMERS AND FAMILY FISHERMEN

Sec. 1001. Permanent Reenactment of Chapter 12. Chapter 12 is a specialized form of bankruptcy relief available only to a "family farmer with regular annual income,"[167] a defined term.[168] This form of bankruptcy relief permits eligible family farmers, under the supervision of a bankruptcy trustee,[169] to reorganize their debts pursuant to a repayment plan.[170] The special attributes of chapter 12 make it better suited to meet the particularized needs of family farmers in financial distress than other forms of bankruptcy relief, such as chapter 11[171] and chapter 13.[172]

Chapter 12 was enacted on a temporary 7-year basis as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[173] in response to the farm financial crisis of the early- to mid-1980's.[174] It was subsequently reenacted and extended on several occasions. The most recent extension, authorized as part of the Farm Security and Rural Investment Act of 2002, provides that chapter remains in effect until December 31, 2002.[175]

Section 1001(a) of the Act reenacts chapter 12 of the Bankruptcy Code and provides that such reenactment takes effect as of July 1, 2005. Section 1001(b) makes a conforming amendment to section 302 of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. As a result of this provision, chapter 12 becomes a permanent form of relief under the Bankruptcy Code.

Sec. 1002. Debt Limit Increase. Section 1002 of the Act amends section 104(b) of the Bankruptcy Code to provide for periodic adjustments for inflation of the debt eligibility limit for family farmers.

Sec. 1003. Certain Claims Owed to Governmental Units. Subsection (a) of section 1003 of the Act amends section 1222(a) of the Bankruptcy Code to add an exception with respect to payments to a governmental unit for a debt entitled to priority under section 507 if such debt arises from the sale, transfer, exchange, or other disposition of an asset used in the debtor's farming operation, but only if the debtor receives a discharge. Section 1003(b) amends section

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[167] 11 U.S.C. § 109(f).
[168] 11 U.S.C. § 101(19).
[169] 11 U.S.C. § 1202.
[170] 11 U.S.C. § 1222.
[171] For example, chapter 12 is typically less complex and expensive than chapter 11, a form of bankruptcy relief generally utilized to effectuate large corporate reorganizations.
[172] Chapter 13, a form of bankruptcy relief for individuals seeking to reorganize their debts, limits its eligibility to debtors with debts in lower amounts than permitted for eligibility purposes under chapter 12. *Cf.* 11 U.S.C. §§ 109(e), 101(18).
[173] Pub. L. No. 99–554, § 255, 100 Stat. 3088, 3105 (1986).
[174] *See* U.S. DEPT. OF AGRICULTURE, INFO. BULL. NO. 724–09, ISSUES IN AGRICULTURAL AND RURAL FINANCE: DO FARMERS NEED A SEPARATE CHAPTER IN THE BANKRUPTCY CODE? (Oct. 1997).

As one of the principal proponents of this legislation explained:

> I doubt there will be anything that we do that will have such an immediate impact in the grassroots of our country with respect to the situation that exists in most of the heartland, and that is in the agricultural sector. . . .
>
> You know, William Jennings Bryan in his famous speech, the Cross of Gold, almost 60 years ago [sic], stated these words: "Destroy our cities and they will spring up again as if by magic; but destroy our farms, and the grass will grow in every city in our country."
>
> This legislation will hopefully stem the tide that we have seen so recently in the massive bankruptcies in the family farm area.

132 CONG. REC. 28,147 (1986) (statement of Rep. Mike Synar (D-Okla.)).

[175] Pub. L. No. 107–171, § 10814 (2002).

1231(b) of the Bankruptcy Code to have it apply to any governmental unit. Subsection (c) provides that section 1003 becomes effective on the date of enactment of this Act and applies to cases commenced after such effective date.

Sec. 1004. Definition of Family Farmer. Section 1004 of the Act amends the definition of "family farmer" in section 101(18) of the Bankruptcy Code to increase the debt eligibility limit from $1,500,000 to $3,237,000. It also reduces the percentage of the farmer's liabilities that must arise out of the debtor's farming operation for eligibility purposes from 80 percent to 50 percent.

Sec. 1005. Elimination of Requirement that Family Farmer and Spouse Receive over 50 Percent of Income from Farming Operation in Year Prior to Bankruptcy. Section 1005 of the Act amends the Bankruptcy Code's definition of "family farmer" with respect to the determination of the farmer's income. Current law provides that a debtor, in order to be eligible to be a family farmer, must derive a specified percentage of his or her income from farming activities for the taxable year preceding the commencement of the bankruptcy case. Section 1005 adjusts the threshold percentage to be met during either: (1) the taxable year preceding the filing of the bankruptcy case; or (2) the taxable year in the second and third taxable years preceding the filing of the bankruptcy case.

Sec. 1006. Prohibition of Retroactive Assessment of Disposable Income. Section 1006 of the Act amends the Bankruptcy Code in two respects concerning chapter 12 plans. Section 1006(a) amends Bankruptcy Code section 1225(b) to permit the court to confirm a plan even if the distribution proposed under the plan equal or exceed the debtor's projected disposable income for that period, providing the plan otherwise satisfies the requirements for confirmation. Section 1006(b) amends Bankruptcy Code section 1229 to restrict the bases for modifying a confirmed chapter 12 plan. Specifically, Section 1006(b) to provide that a confirmed chapter 12 plan may not be modified to increase the amount of payments due prior to the date of the order modifying the confirmation of the plan. Where the modification is based on an increase in the debtor's disposable income, the plan may not be modified to require payments to unsecured creditors in any particular month in an amount greater than the debtor's disposable income for that month, unless the debtor proposes such a modification. Section 1006(b) further provides that a modification of a plan shall not require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed, unless the debtor proposes such a modification.

Sec. 1007. Family Fishermen. Subsection (a) of section 1007 of the Act amends Bankruptcy Code section 101 to add definitions of "commercial fishing operation," "commercial fishing vessel," "family fisherman" and "family fisherman with regular annual income." The definition of "commercial fishing operation" includes the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products. The term "commercial fishing vessel" is defined as a vessel used by a fisher to "carry out a commercial fishing operation." The term "family fisherman" is defined as an individual engaged in a commercial fishing operation, with an aggregate debt limit of $1.5 million. The definition specifies that at least 80 percent of those debts must be derived from a commercial fishing operation. The percentage of income that must be derived from such operation is specified to be more than 50 percent of the individual's gross income for the taxable year preceding the taxable year in which the case was filed. Similar provisions are included for corporations and partnerships. The term "family fisherman with regular annual income" is defined as a family fisherman whose annual income is sufficiently stable and regular to enable such person to make payments under a chapter 12 plan. Section 1007(b) amends Bankruptcy Code section 109 to provide that a family fisherman is eligible to be a debtor under chapter 12. Section 1007(c) amends the heading of chapter 12 to include a reference to family fisherman and makes conforming revisions to Sections 1203 and 1206.

TITLE XI. HEALTH CARE AND EMPLOYEE BENEFITS

Sec. 1101. Definitions. Subsection (a) of section 1101 of the Act amends section 101 of the Bankruptcy Code to add a definition of "health care business." The definition includes any public or private entity (without regard to whether that entity is for or not for profit) that is primarily engaged in offering to the general public facilities and services for the diagnosis or treatment of injury, deformity or disease; and surgical, drug treatment, psychiatric or obstetric care. It also includes the following entities: (1) a general or specialized hospital; (2) an ancillary ambulatory, emergency, or surgical treatment facility; (3) a hospice; (d) a home health agency; (e) other health care institution that is similar to an entity referred to in (a) through (d); and other long-term care facility. These include a skilled nursing facility, intermediate care facility, assisted living facility, home for the aged, domiciliary care facility, or health care institution that is related to an aforementioned facility. Section 1101(b) amends Bankruptcy Code section 101 to add a definition of "patient." The term means an individual who obtains or receives services from a health care business. Section 1101(c) amends section 101 of the Bankruptcy Code to add a definition of "patient records." The term means any written document relating to a patient or record recorded in a magnetic, optical, or other form of electronic medium. Section 1101(d) specifies that the amendments effectuated by new section 101(27A) do not affect the interpretation of section 109(b).

Sec. 1102. Disposal of Patient Records. Section 1102 of the Act adds a provision to the Bankruptcy Code specifying requirements for the disposal of patient records in a chapter 7, 9, or 11 case of a health care business where the trustee lacks sufficient funds to pay for the storage of such records in accordance with applicable Federal or state law. The requirements chiefly consist of providing notice to the affected patients and specifying the method of disposal for unclaimed records. They are intended to protect the privacy and confidentiality of a patient's medical records when they are in the custody of a health care business in bankruptcy. The provision specifies the following requirements:

1. The trustee shall: (a) publish notice in one or more appropriate newspapers stating that if the records are not

claimed by the patient or an insurance provider (if permitted under applicable law) within 365 days of the date of such notice, then the trustee will destroy such records; and (b) during the first 180 days of such 365-day period, attempt to directly notify by mail each patient and appropriate insurance carrier of the claiming or disposing of such records.

2. If after providing such notice patient records are not claimed within the specified period, the trustee shall, upon the expiration of such period, send a request by certified mail to each appropriate Federal agency to request permission from such agency to deposit the records with the agency.
3. If after providing the notice as set forth above, patient records are not claimed, the trustee shall destroy such records as follows: (a) by shredding or burning, if the records are written; or (b) by destroying the records so that their information cannot be retrieved, if the records are magnetic, optical or electronic.

It is anticipated that if the estate of the debtor lacks the funds to pay for the costs and expenses related to the above, the trustee may recover such costs and expenses under section 506(c) of the Bankruptcy Code.

Sec. 1103. Administrative Expense Claim for Costs of Closing a Health Care Business and Other Administrative Expenses. Section 1103 of the Act amends section 503(b) of the Bankruptcy Code to provide that the actual, necessary costs and expenses of closing a health care business (including the disposal of patient records or transferral of patients) incurred by a trustee, Federal agency, or a department or agency of a state are allowed administrative expenses.

Sec. 1104. Appointment of Ombudsman to Act as Patient Advocate. Section 1104 of the Act adds a provision to the Bankruptcy Code requiring the court to order the appointment of an ombudsman to monitor the quality of patient care within 30 days after commencement of a chapter 7, 9, or 11 health care business bankruptcy case, unless the court finds that such appointment is not necessary for the protection of patients under the specific facts of the case. The ombudsman must be a disinterested person. If the health care business is a long-term care facility, a person who is serving as a State Long-Term Care Ombudsman of the Older Americans Act of 1965 may be appointed as the ombudsman in such case. The ombudsman must: (1) monitor the quality of patient care to the extent necessary under the circumstances, including interviewing patients and physicians; (2) report to the court, not less than 60 days from the date of appointment and then every 60 days thereafter, at a hearing or in writing regarding the quality of patient care at the health care business involved; and (3) notify the court by motion or written report (with notice to appropriate parties in interest) if the ombudsman determines that the quality of patient care is declining significantly or is otherwise being materially compromised. The provision requires the ombudsman to maintain any information obtained that relates to patients (including patient records) as confidential. Section 1104(b) amends section 330(a)(1) of the Bankruptcy Code to authorize the payment of reasonable compensation to an ombudsman.

Sec. 1105. Debtor in Possession; Duty of Trustee to Transfer Patients. Section 1105 of the Act amends section 704(a) of the Bankruptcy Code to require a trustee or debtor in possession to use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business. The transferee health care business should be in the vicinity of the transferor health care business, provide the patient with services that are substantially similar to those provided by the transferor health care business, and maintain a reasonable quality of care.

Sec. 1106. Exclusion from Program Participation Not Subject to Automatic Stay. Section 1106 amends section 362(b) of the Bankruptcy Code to except from the automatic stay the exclusion by the Secretary of Health and Human Services of a debtor from participation in the medicare program or other specified Federal health care programs.

TITLE XII. TECHNICAL AMENDMENTS

Sec. 1201. Definitions. Section 1201 of the Act amends the definitions contained in section 101 of the Bankruptcy Code. Paragraphs (1), (2), (4), and (7) of section 1201 make technical changes to section 101 to convert each definition into a sentence (thereby facilitating future amendments to the separate paragraphs) and to redesignate the definitions in correct and completely numerical sequence. Paragraph (3) of section 1101 makes necessary and conforming amendments to cross references to the newly redesignated definitions.

Paragraph (5) of section 1201 concerns single asset real estate debtors. A single asset real estate chapter 11 case presents special concerns. As the name implies, the principal asset in this type of case consists of some form of real estate, such as undeveloped land. Typically, the form of ownership of a single asset real estate debtor is a corporation or limited partnership. The largest creditor in a single asset real estate case is typically the secured lender who advanced the funds to the debtor to acquire the real property. Often, a single asset real estate debtor resorts to filing for bankruptcy relief for the sole purpose of staying an impending foreclosure proceeding or sale commenced by the secured lender. Foreclosure actions are filed when the debtor lacks sufficient cash flow to service the debt and maintain the property. Taxing authorities may also have liens against the property. Based on the nature of its principal asset, a single asset real estate debtor often has few, if any, unsecured creditors. If unsecured creditors exist, they may have only nominal claims against the single asset real estate debtor. Depending on the nature and ownership of any business operating on the debtor's real property, the debtor may have few, if any, employees. Accordingly, there may be little interest on behalf of unsecured creditors in a single asset real estate case to serve on a creditors' committee.

In 1994, the Bankruptcy Code was amended to accord special treatment for single asset real estate debtors. It defined this type of debtor as a bankruptcy estate comprised of a single piece of real property or project, other than residential real property with fewer than four residential units. The property or project must generate substantially all of the debtor's gross income. A debtor that conducts substantial business on the property beyond that relating to its operation is excluded from this definition. In addition, the definition fixed a monetary cap. To qualify as a single asset real estate debtor, the debtor could not have noncontingent, liquidated secured debts in excess of $4 million. Subparagraph (5)(A) amends the definition of "single asset real estate" to exclude family farmers from this definition. Paragraph (5)(B) amends section 101(51B) of the Bankruptcy Code to eliminate the $4 million debt limitation on single asset real estate. The present $4 million cap prevents the use of the expedited relief procedure in many commercial property reorganizations, and effectively provides an opportunity for a number of debtors to abusively file for bankruptcy in order to obtain the protection of the automatic stay against their creditors. As a result of this amendment, creditors in more cases will be able to obtain the expedited relief from the automatic stay which is made available under section 362(d)(3) of the Bankruptcy Code.

Paragraph (6) of section 1201, together with section 1214, respond to a 1997 Ninth Circuit case, in which two purchase money lenders (without knowledge that the debtor had recently filed an undisclosed chapter 11 case that was subsequently converted to chapter 7), funded the debtor's acquisition of an apartment complex and recorded their purchase-money deed of trust immediately following recordation of the deed to the debtors.[176] Specifically, it amends the definition of "transfer" in section 101(54) of the Bankruptcy Code to include the "creation of a lien." This amendment gives expression to a widely held understanding since the enactment of the Bankruptcy Reform Act of 1978,[177] that is, a transfer includes the creation of a lien.

Sec. 1202. Adjustment of Dollar Amounts. Bankruptcy Code section 104 provides for the periodic automatic adjustment of certain dollar amounts specified in the Code to reflect the change in the Consumer Price Index. Section 1202 amends Bankruptcy Code section 104(b) to add a reference to certain other monetary amounts specified in the Bankruptcy Code section. These include: (1) section 522(f)(3) (pertaining to the avoidance of certain liens on implements and other personal property valued at less than $5,000); (2) section 101(19A) (definition of family fisherman); (3) section 522(f)(4) (definition of household goods); (4) section 541(b) (property items, such as certain educational individual retirement accounts and tuition credit or certificate programs, that do not constitute property of the bankruptcy estate); (5) section 547(c)(9) (limits the avoidance of a preferential transfer, under certain circumstances); (6) section 1322(d) (concerning the applicability of the needs-based test to chapter 13 debtors with above median incomes); (7) section 1325(b) (determination of disposable income for chapter 13 debtors with above median incomes); and (8) section 1326(b)(3) (payments to a chapter 7 trustee in a chapter 13 case). In addition, the provision adds a reference to section 1409(b) of title 28 of the United

[176] *Thompson v. Margen* (*In re* McConville), 110 F.3d 47 (9th Cir.), *cert. denied,* 522 U.S. 966 (1997).

[177] Pub. L. No. 95–598, 92 Stat. 2549 (1978).

States Code, which pertains to the venue of proceedings to recover a money judgment or property.

Sec. 1203. Extension of Time. Section 1203 of the Act makes a technical amendment to correct a reference error described in amendment notes contained in the United States Code. As specified in the amendment note relating to subsection (c)(2) of section 108 of the Bankruptcy Code, the amendment made by section 257(b)(2)(B) of Public Law 99–554 could not be executed as stated.

Sec. 1204. Technical Amendments. Section 1204 of the Act makes technical amendments to Bankruptcy Code sections 109(b)(2) (to strike an statutory cross reference), 541(b)(2) (to add "or" to the end of this provision), and 522(b)(1) (to replace "product" with "products").

Sec. 1205. Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions. Section 1205 of the Act amends section 110(j)(4) of the Bankruptcy Code to change the reference to attorneys from the singular possessive to the plural possessive.

Sec. 1206. Limitation on Compensation of Professional Persons. Section 328(a) of the Bankruptcy Code provides that a trustee or a creditors' and equity security holders' committee may, with court approval, obtain the services of a professional person on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Section 1206 of the Act amends section 328(a) to include compensation "on a fixed or percentage fee basis" in addition to the other specified forms of reimbursement.

Sec. 1207. Effect of Conversion. Section 1207 of the Act makes a technical correction in section 348(f)(2) of the Bankruptcy Code to clarify that the first reference to property, like the subsequent reference to property, is a reference to property of the estate.

Sec. 1208. Allowance of Administrative Expenses. Section 1208 of the Act amends section 503(b)(4) of the Bankruptcy Code to limit the types of compensable professional services rendered by an attorney or accountant that can qualify as administrative expenses in a bankruptcy case. Expenses for attorneys or accountants incurred by individual members of creditors' or equity security holders' committees are not recoverable, but expenses incurred for such professional services incurred by such committees themselves would be.

Sec. 1209. Exceptions to Discharge. Section 1209 of the Act amends section 523(a) of the Bankruptcy Code to correct a technical error in the placement of paragraph (15), which was added to section 523 by section 304(e)(1) of the Bankruptcy Reform Act of 1994. Section 1209 also amends section 523(a)(9), which makes nondischargeable any debt resulting from death or personal injury arising from the debtor's unlawful operation of a motor vehicle while intoxicated, to add "watercraft, or aircraft" after "motor vehicle." Neither additional term should be defined or included as a "motor vehicle" in section 523(a)(9) and each is intended to comprise unpowered as well as motor-powered craft. Congress previously made the policy judgment that the equities of persons injured by drunk drivers outweigh the responsible debtor's interest in a fresh start, and here clarifies that the policy applies not only on land but also on the water and in the air. Viewed from a practical standpoint, this provision closes a loophole that gives intoxicated watercraft and aircraft operators preferred treatment over intoxicated motor vehicle drivers and denies victims of alcohol and drug related boat and plane accidents the same rights accorded to automobile accident victims under current law. Finally, this section corrects a grammatical error in section 523(e).

Sec. 1210. Effect of Discharge. Section 1210 of the Act makes technical amendments to correct errors in section 524(a)(3) of the Bankruptcy Code caused by section 257(o)(2) of Public Law 99–554 and section 501(d)(14)(A) of Public Law 103–394.[178]

Sec. 1211. Protection Against Discriminatory Treatment. Section 1211 of the Act conforms a reference to its antecedent reference in section 525(c) of the Bankruptcy Code. The omission of "student" before "grant" in the second place it appears in section 525(c) made possible the interpretation that a broader limitation on lender discretion was intended, so that no loan could be denied because of a prior bankruptcy if the lending institution was in the business of making student loans. Section 1211 is intended to make clear that lenders involved in making government guaranteed or insured student loans are not barred by this Bankruptcy Code provision from denying other types of loans based on an applicant's bankruptcy history; only student loans and grants, therefore, cannot be denied under section 525(c) because of a prior bankruptcy.

Sec. 1212. Property of the Estate. Production payments are royalties tied to the production of a certain volume or value of oil or gas, determined without regard to production costs. They typically would be paid by an oil or gas operator to the owner of the underlying property on which the oil or gas is found. Under section 541(b)(4)(B)(ii) of the Bankruptcy Code, added by the Bankruptcy Reform Act of 1994, production payments are generally excluded from the debtor's estate, provided they could be included only by virtue of section 542 of the Bankruptcy Code, which relates generally to the obligation of those holding property which belongs in the estate to turn it over to the trustee. Section 1212 of the Act adds to this proviso a reference to section 365 of the Bankruptcy Code, which authorizes the trustee to assume or reject an executory contract or unexpired lease. It thereby clarifies the original Congressional intent to generally exclude production payments from the debtor's estate.

Sec. 1213. Preferences. Section 547 of the Bankruptcy Code authorizes a trustee to avoid a preferential payment made to a creditor by a debtor within 90 days of filing, whether the creditor is an insider or an outsider. To address the concern that a corporate insider (such as an officer or director who is a creditor of his or her own corporation) has an unfair advantage over outside creditors, section 547 also authorizes a trustee to avoid a preferential payment made to an insider creditor between 90 days and one year be-

[178] For a description of these errors, see the appropriate footnote and amendment notes in the United States Code.

fore filing. Several recent cases, including *DePrizio,*[179] allowed the trustee to "reach-back" and avoid a transfer to a noninsider creditor made within the 90-day to one-year time frame if an insider benefitted from the transfer in some way. This had the effect of discouraging lenders from obtaining loan guarantees, lest transfers to the lender be vulnerable to recapture by reason of the debtor's insider relationship with the loan guarantor. Section 202 of the Bankruptcy Reform Act of 1994 addressed the *DePrizio* problem by inserting a new section 550(c) into the Bankruptcy Code to prevent avoidance or recovery from a noninsider creditor during the 90-day to one-year period even though the transfer to the noninsider benefitted an insider creditor. The 1994 amendments, however, failed to make a corresponding amendment to section 547, which deals with the avoidance of preferential transfers. As a result, a trustee could still utilize section 547 to avoid a preferential lien given to a noninsider bank, more than 90 days but less than one year before bankruptcy, if the transfer benefitted an insider guarantor of the debtor's debt. Accordingly, section 1213 of the Act makes a perfecting amendment to section 547 to provide that if the trustee avoids a transfer given by the debtor to a noninsider for the benefit of an insider creditor between 90 days and one year before filing, that avoidance is valid only with respect to the insider creditor. Thus both the previous amendment to section 550 and the perfecting amendment to section 547 protect the noninsider from the avoiding powers of the trustee exercised with respect to transfers made during the 90-day to one year pre-filing period. This provision is intended to apply to any case, including any adversary proceeding, that is pending or commenced on or after the date of enactment of this Act.

Sec. 1214. Postpetition Transactions. Section 1214 of the Act amends section 549(c) of the Bankruptcy Code to clarify its application to an interest in real property. This amendment should be construed in conjunction with section 1201 of the Act.[180]

Sec. 1215. Disposition of Property of the Estate. Section 1215 of the Act amends section 726(b) of the Bankruptcy Code to strike an erroneous reference.[181]

Sec. 1216. General Provisions. Section 1216 of the Act amends section 901(a) of the Bankruptcy Code to correct an omission in a list of sections applicable to cases under chapter 9 of title 11 of the United States Code.

Sec. 1217. Abandonment of Railroad Line. Section 1217 of the Act amends section 1170(e)(1) of the Bankruptcy Code to reflect the fact that section 11347 of title 49 of the United States Code was repealed by section 102(a) of Public Law 104–88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Sec. 1218. Contents of Plan. Section 1218 of the Act amends section 1172(c)(1) of the Bankruptcy Code to reflect the fact that section

[179] *Levit v. Ingersoll Rand Fin. Corp.,* 874 F.2d 1186 (7th Cir. 1989); *see also Ray v. City Bank and Trust Co.* (*In re* C-L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); *Manufacturers Hanover Leasing Corp. v. Lowrey* (*In re* Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir. 1989).
[180] *See supra* notes 86 and 176 and accompanying text.
[181] For a description of the error, see the appropriate footnote and amendment notes in the United States Code.

11347 of title 49 of the United States Code was repealed by section 102(a) of Public Law 104–88 and that provisions comparable to section 11347 appear in section 11326(a) of title 49 of the United States Code.

Sec. 1219. Bankruptcy Cases and Proceedings. Section 1219 of the Act amends section 1334(d) of title 28 of the United States Code to make clarifying references.[182]

Sec. 1220. Knowing Disregard of Bankruptcy Law or Rule. Section 1220 of the Act amends section 156(a) of title 18 of the United States Code to make stylistic changes and correct a reference to the Bankruptcy Code.

Sec. 1221. Transfers Made by Nonprofit Charitable Corporations. Section 1221 of the Act amends section 363(d) of the Bankruptcy Code to restrict the authority of a trustee to use, sell, or lease property by a nonprofit corporation or trust. First, the use, sell or lease of such property must be in accordance with applicable nonbankruptcy law and to the extent it is not inconsistent with any relief granted under certain specified provisions of section 362 of the Bankruptcy Code concerning the applicability of the automatic stay. Second, section 1221 imposes similar restrictions with regard to plan confirmation requirements for chapter 11 cases. Third, it amends section 541 of the Bankruptcy Code to provide that any property of a bankruptcy estate in which the debtor is a nonprofit corporation (as described in certain provisions of the Internal Revenue Code) may not be transferred to an entity that is not such a corporation, but only under the same conditions that would apply if the debtor was not in bankruptcy. The amendments made by this section apply to cases pending on the date of enactment or to cases filed after such date. Section 1221 provides that a court may not confirm a plan without considering whether this provision would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor postpetition. Nothing in this provision may be construed to require the court to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Sec. 1222. Protection of Valid Purchase Money Security Interests. Section 1222 of the Act extends the applicable perfection period for a security interest in property of the debtor in section 547(c)(3)(B) of the Bankruptcy Code from 20 to 30 days.

Sec. 1223. Bankruptcy Judgeships. The substantial increase in bankruptcy case filings clearly creates a need for additional bankruptcy judgeships. In the 105th Congress, the House responded to this need by passing H.R. 1596, which would have created additional permanent and temporary bankruptcy judgeships and extended an existing temporary position. Section 1223 extends four existing temporary judgeships and authorizes 28 additional bankruptcy judgeships. In determining the official duty stations of bankruptcy judges and places of holding court pursuant to section 152(b)(1) of title 28 of the United States Code regarding the additional judgeships authorized in this section, the Judicial Con-

[182] For a description of the errors, see the appropriate footnote and amendment notes in the United States Code.

ference should consider the convenience of the parties, the district's geography, and factors that would facilitate better administration of cases, such as may be presented in the Eastern District of California with respect to Bakersfield, for example.

Sec. 1224. Compensating Trustees. Section 1224 of the Act amends section 1326 of the Bankruptcy Code to provide that if a chapter 7 trustee has been allowed compensation as a result of the conversion or dismissal of the debtor's prior case pursuant to section 707(b) and some portion of that compensation remains unpaid, the amount of any such unpaid compensation must be repaid in the debtor's subsequent chapter 13 case. This payment must be prorated over the term of the plan and paid on a monthly basis. The amount of the monthly payment may not exceed the greater of $25 or the amount payable to unsecured nonpriority creditors as provided by the plan, multiplied by five percent and the result divided by the number of months of the plan.

S*ec. 1225. Amendment to Section 362 of Titile11, United States Code.* Section 1225 of the Act amends section 362(b) of the Bankruptcy Code to except from the automatic stay the creation or perfection of a statutory lien for an *ad valorem* property tax or for a special tax or special assessment on real property (whether or not *ad valorem*) that is imposed by a governmental unit, if such tax or assessment becomes due after the filing of the petition.

Sec. 1226. Judicial Education. Section 1226 of the Act requires the Director of the Federal Judicial Center, in consultation with the Director of the Executive Office for United States Trustees, to develop materials and conduct training as may be useful to the courts in implementing this Act, including the needs-based reforms under section 707(b) (as amended by this Act) and amendments pertaining to reaffirmation agreements.

Sec. 1227. Reclamation. Section 1227 of the Act amends section 546(c) of the Bankruptcy Code to provide that the rights of a trustee under sections 544(a), 545, 547, and 549 are subject to the rights of a seller of goods to reclaim goods sold in the ordinary course of business to the debtor if: (1) the debtor, while insolvent, received these goods not later than 45 days prior to the commencement of the case, and (2) written demand for reclamation of the goods is made not later than 45 days after receipt of such goods by the debtor or not later than 20 days after the commencement of the case, if the 45-day period expires after the commencement of the case. If the seller fails to provide notice in the manner provided in this provision, the seller may still assert the rights set forth in section 503(b)(7) of the Bankruptcy Code. Section 1227(b) amends Bankruptcy Code section 503(b) to provide that the value of any goods received by a debtor not later than within 20 days prior to the commencement of a bankruptcy case in which the goods have been sold to the debtor in the ordinary course of the debtor's business is an allowed administrative expense.

Sec. 1228. Providing Requested Tax Documents to the Court. Subsection (a) of section 1228 of the Act provides that the court may not grant a discharge to an individual in a case under chapter 7 unless requested tax documents have been provided to the court. Section 1228(b) similarly provides that the court may not confirm a chapter 11 or 13 plan unless requested tax documents have been filed with the court. Section 1228(c) directs the court to destroy documents submitted in support of a bankruptcy claim not sooner than three years after the date of the conclusion of a bankruptcy case filed by an individual debtor under chapter 7, 11, or 13. In the event of a pending audit or enforcement action, the court may extend the time for destruction of such requested tax documents.

Sec. 1229. Encouraging Creditworthiness. Subsection (a) of section 1229 of the Act expresses the sense of the Congress that certain lenders may sometimes offer credit to consumers indiscriminately and that resulting consumer debt may be a major contributing factor leading to consumer insolvency. Section 1229(b) directs the Board of Governors of the Federal Reserve to study certain consumer credit industry solicitation and credit granting practices as well as the effect of such practices on consumer debt and insolvency. The specified practices involve the solicitation and extension of credit on an indiscriminate basis that encourages consumers to accumulate additional debt and where the lender fails to ensure that the consumer borrower is capable of repaying the debt. Section 1229(c) requires the study described in subsection (b) to be prepared within 12 months from the date of the Act's enactment. This provision authorizes the Board to issue regulations requiring additional disclosures to consumers and permits it to undertake any other actions consistent with its statutory authority, which are necessary to ensure responsible industry practices and to prevent resulting consumer debt and insolvency.

Sec. 1230. Property No Longer Subject to Redemption. Section 1230 of the Act amends section 541(b) of the Bankruptcy Code to provide that, under certain circumstances, an interest of the debtor in tangible personal property (other than securities, or written or printed evidences of indebtedness or title) that the debtor pledged or sold as collateral for a loan or advance of money given by a person licensed under law to make such loan or advance is not property of the estate. Subject to subchapter III of chapter 5 of the Bankruptcy Code, the provision applies where: (1) the property is in the possession of the pledgee or transferee; (2) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and (3) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law in a timely manner as provided under state law and section 108(b) of the Bankruptcy Code.

Sec. 1231. Trustees. Section 1231 of the Act establishes a series of procedural protections for chapter 7 and chapter 13 trustees concerning final agency decisions relating to trustee appointments and future case assignments. Section 1231(a) amends section 586(d) of title 28 of the United States Code to allow a chapter 7 or chapter 13 trustee to obtain judicial review of such decisions by commencing an action in the United States district court after the trustee exhausts all available administrative remedies. Unless the trustee elects to have an administrative hearing on the record, the trustee is deemed to have exhausted all administrative remedies under this provision if the agency fails to make a final agency decision within 90 days after the trustee requests an administrative remedy. The provision requires the Attorney General to promulgate procedures to implement this provision. It further provides that the agency's decision must be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

Section 1231(b) amends section 586(e) of title 28 of the United States Code to permit a chapter 13 trustee to obtain judicial review of certain final agency actions relating to claims for actual, necessary expenses under section 586(e). The trustee may commence an action in the United States district court where the trustee resides. The agency's decision must be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency. It directs the Attorney General to prescribe procedures to implement this provision.

Sec. 1232. Bankruptcy Forms. Section 1232 of the Act amends section 2075 of title 28 of the United States Code to a form to be prescribed for the statement specified under section 707(b)(2)(C) of the Bankruptcy Code and to promulgate general rules on the content of such statement.

Sec. 1233. Direct Appeals of Bankruptcy Matters to Courts of Appeals. Under current law, appeals from decisions rendered by the bankruptcy court are either heard by the district court or a bankruptcy appellate panel. In addition to the time and cost factors attendant to the present appellate system, decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.

To address these problems, section 1233 of the Act amends section 158(d) of title 28 to establish a procedure to facilitate appeals of certain decisions, judgments, orders and decrees of the bankruptcy courts to the circuit courts of appeals by means of a two-step certification process. The first step is a certification by the bankruptcy court, district court, or bankruptcy appellate panel (acting on its own motion or on the request of a party, or the appellants and appellees acting jointly). Such certification must be issued by the lower court if: (1) the bankruptcy court, district court, or bankruptcy appellate panel determines that one or more of certain specified standards are met; or (2) a majority in number of the appellants and a majority in number of the appellees request certification and represent that one or more of the standards are met. The second step is authorization by the circuit court of appeals. Jurisdiction for the direct appeal would exist in the circuit court of appeals only if the court of appeals authorizes the direct appeal.

This procedure is intended to be used to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level, where the matter is one of public importance, where there is a need to resolve conflicting decisions on a question of law, or where an immediate appeal may materially advance the progress of the case or proceeding. The courts of appeals are encouraged to authorize direct appeals in these circumstances. While fact-intensive issues may occasionally offer grounds for certification even when binding precedent already exists on the general legal issue in question, it is anticipated that this procedure will rarely be used in that circumstance or in an attempt to bring to the circuit courts of appeals matters that can appropriately be resolved initially by district court judges or bankruptcy appellate panels.

Sec. 1234. Involuntary Cases. Section 1234 of the Act amends the Bankruptcy Code's criteria for commencing an involuntary bankruptcy case. Current law renders a creditor ineligible if its claim is contingent as to liability or the subject of a bona fide dispute. This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount. It further provides that the claims needed to meet the monetary threshold must be undisputed. The provision makes a conforming revision to section 303(h)(1). Section 1234 becomes effective on the date of enactment of this Act and applies to cases commenced before, on, and after such date.

Sec. 1235. Federal Election Law Fines and Penalties as Nondischargeable Debt. Section 1235 of the Act amends section 523(a) of the Bankruptcy Code to make debts incurred to pay fines or penalties imposed under Federal election law nondischargeable.

TITLE XIII. CONSUMER CREDIT DISCLOSURE

Sec. 1301. Enhanced Disclosures under an Open End Credit Plan. Section 1301 of the Act amends section 127(b) of the Truth in Lending Act to mandate the inclusion of certain specified disclosures in billing statements with respect to various open end credit plans. In general, these statements must contain an example of the time it would take to repay a stated balance at a specified interest rate. In addition, they must warn the borrower that making only the minimum payment will increase the amount of interest that must be paid and the time it takes to repay the balance. Further, a toll-free telephone number must be provided where the borrower can obtain an estimate of the time it would take to repay the balance if only minimum payments are made. With respect to a creditor whose compliance with title 15 of the United States Code is enforced by the Federal Trade Commission (FTC), the billing statement must advise the borrower to contact the FTC at a toll-free telephone number to obtain an estimate of the time it would take to repay the borrower's balance. Section 1301(a) permits the creditor to substitute an example based on a higher interest rate. As necessary, the provision requires the Board of Governors of the Federal Reserve System ("Board"), to periodically recalculate by rule the interest rate and repayment periods specified in Section 1301(a). With respect to the toll-free telephone number, section 1301(a) permits a third party to establish and maintain it. Under certain circumstances, the toll-free number may connect callers to an automated device.

For a period not to exceed 24 months from the effective date of the Act, the Board is required to establish and maintain a toll-free telephone number (or provide a toll-free telephone number established and maintained by a third party) for use by creditors that are depository institutions (as defined in section 3 of the Federal Deposit Insurance Act), including a Federal or state credit union (as defined in section 101 of the Federal Credit Union Act), with total assets not exceeding $250 million. Not later than six months prior to the expiration of the 24-month period, the Board must submit a report on this program to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives. In addition, section 1301(a) requires the Board to establish a detailed table illustrating the approximate number of months that it would take to repay an outstanding balance if a consumer pays only the required minimum month payments and if no other advances are made. The table should reflect a significant number of different annual percentage rates, and account balances, minimum payment amounts. The Board must also promulgate regulations providing instructional guidance regarding the manner in which the information contained in the tables should be used to respond to a request by an obligor under this provision. Section 1301(a) provides that the disclosure requirements of this provision are inapplicable to any charge card account where the primary purpose of which is to require payment of charges in full each month.

Section 1301(b)(1) requires the Federal Reserve Board to promulgate regulations implementing section 1301(a)'s amendments to section 127. Section 1301(b)(2) specifies that the effective date of the amendments under subsection (a) and the regulations required under this provision shall not take effect until the later of 18 months after the date of enactment of this Act or 12 months after the publication of final regulations by the Board.

Section 1301(c) authorizes the Federal Reserve Board to conduct a study to determine the types of information available to potential borrowers from consumer credit lending institutions regarding factors qualifying potential borrowers for credit, repayment requirements, and the consequences of default. The provision specifies the factors that should be considered. The study's findings must be submitted to Congress and include recommendations for legislative initiatives, based on the Board's findings.

Sec. 1302. Enhanced Disclosure for Credit Extensions Secured by a Dwelling. Subsection (a)(1) of section 1302 of the Act amends section 127A(a)(13) of the Truth in Lending Act to require a statement in any case in which the extension of credit exceeds the fair market value of a dwelling specifying that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes. Section 1302(a)(2) amends section 147(b) of the Truth in Lending Act to require an advertisement relating to an extension of credit that may exceed the fair market value of a dwelling and such advertisement is disseminated in paper form to the public or through the Internet (as opposed to dissemination by radio or television) to include a specified statement. The statement must disclose that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

With respect to non-open end credit extensions, section 1302(b)(1) amends section 128 of the Truth in Lending Act to require that a consumer receive a specified statement at the time he or she applies for credit with respect to a consumer credit transaction secured by the consumer's principal dwelling and where the credit extension may exceed the fair market value of the dwelling. The statement must disclose that the interest on the portion of the credit extension that exceeds the dwelling's fair market value is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges. Section 1302(b)(2) requires certain advertisements disseminated in paper form to the public or through the Internet that relate to a consumer credit transaction secured by a consumer's principal dwelling where the extension of credit may exceed the dwelling's fair market value to contain specified statements. These statements advise that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges.

Section 1302(c)(1) requires the Federal Reserve Board to promulgate regulations implementing the amendments effectuated by this provision. Section 1302(c)(2) provides that these regulations shall not take effect until the later of 12 months following the Act's enactment date or 12 months after the date of publication of such final regulations by the Board.

Sec. 1303. Disclosures Related to "Introductory Rates." Subsection (a) of section 1303 of the Act amends section 127(c) of the Truth in Lending Act by adding a provision to specify further requirements for applications, solicitations and related materials that are subject to section 127(c)(1). With respect to an application or solicitation to open a credit card account and all promotional materials accompanying such application or solicitation involving an "introductory rate" offer, such materials must do the following if they offer a temporary annual percentage rate of interest:

1. the term "introductory" in immediate proximity to each listing of the temporary annual percentage interest rate applicable to such account;
2. if the annual percentage interest rate that will apply after the end of the temporary rate period will be a fixed rate, the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate;
3. if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect 60 days before the date of mailing of the application or solicitation must be clearly and conspicuously stated in a prominent location closely proximate to the first listing of the temporary annual percentage rate.

The second and third provisions described above do not apply to any listing of a temporary annual percentage rate on an envelope or other enclosure in which an application or solicitation to open a credit card account is mailed. With respect to an application or solicitation to open a credit card account for which disclosure is required pursuant to section 127(c)(1) of the Truth in Lending Act, section 1303(a) specifies that certain statements be made if the rate of interest is revocable under any circumstance or upon any event. The statements must clearly and conspicuously appear in a prominent manner on or with the application or solicitation. The disclosures include a general description of the circumstances that may result in the revocation of the temporary annual percentage rate and an explanation of the type of interest rate that will apply upon revocation of the temporary rate.

To implement this provision, section 1303(b) amends section 127(c) of the Truth in Lending Act to define various relevant terms and requires the Board to promulgate regulations. The provision does not become effective until the earlier of 12 months after the Act's enactment date or 12 months after the date of publication of such final regulations.

Sec. 1304. Internet-Based Credit Card Solicitations. Subsection (a) of section 1304 of the Act amends section 127(c) of the Truth in Lending Act to require any solicitation to open a credit card account for an open end consumer credit plan through the Internet or other interactive computer service to clearly and conspicuously include the disclosures required under section 127(c)(1)(A) and (B). It also specifies that the disclosure required pursuant to section 127(c)(1)(A) be readily accessible to consumers in close proximity to the solicitation and be updated regularly to reflect current policies, terms, and fee amounts applicable to the credit card account. Section 1304(a) defines terms relevant to the Internet.

Section 1304(b) requires the Federal Reserve Board to promulgate regulations implementing this provision. It also provides that the amendments effectuated by section 1304 do not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such regulations.

Sec. 1305. Disclosures Related to Late Payment Deadlines and Penalties. Subsection (a) of section 1305 of the Act amends section 127(b) of the Truth in Lending Act to provide that if a late payment fee is to be imposed due to the obligor's failure to make payment on or before a required payment due date, the billing statement must specify the date on which that payment is due (or if different the earliest date on which a late payment fee may be charged) and the amount of the late payment fee to be imposed if payment is made after such date.

Section 1305(b) requires the Federal Reserve Board to promulgate regulations implementing this provision. The amendments effectuated by this provision and the regulations promulgated thereunder shall not take effect until the later of 12 months after the Act's enactment date or 12 months after the date of publication of the regulations.

Sec. 1306. Prohibition on Certain Actions for Failure to Incur Finance Charges. Subsection (a) of section 1306 of the Act amends section 127 of the Truth in Lending Act to add a provision prohibiting a creditor of an open end consumer credit plan from terminating an account prior to its expiration date solely because the consumer has not incurred finance charges on the account. The provision does not prevent the creditor from terminating such account for inactivity for three or more consecutive months.

Section 1306(b) requires the Federal Reserve Board to promulgate regulations implementing the amendments effectuated by section 1306(a) and provides that they do not become effective until the later of 12 months after the Act's enactment date or 12 months after the date of publication of such final regulations.

Sec. 1307. Dual Use Debit Card. Subsection (a) of section 1307 of the act provides that the Federal Reserve Board may conduct a study and submit a report to Congress containing its analysis of consumer protections under existing law to limit the liability of consumers for unauthorized use of a debit card or similar access device. The report must include recommendations for legislative initiatives, if any, based on its findings.

Section 1307(b) provides that the Federal Reserve Board, in preparing its report, may include analysis of section 909 of the Electronic Fund Transfer Act to the extent this provision is in effect at the time of the report and the implementing regulations. In addition, the analysis may pertain to whether any voluntary industry rules have enhanced or may enhance the level of protection afforded consumers in connection with such unauthorized use liability and whether amendments to the Electronic Fund Transfer Act or implementing regulations are necessary to further address adequate protection for consumers concerning unauthorized use liability.

Sec. 1308. Study of Bankruptcy Impact of Credit Extended to Dependent Students. Section 1308 of the Act directs the Board of Governors of the Federal Reserve to study the impact that the extension of credit to dependents (defined under the Internal Revenue Code of 1986) who are enrolled in postsecondary educational institutions has on the rate of bankruptcy cases filed. The report must be submitted to the Senate and House of Representatives no later than one year from the Act's enactment date.

Sec. 1309. Clarification of Clear and Conspicuous. Subsection (a) of section 1309 of the Act requires the Board (in consultation with other Federal banking agencies, the National Credit Union Administration Board, and the Federal Trade Commission) to promulgate regulations not later than six months after the Act's enactment date to provide guidance on the meaning of the term "clear and conspicuous" as it is used in section 127(b)(11)(A), (B) and (C) and section 127(c)(6)(A)(ii) and (iii) of the Truth in Lending Act.

Section 1309(b) provides that regulations promulgated under section 1309(a) shall include examples of clear and conspicuous model disclosures for the purpose of disclosures required under the Truth in Lending Act provisions set forth therein.

Section 1309(c) requires the Federal Reserve Board, in promulgating regulations under this provision, to ensure that the clear and conspicuous standard required for disclosures made under the Truth in Lending Act provisions set forth in section 1309(a) can be implemented in a manner that results in disclosures which are reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

TITLE XIV. PREVENTING CORPORATE BANKRUPTCY ABUSE

Sec. 1401. Employee Wage and Benefit Priorities. Section 1401 of the Act amends Bankruptcy Code section 507(a) to provide heightened protections for employees by increasing the monetary cap on wage and employee benefit claims entitled to priority under the Bankruptcy Code from $4,650 to $10,000 and lengthens the reachback period for wage claims from 90 days to 180 days. As few employees will continue working without pay for an extended period, the principal effect of extending the time period to 180 days is that a greater portion of unpaid vacation, severance, and sick leave pay will be entitled to priority payment.

Sec. 1402. Fraudulent Transfers and Obligations. Section 1402 of the Act amends section 548 of the Bankruptcy Code to enhance the recovery of avoidable transfers and excessive prepetition compensation, such as bonuses, paid to insiders of a debtor. It effectuates two changes to current law that would make it easier for a trustee to avoid pre-petition transfers. First, section 1402(1) extends the one-year reachback period for fraudulent transfers to two years. Second, section 1402(2) amends Bankruptcy Code section 548(a) to clarify that it permits the recovery of any transfer to or an obligation incurred for the benefit of an insider under an employment contract, under certain conditions. In addition, section 1402 adds a new provision to section 548 authorizing a bankruptcy trustee to avoid any transfer of an interest of the debtor in property that was made on or within the ten-year period preceding the filing of the debtor's bankruptcy case if: (a) the transfer was made to a self-settled trust or similar device; (b) the transfer was made by the debtor; (c) the debtor is a beneficiary of such trust or similar device; and (d) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date of such transfer, indebted. For purposes of this provision, a transfer includes a transfer made in anticipation of any money judgment, criminal fine, or similar obligation or which the debtor believed would be incurred as a result of: (1) a violation of Federal or state securities laws, regulations, or orders; or (2) fraud, deceit, or manipulation in fiduciary capacity or in connection with the purchase or sale of a security under specified provisions of the Federal securities laws.

Sec. 1403. Payment of Insurance Benefits to Retired Employees. Current bankruptcy law prevents a chapter 11 debtor from unilaterally modifying certain retiree benefits, such as health insurance, during the pendency of the bankruptcy case unless an authorized retiree representative is appointed and agrees to the modification, or the court authorizes the modification. Section 1403 amends Bankruptcy Code section 1114 to prevent debtors from evading these requirements by terminating retiree benefit plans on the eve of bankruptcy. The amendment would require retroactive reinstatement of retiree benefits that were modified within 180 days before the debtor filed for bankruptcy protection, unless the court finds that the balance of the equities clearly favors the modification.

Sec. 1404. Debts Nondischargeable If Incurred in Violation of Securities Fraud Laws. Bankruptcy Code section 523(a)(19) makes certain debts nondischargeable that result from the violation of Federal securities law, state securities law, or any regulation or order issued under such Federal or state securities law nondischargeable. Section 1404 amends Bankruptcy Code section 523(a)(19)(B) to provide that it applies to such debts that result before, on, or after the date on which the petition was filed from any judgment, order, consent order, decree, settlement agreement, or from any court or administrative order for damages or for other specified payments owed by the debtor. Section 1404 is effective as of July 30, 2002.

Sec. 1405. Appointment of Trustee in Cases of Suspected Fraud. Section 1405 amends Bankruptcy Code section 1104 to require the United States trustee to move for the appointment of a trustee if there are reasonable grounds to suspect that current members of a chapter 11 debtor's governing body, chief executive officer, chief financial officer, or members of the debtor's governing body who selected the debtor's chief executive officer or chief financial officer participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

Sec. 1406. Effective Date; Application of Amendments. Section 1406 provides that title XIV, with the exception of one provision, takes effect on the date of enactment of this Act and the amendments apply only to cases commenced after such date. The exception applies to section 1402(1) of the Act, which applies only to cases commenced under the Bankruptcy Code more than one year after the date of enactment of this Act.

TITLE XV. GENERAL EFFECTIVE DATE; APPLICATION OF AMENDMENTS

Sec. 1501. Effective Date; Application of Amendments. Subsection (a) of section 1501 of the Act provides that the Act shall take effect 180 days after the date of enactment, unless otherwise specified in this Act. Section 1501(b) provides that the amendments made by this Act shall not apply to cases commenced under the Bankruptcy Code before the Act's effective date, unless otherwise specified in this Act. The provision specifies that the amendments made by sections 308, 322 and 330 shall apply to cases commenced on or after the date of enactment of this Act.

Sec. 1502. Technical Corrections. In light of the renumbering of a paragraph in Bankruptcy Code section 507 as effectuated by section 212 of this Act, section 1502 corrects various cross-references in the Bankruptcy Code to reflect such renumbering.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 11, UNITED STATES CODE

CHAPTER 1—GENERAL PROVISIONS

§ 101. Definitions

[In this title—] *In this title the following definitions shall apply:*

(1) *The term* "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized[;].

(2) *The term* "affiliate" means—

(A) * * *

* * * * * * *

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement[;].

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) *The term* "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law[;].

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) *The term* "claim" means—

(A) * * *

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[;].

(6) *The term* "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing

organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title**[**;**]**.

(7) *The term* "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case**[**;**]**.

(7A) The term "commercial fishing operation" means—

(A) the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or

(B) for purposes of section 109 and chapter 12, aquaculture activities consisting of raising for market any species or product described in subparagraph (A).

(7B) The term "commercial fishing vessel" means a vessel used by a family fisherman to carry out a commercial fishing operation.

(8) *The term* "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose**[**;**]**.

(9) *The term* "corporation"—

(A) * * *

(B) does not include limited partnership**[**;**]**.

(10) *The term* "creditor" means—

(A) * * *

* * * * * * *

(C) entity that has a community claim**[**;**]**.

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

(11) *The term* “custodian” means—

(A) * * *

* * * * * * *

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor’s creditors**[**;**]**.

(12) *The term* “debt” means liability on a claim**[**;**]**.

[(12A) “debt for child support” means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor;**]**

(12A) The term “debt relief agency” means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(13) *The term* “debtor” means person or municipality concerning which a case under this title has been commenced**[**;**]**.

(13A) The term “debtor’s principal residence”—

(A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer.

[(14) “disinterested person” means person that—

[(A) is not a creditor, an equity security holder, or an insider;

[(B) is not and was not an investment banker for any outstanding security of the debtor;

[(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

[(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

[(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;]

(14) The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(15) *The term* "entity" includes person, estate, trust, governmental unit, and United States trustee[;].

(16) *The term* "equity security" means—

(A) * * *

* * * * * * *

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph【;】.

(17) *The term* "equity security holder" means holder of an equity security of the debtor【;】.

(18) *The term* "family farmer" means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed 【$1,500,000】 *$3,237,000* and not less than 【80】 *50* percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income 【for the taxable year preceding the taxable year】 *for—*

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) * * *

(ii) its aggregate debts do not exceed 【$1,500,000】 *$3,237,000* and not less than 【80】 *50* percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded【;】.

(19) *The term* "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title【;】.

(19A) The term "family fisherman" means—

(A) an individual or individual and spouse engaged in a commercial fishing operation—

(i) whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is

filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and

(ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) a corporation or partnership—

(i) in which more than 50 percent of the outstanding stock or equity is held by—

(I) 1 family that conducts the commercial fishing operation; or

(II) 1 family and the relatives of the members of such family, and such family or such relatives conduct the commercial fishing operation; and

(ii)(I) more than 80 percent of the value of its assets consists of assets related to the commercial fishing operation;

(II) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for 1 dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such corporation or such partnership; and

(III) if such corporation issues stock, such stock is not publicly traded.

(19B) The term "family fisherman with regular annual income" means a family fisherman whose annual income is sufficiently stable and regular to enable such family fisherman to make payments under a plan under chapter 12 of this title.

(20) *The term* "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person**[**;**]**.

(21) *The term* "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state**[**;**]**.

(21A) *The term* "farmout agreement" means a written agreement in which—

(A) * * *

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property**[**;**]**.

(21B) *The term* "Federal depository institutions regulatory agency" means—

(A) * * *

* * * * * * *

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation[;].

[(22) the term "financial institution"—

[(A) means—

[(i) a Federal reserve bank or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, or receiver or conservator for such entity and, when any such Federal reserve bank, receiver, conservator, or entity is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741 of this title, the customer; or

[(ii) in connection with a securities contract, as defined in section 741 of this title, an investment company registered under the Investment Company Act of 1940; and

[(B) includes any person described in subparagraph (A) which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991;

[(23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

[(24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding;]

(22) The term "financial institution" means—

(A) a Federal reserve bank, or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means—

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or

transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

(25) *The term* "forward contract" **[**means a contract**]** *means—*

(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction**[**, or any combination thereof or option thereon;**]***, or any other similar agreement;*

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction

referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.

【(26) "forward contract merchant" means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;】

(26) The term "forward contract merchant" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.

(27) *The term* "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government【;】.

(27A) The term "health care business"—

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes—

(i) any—

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any—

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in

offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

(27B) The term "incidental property" means, with respect to a debtor's principal residence—

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) *The term* "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor[;].

(29) *The term* "indenture trustee" means trustee under an indenture[;].

(30) *The term* "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker[;].

(31) *The term* "insider" includes—

(A) * * *

* * * * * * *

(F) managing agent of the debtor[;].

(32) *The term* "insolvent" means—

(A) * * *

* * * * * * *

(C) with reference to a municipality, financial condition such that the municipality is—

(i) * * *

(ii) unable to pay its debts as they become due[;].

(33) *The term* "institution-affiliated party"—

(A) * * *

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act[;].

(34) *The term* "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union Act[;].

(35) *The term* "insured depository institution"—

(A) * * *

(B) includes an insured credit union (except in the case of [paragraphs (21B) and (33)(A)] *paragraphs (23) and (35)* of this subsection)[;].

(35A) *The term* "intellectual property" means—

(A) * * *

* * * * * * *

to the extent protected by applicable nonbankruptcy law[; and].

(36) *The term* "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding**[**;**]**.

(37) *The term* "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation**[**;**]**.

(38) *The term* "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments**[**; and**]**.

(38A) The term "master netting agreement"—

(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and

(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a).

(38B) The term "master netting agreement participant" means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor.

(39) *The term* "mask work" has the meaning given it in section 901(a)(2) of title 17.

(39A) The term "median family income" means for any year—

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

(40) *The term* "municipality" means political subdivision or public agency or instrumentality of a State**[**;**]**.

(40A) The term "patient" means any individual who obtains or receives services from a health care business.

(40B) The term "patient records" means any written document relating to a patient or a record recorded in a magnetic, optical, or other form of electronic medium.

(41) *The term* “person” includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

(A) * * *

* * * * * * *

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit[;].

(41A) The term “personally identifiable information” means—

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—

(i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;

(ii) the geographical address of a physical place of residence of such individual;

(iii) an electronic address (including an e-mail address) of such individual;

(iv) a telephone number dedicated to contacting such individual at such physical place of residence;

(v) a social security account number issued to such individual; or

(vi) the account number of a credit card issued to such individual; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—

(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or

(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

(42) *The term* “petition” means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title[;].

(42A) *The term* “production payment” means a term overriding royalty satisfiable in cash or in kind—

(A) * * *

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs[;].

(43) *The term* “purchaser” means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee[;].

(44) *The term* “railroad” means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier[;].

(45) *The term* “relative” means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree[;].

(46) *The term* "repo participant" means an entity that, ⟦on any day during the period beginning 90 days before the date of⟧ *at any time before* the filing of the petition, has an outstanding repurchase agreement with the debtor⟦;⟧.

⟦(47) "repurchase agreement" (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;⟧

(47) The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—

(A) means—

(i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;

(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);

(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or trans-

action under the master agreement that is referred to in clause (i), (ii), or (iii); or

(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

(B) does not include a repurchase obligation under a participation in a commercial mortgage loan.

(48) *The term* "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934*, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission,* or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A**[**;**]**.

(48A) The term "securities self regulatory organization" means either a securities association registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities and Exchange Commission under section 6 of the Securities Exchange Act of 1934.

(49) *The term* "security"—

(A) * * *

* * * * * * *

(B) does not include—

(i) * * *

* * * * * * *

(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered**[**;**]**.

(50) *The term* "security agreement" means agreement that creates or provides for a security interest**[**;**]**.

(51) *The term* "security interest" means lien created by an agreement**[**;**]**.

(51A) *The term* "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade**[**;**]**.

(51B) *The term* "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor *who is not a family farmer* and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental **[**thereto having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000;❙.

❚(51C) "small business" means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed $2,000,000;❙

(51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

(51D) The term "small business debtor"—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

(52) *The term* "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title❚;❙.

(53) *The term* "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute❚;❙.

(53A) *The term* "stockbroker" means person—

(A) * * *

(B) that is engaged in the business of effecting transactions in securities—

(i) * * *

(ii) with members of the general public, from or for such person's own account❚;❙.

❚(53B) "swap agreement" means—

❚(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

⟦(B) any combination of the foregoing; or

⟦(C) a master agreement for any of the foregoing together with all supplements;⟧

(53B) The term "swap agreement"—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is—

(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

(III) a currency swap, option, future, or forward agreement;

(IV) an equity index or equity swap, option, future, or forward agreement;

(V) a debt index or debt swap, option, future, or forward agreement;

(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

(VIII) a weather swap, weather derivative, or weather option;

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that—

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into an agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the mas-

ter agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.

(53C) *The term* "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor**[**;**]**.

(56A) *The term* "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized**[**;**]**.

(53D) *The term* "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan**[**;**]**.

[(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;**]**

(54) The term "transfer" means—

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

(i) property; or

(ii) an interest in property.

(54A) ❲the term❳ *The term* "uninsured State member bank" means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation❲; and❳.

(55) *The term* "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States❲;❳.

* * * * * * *

§ 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title*, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15*.

* * * * * * *

(k) Chapter 15 applies only in a case under such chapter, except that—

(1) sections 1505, 1513, and 1514 apply in all cases under this title; and

(2) section 1509 applies whether or not a case under this title is pending.

§ 104. Adjustment of dollar amounts

(a) * * *

(b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections *101(3), 101(18), 101(19A), 101(51D),* 109(e), 303(b), 507(a), 522(d), ❲and 523(a)(2)(C)❳ *522(f)(3) and 522(f)(4), 522(n), 522(p), 522(q), 522(f)(3) and 522(f)(4), 523(a)(2)(C), 541(b), 547(c)(9), 707(b), 1322(d), 1325(b), and 1326(b)(3) of this title and section 1409(b) of title 28* immediately before such April 1 shall be adjusted—

(A) * * *

* * * * * * *

(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections *101(3), 101(18), 101(19A), 101(51D),* 109(e), 303(b), 507(a), 522(d), ❲and 523(a)(2)(C) of this title❳ *522(f)(3) and 522(f)(4), 522(n), 522(p), 522(q), 522(f)(3) and 522(f)(4), 523(a)(2)(C), 541(b), 547(c)(9),*

707(b), 1322(d), 1325(b), and 1326(b)(3) of this title and section 1409(b) of title 28.

* * * * * * *

§ 105. Power of court

(a) * * *

* * * * * * *

(d) The court, on its own motion or on the request of a party in interest【, may】—

【(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and】

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

* * * * * * *

§ 107. Public access to papers

(a) Except as provided in subsection (b) of this section *and subject to section 112*, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

* * * * * * *

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

(2) Upon ex parte application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.

(3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28—

(A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and

(B) shall not disclose information specifically protected by the court under this title.

§ 108. Extension of time

(a) * * *

* * * * * * *

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) * * *

(2) 30 days after notice of the termination or expiration of the stay under section 362, ⟦922, 1201, or⟧ *922, 1201, or* 1301 of this title, as the case may be, with respect to such claim.

§ 109. Who may be a debtor

(a) * * *

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under ⟦subsection (c) or (d) of⟧ section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

⟦(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.⟧

(3)(A) a foreign insurance company, engaged in such business in the United States; or

(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978 in the United States.

* * * * * * *

(f) Only a family farmer *or family fisherman* with regular annual income may be a debtor under chapter 12 of this title.

* * * * * * *

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) "bankruptcy petition preparer" means a person, other than an attorney [or an employee of an attorney] *for the debtor or an employee of such attorney under the direct supervision of such attorney*, who prepares for compensation a document for filing; and

* * * * * * *

(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address. *If a bankruptcy petition preparer is* *not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer shall be required to—*

(A) sign the document for filing; and

(B) print on the document the name and address of that officer, principal, responsible person, or partner.

⟦(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.⟧

(2)(A) Before preparing any document for filing or accepting any fees from a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.

(B) The notice under subparagraph (A)—

(i) shall inform the debtor in simple language that a bankruptcy petition preparer is not an attorney and may not practice law or give legal advice;

(ii) may contain a description of examples of legal advice that a bankruptcy petition preparer is not authorized to give, in addition to any advice that the preparer may not give by reason of subsection (e)(2); and

(iii) shall—

(I) be signed by the debtor and, under penalty of perjury, by the bankruptcy petition preparer; and

(II) be filed with any document for filing.

(c)(1) * * *

⟦(2) For purposes⟧ *(2)(A) Subject to subparagraph (B), for purposes* of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(B) If a bankruptcy petition preparer is not an individual, the identifying number of the bankruptcy petition preparer shall be the Social Security account number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.

⟦(3) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.⟧

⟦(d)(1)⟧ *(d)* A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

⟦(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.⟧

(e)(1) * * *

⟦(2) A bankruptcy petition preparer may be fined not more than $500 for each document executed in violation of paragraph (1).⟧

(2)(A) A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

(B) The legal advice referred to in subparagraph (A) includes advising the debtor—

(i) whether—

(I) to file a petition under this title; or

(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning—

(I) the tax consequences of a case brought under this title; or

(II) the dischargeability of tax claims;

(v) whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;

(vi) concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or

(vii) concerning bankruptcy procedures and rights.

【(f)(1)】 *(f)* A bankruptcy petition preparer shall not use the word "legal" or any similar term in any advertisements, or advertise under any category that includes the word "legal" or any similar term.

【(2) A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1).】

【(g)(1)】 *(g)* A bankruptcy petition preparer shall not collect or receive any payment from the debtor or on behalf of the debtor for the court fees in connection with filing the petition.

【(2) A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1).】

(h)*(1) The Supreme Court may promulgate rules under section 2075 of title 28, or the Judicial Conference of the United States may prescribe guidelines, for setting a maximum allowable fee chargeable by a bankruptcy petition preparer. A bankruptcy petition preparer shall notify the debtor of any such maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor.*

【(1) Within 10 days after the date of the filing of a petition, a bankruptcy petition preparer shall file a】 *(2) A* declaration under penalty of perjury *by the bankruptcy petition preparer shall be filed together with the petition,* disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor. *If rules or guidelines setting a maximum fee for services have been promulgated or prescribed under paragraph (1), the declaration under this paragraph shall include a certification that the bankruptcy petition preparer complied with the notification requirement under paragraph (1).*

【(2) The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared. An individual debtor may exempt any funds so recovered under section 522(b).】

(3)(A) The court shall disallow and order the immediate turnover to the bankruptcy trustee any fee referred to in paragraph (2) found to be in excess of the value of any services—

(i) rendered by the bankruptcy petition preparer during the 12-month period immediately preceding the date of the filing of the petition; or

(ii) found to be in violation of any rule or guideline promulgated or prescribed under paragraph (1).

(B) All fees charged by a bankruptcy petition preparer may be forfeited in any case in which the bankruptcy petition preparer fails to comply with this subsection or subsection (b), (c), (d), (e), (f), or (g).

(C) An individual may exempt any funds recovered under this paragraph under section 522(b).

⟦(3)⟧ *(4)* The debtor, the trustee, a creditor, ⟦or the United States trustee⟧ *the United States trustee (or the bankruptcy administrator, if any) or the court, on the initiative of the court,* may file a motion for an order under paragraph (2).

⟦(4)⟧ *(5)* A bankruptcy petition preparer shall be fined not more than $500 for each failure to comply with a court order to turn over funds within 30 days of service of such order.

⟦(i)(1) If a bankruptcy case or related proceeding is dismissed because of the failure to file bankruptcy papers, including papers specified in section 521(1) of this title, the negligence or intentional disregard of this title or the Federal Rules of Bankruptcy Procedure by a bankruptcy petition preparer, or if a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, the bankruptcy court shall certify that fact to the district court, and the district court, on motion of the debtor, the trustee, or a creditor and after a hearing, shall order the bankruptcy petition preparer to pay to the debtor—⟧

(i)(1) If a bankruptcy petition preparer violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any), and after notice and a hearing, the court shall order the bankruptcy petition preparer to pay to the debtor—

(A) * * *

* * * * * * *

(j)(1) * * *

(2)(A) In an action under paragraph (1), if the court finds that—

(i) a bankruptcy petition preparer has—

(I) engaged in conduct in violation of this section or of any provision of this title ⟦a violation of which subjects a person to criminal penalty⟧;

* * * * * * *

(B) If the court finds that a bankruptcy petition preparer has continually engaged in conduct described in subclause (I), (II), or (III) of clause (i) and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, ⟦or has not paid a penalty⟧ *has not paid a penalty* imposed under this section, *or failed to disgorge all fees ordered by the court* the court may enjoin the person from acting as a bankruptcy petition preparer.

(3) The court, as part of its contempt power, may enjoin a bankruptcy petition preparer that has failed to comply with a previous

order issued under this section. The injunction under this paragraph may be issued on the motion of the court, the trustee, or the United States trustee (or the bankruptcy administrator, if any).

【(3)】 *(4)* The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable 【attorney's】 *attorneys'* fees and costs of the action, to be paid by the bankruptcy petition preparer.

* * * * * * *

(l)(1) A bankruptcy petition preparer who fails to comply with any provision of subsection (b), (c), (d), (e), (f), (g), or (h) may be fined not more than $500 for each such failure.

(2) The court shall triple the amount of a fine assessed under paragraph (1) in any case in which the court finds that a bankruptcy petition preparer—

(A) advised the debtor to exclude assets or income that should have been included on applicable schedules;

(B) advised the debtor to use a false Social Security account number;

(C) failed to inform the debtor that the debtor was filing for relief under this title; or

(D) prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.

(3) A debtor, trustee, creditor, or United States trustee (or the bankruptcy administrator, if any) may file a motion for an order imposing a fine on the bankruptcy petition preparer for any violation of this section.

(4)(A) Fines imposed under this subsection in judicial districts served by United States trustees shall be paid to the United States trustee, who shall deposit an amount equal to such fines in a special account of the United States Trustee System Fund referred to in section 586(e)(2) of title 28. Amounts deposited under this subparagraph shall be available to fund the enforcement of this section on a national basis.

(B) Fines imposed under this subsection in judicial districts served by bankruptcy administrators shall be deposited as offsetting receipts to the fund established under section 1931 of title 28, and shall remain available until expended to reimburse any appropriation for the amount paid out of such appropriation for expenses of the operation and maintenance of the courts of the United States.

§111. Nonprofit budget and credit counseling agencies; financial management instructional courses

(a) The clerk shall maintain a publicly available list of—

(1) nonprofit budget and credit counseling agencies that provide 1 or more services described in section 109(h) currently approved by the United States trustee (or the bankruptcy administrator, if any); and

(2) instructional courses concerning personal financial management currently approved by the United States trustee (or the bankruptcy administrator, if any), as applicable.

(b) The United States trustee (or bankruptcy administrator, if any) shall only approve a nonprofit budget and credit counseling agency or an instructional course concerning personal financial management as follows:

(1) The United States trustee (or bankruptcy administrator, if any) shall have thoroughly reviewed the qualifications of the nonprofit budget and credit counseling agency or of the provider of the instructional course under the standards set forth in this section, and the services or instructional courses that will be offered by such agency or such provider, and may require such agency or such provider that has sought approval to provide information with respect to such review.

(2) The United States trustee (or bankruptcy administrator, if any) shall have determined that such agency or such instructional course fully satisfies the applicable standards set forth in this section.

(3) If a nonprofit budget and credit counseling agency or instructional course did not appear on the approved list for the district under subsection (a) immediately before approval under this section, approval under this subsection of such agency or such instructional course shall be for a probationary period not to exceed 6 months.

(4) At the conclusion of the applicable probationary period under paragraph (3), the United States trustee (or bankruptcy administrator, if any) may only approve for an additional 1-year period, and for successive 1-year periods thereafter, an agency or instructional course that has demonstrated during the probationary or applicable subsequent period of approval that such agency or instructional course—

(A) has met the standards set forth under this section during such period; and

(B) can satisfy such standards in the future.

(5) Not later than 30 days after any final decision under paragraph (4), an interested person may seek judicial review of such decision in the appropriate district court of the United States.

(c)(1) The United States trustee (or the bankruptcy administrator, if any) shall only approve a nonprofit budget and credit counseling agency that demonstrates that it will provide qualified counselors, maintain adequate provision for safekeeping and payment of client funds, provide adequate counseling with respect to client credit problems, and deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of the services it provides.

(2) To be approved by the United States trustee (or the bankruptcy administrator, if any), a nonprofit budget and credit counseling agency shall, at a minimum—

(A) have a board of directors the majority of which—

(i) are not employed by such agency; and

(ii) will not directly or indirectly benefit financially from the outcome of the counseling services provided by such agency;

(B) if a fee is charged for counseling services, charge a reasonable fee, and provide services without regard to ability to pay the fee;

(C) provide for safekeeping and payment of client funds, including an annual audit of the trust accounts and appropriate employee bonding;

(D) provide full disclosures to a client, including funding sources, counselor qualifications, possible impact on credit reports, and any costs of such program that will be paid by such client and how such costs will be paid;

(E) provide adequate counseling with respect to a client's credit problems that includes an analysis of such client's current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt;

(F) provide trained counselors who receive no commissions or bonuses based on the outcome of the counseling services provided by such agency, and who have adequate experience, and have been adequately trained to provide counseling services to individuals in financial difficulty, including the matters described in subparagraph (E);

(G) demonstrate adequate experience and background in providing credit counseling; and

(H) have adequate financial resources to provide continuing support services for budgeting plans over the life of any repayment plan.

(d) The United States trustee (or the bankruptcy administrator, if any) shall only approve an instructional course concerning personal financial management—

(1) for an initial probationary period under subsection (b)(3) if the course will provide at a minimum—

(A) trained personnel with adequate experience and training in providing effective instruction and services;

(B) learning materials and teaching methodologies designed to assist debtors in understanding personal financial management and that are consistent with stated objectives directly related to the goals of such instructional course;

(C) adequate facilities situated in reasonably convenient locations at which such instructional course is offered, except that such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective;

(D) the preparation and retention of reasonable records (which shall include the debtor's bankruptcy case number) to permit evaluation of the effectiveness of such instructional course, including any evaluation of satisfaction of instructional course requirements for each debtor attending such instructional course, which shall be available for inspection and evaluation by the Executive Office for United States Trustees, the United States trustee (or the bankruptcy administrator, if any), or the chief bankruptcy judge for the district in which such instructional course is offered; and

(E) if a fee is charged for the instructional course, charge a reasonable fee, and provide services without regard to ability to pay the fee.

(2) for any 1-year period if the provider thereof has demonstrated that the course meets the standards of paragraph (1) and, in addition—

(A) has been effective in assisting a substantial number of debtors to understand personal financial management; and

(B) is otherwise likely to increase substantially the debtor's understanding of personal financial management.

(e) The district court may, at any time, investigate the qualifications of a nonprofit budget and credit counseling agency referred to in subsection (a), and request production of documents to ensure the integrity and effectiveness of such agency. The district court may, at any time, remove from the approved list under subsection (a) a nonprofit budget and credit counseling agency upon finding such agency does not meet the qualifications of subsection (b).

(f) The United States trustee (or the bankruptcy administrator, if any) shall notify the clerk that a nonprofit budget and credit counseling agency or an instructional course is no longer approved, in which case the clerk shall remove it from the list maintained under subsection (a).

(g)(1) No nonprofit budget and credit counseling agency may provide to a credit reporting agency information concerning whether a debtor has received or sought instruction concerning personal financial management from such agency.

(2) A nonprofit budget and credit counseling agency that willfully or negligently fails to comply with any requirement under this title with respect to a debtor shall be liable for damages in an amount equal to the sum of—

(A) any actual damages sustained by the debtor as a result of the violation; and

(B) any court costs or reasonable attorneys' fees (as determined by the court) incurred in an action to recover those damages.

§ 112. Prohibition on disclosure of name of minor children

The debtor may be required to provide information regarding a minor child involved in matters under this title but may not be required to disclose in the public records in the case the name of such minor child. The debtor may be required to disclose the name of such minor child in a nonpublic record that is maintained by the court and made available by the court for examination by the United States trustee, the trustee, and the auditor (if any) serving under section 586(f) of title 28, in the case. The court, the United States trustee, the trustee, and such auditor shall not disclose the name of such minor child maintained in such nonpublic record.

CHAPTER 3—CASE ADMINISTRATION

SUBCHAPTER I—COMMENCEMENT OF A CASE

SUBCHAPTER I—COMMENCEMENT OF A CASE

§ 301. Voluntary cases

(a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. 【The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.】

(b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

* * * * * * *

§ 303. Involuntary cases

(a) * * *

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute *as to liability or amount*, or an indenture trustee representing such a holder, 【if such claims】 *if such noncontingent, undisputed claims* aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

* * * * * * *

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute *as to liability or amount*; or

* * * * * * *

【(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.】

(l)(1) If—

(A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;

(B) the debtor is an individual; and

(C) the court dismisses such petition,

the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.

(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.

(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.

⟦§ 304. Cases ancillary to foreign proceedings

⟦(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

⟦(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

⟦(1) enjoin the commencement or continuation of—

⟦(A) any action against—

⟦(i) a debtor with respect to property involved in such foreign proceeding; or

⟦(ii) such property; or

⟦(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

⟦(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

⟦(3) order other appropriate relief.

⟦(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

⟦(1) just treatment of all holders of claims against or interests in such estate;

⟦(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

⟦(3) prevention of preferential or fraudulent dispositions of property of such estate;

⟦(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

⟦(5) comity; and

⟦(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⟧

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) * * *

⟦(2)(A) there is pending a foreign proceeding; and

⟦(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.⟧

(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and

(B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

* * * * * * *

§ 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303⟦, 304,⟧ or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303⟦, 304,⟧ or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

* * * * * * *

§ 308. Debtor reporting requirements

(a) For purposes of this section, the term "profitability" means, with respect to a debtor, the amount of money that the debtor has earned or lost during current and recent fiscal periods.

(b) A small business debtor shall file periodic financial and other reports containing information including—

(1) the debtor's profitability;

(2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;

(3) comparisons of actual cash receipts and disbursements with projections in prior reports;

(4)(A) whether the debtor is—

(i) in compliance in all material respects with postpetition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and

(ii) timely filing tax returns and other required government filings and paying taxes and other administrative expenses when due;

(B) if the debtor is not in compliance with the requirements referred to in subparagraph (A)(i) or filing tax returns and other required government filings and making the payments referred to in subparagraph (A)(ii), what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and

(C) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11 of this title.

SUBCHAPTER II—OFFICERS

* * * * * * *

§ 328. Limitation on compensation of professional persons

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, *on a fixed or percentage fee basis,* or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

* * * * * * *

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, *a consumer privacy ombudsman appointed under section 332,* an examiner, *an ombudsman appointed under section 333, or* a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, *ombudsman,* professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(3)【(A) In】 *In* determining the amount of reasonable compensation to be awarded *to an examiner, trustee under chapter 11, or professional person*, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) * * *

* * * * * * *

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; 【and】

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

【(E)】 *(F)* whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

* * * * * * *

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

* * * * * * *

§ 332. Consumer privacy ombudsman

(a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.

(b) The consumer privacy ombudsman may appear and be heard at such hearing and shall provide to the court information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information under section 363(b)(1)(B). Such information may include presentation of—

(1) the debtor's privacy policy;

(2) the potential losses or gains of privacy to consumers if such sale or such lease is approved by the court;

(3) the potential costs or benefits to consumers if such sale or such lease is approved by the court; and

(4) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers.

(c) A consumer privacy ombudsman shall not disclose any personally identifiable information obtained by the ombudsman under this title.

§ 333. Appointment of patient care ombudsman

(a)(1) If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

(2)(A) If the court orders the appointment of an ombudsman under paragraph (1), the United States trustee shall appoint 1 disinterested person (other than the United States trustee) to serve as such ombudsman.

(B) If the debtor is a health care business that provides long-term care, then the United States trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending to serve as the ombudsman required by paragraph (1).

(C) If the United States trustee does not appoint a State Long-Term Care Ombudsman under subparagraph (B), the court shall notify the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending, of the name and address of the person who is appointed under subparagraph (A).

(b) An ombudsman appointed under subsection (a) shall—

(1) monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians;

(2) not later than 60 days after the date of appointment, and not less frequently than at 60-day intervals thereafter, report to the court after notice to the parties in interest, at a hear-

ing or in writing, regarding the quality of patient care provided to patients of the debtor; and

(3) if such ombudsman determines that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised, file with the court a motion or a written report, with notice to the parties in interest immediately upon making such determination.

(c)(1) An ombudsman appointed under subsection (a) shall maintain any information obtained by such ombudsman under this section that relates to patients (including information relating to patient records) as confidential information. Such ombudsman may not review confidential patient records unless the court approves such review in advance and imposes restrictions on such ombudsman to protect the confidentiality of such records.

(2) An ombudsman appointed under subsection (a)(2)(B) shall have access to patient records consistent with authority of such ombudsman under the Older Americans Act of 1965 and under non-Federal laws governing the State Long-Term Care Ombudsman program.

SUBCHAPTER III—ADMINISTRATION

§ 341. Meetings of creditors and equity security holders

(a) * * *

* * * * * * *

(c) The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors. *Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.*

* * * * * * *

(e) Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

§ 342. Notice

(a) * * *

【(b) Prior to the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give written notice to such individual that indicates each chapter of this title under which such individual may proceed.】

(b) Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give to such individual written notice containing—

(1) a brief description of—

(A) chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters; and

(B) the types of services available from credit counseling agencies; and

(2) statements specifying that—

(A) a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a case under this title shall be subject to fine, imprisonment, or both; and

(B) all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General.

(c)*(1)* If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and *last 4 digits of the* taxpayer identification number of the debtor**[**, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice**]**. *If the notice concerns an amendment that adds a creditor to the schedules of assets and liabilities, the debtor shall include the full taxpayer identification number in the notice sent to that creditor, but the debtor shall include only the last 4 digits of the taxpayer identification number in the copy of the notice filed with the court.*

(2)(A) If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

(B) If a creditor would be in violation of applicable nonbankruptcy law by sending any such communication within such 90-day period and if such creditor supplies the debtor in the last 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

(d) In a case under chapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under section 707(b), the clerk shall give written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has arisen.

(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.

(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and

the debtor receive such creditor's notice of address, shall be provided to such address.

(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

(3) A notice filed under paragraph (1) may be withdrawn by such entity.

(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.

(2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief.

* * * * * * *

[§ 346. Special tax provisions

[(a) Except to the extent otherwise provided in this section, subsections (b), (c), (d), (e), (g), (h), (i), and (j) of this section apply notwithstanding any State or local law imposing a tax, but subject to the Internal Revenue Code of 1986.

[(b)(1) In a case under chapter 7, 12, or 11 of this title concerning an individual, any income of the estate may be taxed under a State or local law imposing a tax on or measured by income only to the estate, and may not be taxed to such individual. Except as provided in section 728 of this title, if such individual is a partner in a partnership, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of income, gain, loss, deduction, or credit of such individual that is distributed, or considered distributed, from such partnership, after the commencement of the case is gain, loss, income, deduction, or credit, as the case may be, of the estate.

[(2) Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such a case, and any

State or local tax on or measured by such income, shall be computed in the same manner as the income and the tax of an estate.

⟦(3) The estate in such a case shall use the same accounting method as the debtor used immediately before the commencement of the case.

⟦(c)(1) The commencement of a case under this title concerning a corporation or a partnership does not effect a change in the status of such corporation or partnership for the purposes of any State or local law imposing a tax on or measured by income. Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such case may be taxed only as though such case had not been commenced.

⟦(2) In such a case, except as provided in section 728 of this title, the trustee shall make any tax return otherwise required by State or local law to be filed by or on behalf of such corporation or partnership in the same manner and form as such corporation or partnership, as the case may be, is required to make such return.

⟦(d) In a case under chapter 13 of this title, any income of the estate or the debtor may be taxed under a State or local law imposing a tax on or measured by income only to the debtor, and may not be taxed to the estate.

⟦(e) A claim allowed under section 502(f) or 503 of this title, other than a claim for a tax that is not otherwise deductible or a capital expenditure that is not otherwise deductible, is deductible by the entity to which income of the estate is taxed unless such claim was deducted by another entity, and a deduction for such a claim is deemed to be a deduction attributable to a business.

⟦(f) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld was paid.

⟦(g)(1) Neither gain nor loss shall be recognized on a transfer—

⟦(A) by operation of law, of property to the estate;

⟦(B) other than a sale, of property from the estate to the debtor; or

⟦(C) in a case under chapter 11 or 12 of this title concerning a corporation, of property from the estate to a corporation that is an affiliate participating in a joint plan with the debtor, or that is a successor to the debtor under the plan, except that gain or loss may be recognized to the same extent that such transfer results in the recognition of gain or loss under section 371 of the Internal Revenue Code of 1986.

⟦(2) The transferee of a transfer of a kind specified in this subsection shall take the property transferred with the same character, and with the transferor's basis, as adjusted under subsection (j)(5) of this section, and holding period.

⟦(h) Notwithstanding sections 728(a) and 1146(a) of this title, for the purpose of determining the number of taxable periods during which the debtor or the estate may use a loss carryover or a loss carryback, the taxable period of the debtor during which the case is commenced is deemed not to have been terminated by such commencement.

⟦(i)(1) In a case under chapter 7, 12, or 11 of this title concerning an individual, the estate shall succeed to the debtor's tax attributes, including—

⟦(A) any investment credit carryover;

⟦(B) any recovery exclusion;

⟦(C) any loss carryover;

⟦(D) any foreign tax credit carryover;

⟦(E) any capital loss carryover; and

⟦(F) any claim of right.

⟦(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) of this subsection but that was not utilized by the estate. The debtor may utilize such tax attributes as though any applicable time limitations on such utilization by the debtor were suspended during the time during which the case was pending.

⟦(3) In such a case, the estate may carry back any loss of the estate to a taxable period of the debtor that ended before the order for relief under such chapter the same as the debtor could have carried back such loss had the debtor incurred such loss and the case under this title had not been commenced, but the debtor may not carry back any loss of the debtor from a taxable period that ends after such order to any taxable period of the debtor that ended before such order until after the case is closed.

⟦(j)(1) Except as otherwise provided in this subsection, income is not realized by the estate, the debtor, or a successor to the debtor by reason of forgiveness or discharge of indebtedness in a case under this title.

⟦(2) For the purposes of any State or local law imposing a tax on or measured by income, a deduction with respect to a liability may not be allowed for any taxable period during or after which such liability is forgiven or discharged under this title. In this paragraph, "a deduction with respect to a liability" includes a capital loss incurred on the disposition of a capital asset with respect to a liability that was incurred in connection with the acquisition of such asset.

⟦(3) Except as provided in paragraph (4) of this subsection, for the purpose of any State or local law imposing a tax on or measured by income, any net operating loss of an individual or corporate debtor, including a net operating loss carryover to such debtor, shall be reduced by the amount of indebtedness forgiven or discharged in a case under this title, except to the extent that such forgiveness or discharge resulted in a disallowance under paragraph (2) of this subsection.

⟦(4) A reduction of a net operating loss or a net operating loss carryover under paragraph (3) of this subsection or of basis under paragraph (5) of this subsection is not required to the extent that the indebtedness of an individual or corporate debtor forgiven or discharged—

⟦(A) consisted of items of a deductible nature that were not deducted by such debtor; or

⟦(B) resulted in an expired net operating loss carryover or other deduction that—

⟦(i) did not offset income for any taxable period; and [(ii) did not contribute to a net operating loss in or a net operating loss carryover to the taxable period during or after which such indebtedness was discharged.

[(5) For the purposes of a State or local law imposing a tax on or measured by income, the basis of the debtor's property or of property transferred to an entity required to use the debtor's basis in whole or in part shall be reduced by the lesser of—

[(A)(i) the amount by which the indebtedness of the debtor has been forgiven or discharged in a case under this title; minus

[(ii) the total amount of adjustments made under paragraphs (2) and (3) of this subsection; and

[(B) the amount by which the total basis of the debtor's assets that were property of the estate before such forgiveness or discharge exceeds the debtor's total liabilities that were liabilities both before and after such forgiveness or discharge.

[(6) Notwithstanding paragraph (5) of this subsection, basis is not required to be reduced to the extent that the debtor elects to treat as taxable income, of the taxable period in which indebtedness is forgiven or discharged, the amount of indebtedness forgiven or discharged that otherwise would be applied in reduction of basis under paragraph (5) of this subsection.

[(7) For the purposes of this subsection, indebtedness with respect to which an equity security, other than an interest of a limited partner in a limited partnership, is issued to the creditor to whom such indebtedness was owed, or that is forgiven as a contribution to capital by an equity security holder other than a limited partner in the debtor, is not forgiven or discharged in a case under this title—

[(A) to any extent that such indebtedness did not consist of items of a deductible nature; or

[(B) if the issuance of such equity security has the same consequences under a law imposing a tax on or measured by income to such creditor as a payment in cash to such creditor in an amount equal to the fair market value of such equity security, then to the lesser of—

[(i) the extent that such issuance has the same such consequences; and

[(ii) the extent of such fair market value.]

§ 346. Special provisions related to the treatment of State and local taxes

(a) Whenever the Internal Revenue Code of 1986 provides that a separate taxable estate or entity is created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of such estate shall be taxed to or claimed by the estate, a separate taxable estate is also created for purposes of any State and local law imposing a tax on or measured by income and such income, gain, loss, deductions, and credits shall be taxed to or claimed by the estate and may not be taxed to or claimed by the debtor. The preceding sentence shall not apply if the case is dismissed. The trustee shall make tax returns of income required under any such State or local law.

(b) Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a

debtor under this title, and the income, gain, loss, deductions, and credits of an estate shall be taxed to or claimed by the debtor, such income, gain, loss, deductions, and credits shall be taxed to or claimed by the debtor under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by the estate. The trustee shall make such tax returns of income of corporations and of partnerships as are required under any State or local law, but with respect to partnerships, shall make such returns only to the extent such returns are also required to be made under such Code. The estate shall be liable for any tax imposed on such corporation or partnership, but not for any tax imposed on partners or members.

(c) With respect to a partnership or any entity treated as a partnership under a State or local law imposing a tax on or measured by income that is a debtor in a case under this title, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of any income, gain, loss, deduction, or credit of a partner or member that is distributed, or considered distributed, from such partnership, after the commencement of the case, is gain, loss, income, deduction, or credit, as the case may be, of the partner or member, and if such partner or member is a debtor in a case under this title, shall be subject to tax in accordance with subsection (a) or (b).

(d) For purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor in a case under this title shall terminate only if and to the extent that the taxable period of such debtor terminates under the Internal Revenue Code of 1986.

(e) The estate in any case described in subsection (a) shall use the same accounting method as the debtor used immediately before the commencement of the case, if such method of accounting complies with applicable nonbankruptcy tax law.

(f) For purposes of any State or local law imposing a tax on or measured by income, a transfer of property from the debtor to the estate or from the estate to the debtor shall not be treated as a disposition for purposes of any provision assigning tax consequences to a disposition, except to the extent that such transfer is treated as a disposition under the Internal Revenue Code of 1986.

(g) Whenever a tax is imposed pursuant to a State or local law imposing a tax on or measured by income pursuant to subsection (a) or (b), such tax shall be imposed at rates generally applicable to the same types of entities under such State or local law.

(h) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld or collected was paid.

(i)(1) To the extent that any State or local law imposing a tax on or measured by income provides for the carryover of any tax attribute from one taxable period to a subsequent taxable period, the estate shall succeed to such tax attribute in any case in which such estate is subject to tax under subsection (a).

(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) to the extent consistent with the Internal Revenue Code of 1986.

(3) The estate may carry back any loss or tax attribute to a taxable period of the debtor that ended before the date of the order for relief under this title to the extent that—

(A) applicable State or local tax law provides for a carryback in the case of the debtor; and

(B) the same or a similar tax attribute may be carried back by the estate to such a taxable period of the debtor under the Internal Revenue Code of 1986.

(j)(1) For purposes of any State or local law imposing a tax on or measured by income, income is not realized by the estate, the debtor, or a successor to the debtor by reason of discharge of indebtedness in a case under this title, except to the extent, if any, that such income is subject to tax under the Internal Revenue Code of 1986.

(2) Whenever the Internal Revenue Code of 1986 provides that the amount excluded from gross income in respect of the discharge of indebtedness in a case under this title shall be applied to reduce the tax attributes of the debtor or the estate, a similar reduction shall be made under any State or local law imposing a tax on or measured by income to the extent such State or local law recognizes such attributes. Such State or local law may also provide for the reduction of other attributes to the extent that the full amount of income from the discharge of indebtedness has not been applied.

(k)(1) Except as provided in this section and section 505, the time and manner of filing tax returns and the items of income, gain, loss, deduction, and credit of any taxpayer shall be determined under applicable nonbankruptcy law.

(2) For Federal tax purposes, the provisions of this section are subject to the Internal Revenue Code of 1986 and other applicable Federal nonbankruptcy law.

* * * * * * *

§ 348. Effect of conversion

(a) * * *

* * * * * * *

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; [and]

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply [in the converted case, with allowed secured claims] *only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12* reduced to the extent that they have been paid in accordance with the chapter 13 plan[.]*; and*

(C) with respect to cases converted from chapter 13—

(i) the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and

(ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property *of the estate* in the converted case shall consist of the property of the estate as of the date of conversion.

* * * * * * *

§351. Disposal of patient records

If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law, the following requirements shall apply:

(1) The trustee shall—

(A) promptly publish notice, in 1 or more appropriate newspapers, that if patient records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and

(B) during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records.

(2) If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified mail, at the end of such 365-day period a written request to each appropriate Federal agency to request permission from that agency to deposit the patient records with that agency, except that no Federal agency is required to accept patient records under this paragraph.

(3) If, following the 365-day period described in paragraph (2) and after providing the notification under paragraph (1), patient records are not claimed by a patient or insurance provider, or request is not granted by a Federal agency to deposit such records with that agency, the trustee shall destroy those records by—

(A) if the records are written, shredding or burning the records; or

(B) if the records are magnetic, optical, or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.

SUBCHAPTER IV—ADMINISTRATIVE POWERS

* * * * * * *

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) * * *

* * * * * * *

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning ⟦the debtor⟧ *a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title*.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) * * *

⟦(2) under subsection (a) of this section—

⟦(A) of the commencement or continuation of an action or proceeding for—

⟦(i) the establishment of paternity; or

⟦(ii) the establishment or modification of an order for alimony, maintenance, or support; or

⟦(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;⟧

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

* * * * * * *

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, ⟦financial institutions,⟧ *financial institution, financial participant,* or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by*, pledged to, under the control of,* or due from such commodity broker, forward contract merchant, stockbroker, ⟦financial institutions,⟧ *financial institution, financial participant,* or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant *or financial participant*, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by*, pledged to, under the control of,* or due from such repo participant *or financial participant* to margin, guarantee, secure or settle repurchase agreements;

* * * * * * *

⟦(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

⟦(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.⟧

(17) under subsection (a), of the setoff by a swap participant or financial participant of a mutual debt and claim under

or in connection with one or more swap agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant or financial participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to, under the control of, or due from such swap participant or financial participant to margin, guarantee, secure, or settle any swap agreement;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential

property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or

other property held by, pledged to, under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), ⟦(e), and (f)⟧ *(e), (f), and (h)* of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; ⟦and⟧

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) * * *

* * * * * * *

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied⟦.⟧*;*

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was

a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) * * *

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) * * *

(B) such property is not necessary to an effective reorganization; **[**or**]**

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) *or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later*—

(A) * * *

[(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.**]**

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)*(1)* Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

* * * * * * *

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

⟦(h) An⟧ *(k)(1) Except as provided in paragraph (2), an* individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on

which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankrupcty law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

§ 363. Use, sale, or lease of property

(a) * * *

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate**[**.**]***, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—*

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

* * * * * * *

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section ⟦only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.⟧ *only—*

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

* * * * * * *

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

⟦(o)⟧ *(p)* In any hearing under this section—

(1) * * *

* * * * * * *

§ 365. Executory contracts and unexpired leases

(a) * * *

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default⟦;⟧ *other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

* * * * * * *

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) * * *

* * * * * * *

(D) the satisfaction of any ⟦penalty rate or provision⟧ *penalty rate or penalty provision* relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

* * * * * * *

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) * * *

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; *or*

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief**[**; or**]**.

[(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.**]**

(d)(1) * * *

* * * * * * *

[(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

[(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

[(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate—

⟦(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

⟦(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

⟦(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

⟦(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to—

⟦(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

⟦(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

⟦(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

⟦(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.⟧

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

【(10)】 *(5)* The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

* * * * * * *

(f)(1) Except as provided in 【subsection】 *subsections (b) and* (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection【; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event】.

* * * * * * *

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

§ 366. Utility service

(a) Except as provided in ⟦subsection (b)⟧ *subsections (b) and (c)* of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

* * * * * * *

(c)(1)(A) For purposes of this subsection, the term "assurance of payment" means—

(i) a cash deposit;

(ii) a letter of credit;

(iii) a certificate of deposit;

(iv) a surety bond;

(v) a prepayment of utility consumption; or

(vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider—

(i) the absence of security before the date of the filing of the petition;

(ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or

(iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

* * * * * * *

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

SUBCHAPTER I—CREDITORS AND CLAIMS

SUBCHAPTER I—CREDITORS AND CLAIMS

§ 501. Filing of proofs of claims or interests

(a) * * *

* * * * * * *

(e) A claim arising from the liability of a debtor for fuel use tax assessed consistent with the requirements of section 31705 of title 49 may be filed by the base jurisdiction designated pursuant to the International Fuel Tax Agreement (as defined in section 31701 of title 49) and, if so filed, shall be allowed as a single claim.

§ 502. Allowance of claims or interests

(a) * * *

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) * * *

* * * * * * *

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide*, and except that in a case under chapter 13, a claim of a governmental unit for a*

tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

* * * * * * *

(g)*(1)* A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

* * * * * * *

(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)—

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

§ 503. Allowance of administrative expenses

(a) * * *

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)【(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;】 *(A) the actual, necessary costs and expenses of preserving the estate including—*

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, *whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both,* except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; **[**and**]**

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; *and*

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

* * * * * * *

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under *subparagraph (A), (B), (C), (D), or (E) of* paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; **[**and**]**

(6) the fees and mileage payable under chapter 119 of title 28**[**.**]***;*

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the

debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and cir-

cumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

§ 504. Sharing of compensation

(a) * * *

* * * * * * *

(c) This section shall not apply with respect to sharing, or agreeing to share, compensation with a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

§ 505. Determination of tax liability

(a)(1) * * *

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; **[**or**]**

(B) any right of the estate to a tax refund, before the earlier of—

(i) * * *

(ii) a determination by such governmental unit of such request**[**.**]***; or*

(C) the amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.

(b)(1)(A) The clerk shall maintain a list under which a Federal, State, or local governmental unit responsible for the collection of taxes within the district may—

(i) designate an address for service of requests under this subsection; and

(ii) describe where further information concerning additional requirements for filing such requests may be found.

(B) If such governmental unit does not designate an address and provide such address to the clerk under subparagraph (A), any request made under this subsection may be served at the address for the filing of a tax return or protest with the appropriate taxing authority of such governmental unit.

[(b)**]** *(2)* A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax *at the address and in the manner designated in paragraph (1)*. Unless such return is fraudulent, or contains a material misrepresentation, *the estate,* the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax—

⟦(1)⟧ *(A) upon payment of the tax shown on such return, if—*

⟦(A)⟧ *(i)* such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or

⟦(B)⟧ *(ii)* such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days after such request or within such additional time as the court, for cause, permits;

⟦(2)⟧ *(B)* upon payment of the tax determined by the court, after notice and a hearing, after completion by such governmental unit of such examination; or

⟦(3)⟧ *(C)* upon payment of the tax determined by such governmental unit to be due.

§ 506. Determination of secured status

(a)*(1)* An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim*, including the payment of all ad valorem property taxes with respect to the property*.

* * * * * * *

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

⟦(1) First⟧ *(2) Second*, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

⟦(2) Second⟧ *(3) Third*, unsecured claims allowed under section 502(f) of this title.

⟦(3) Third⟧ *(4) Fourth*, allowed unsecured claims, but only to the extent of ⟦$4,000⟧ *$10,000* for each individual or corporation, as the case may be, earned within ⟦90⟧ *180* days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) * * *

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor⟦;⟧.

⟦(4) Fourth⟧ *(5) Fifth*, allowed unsecured claims for contributions to an employee benefit plan—

(A) * * *

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by ⟦$4,000⟧ *$10,000*; less

(ii) the aggregate amount paid to such employees under paragraph ⟦(3)⟧ *(4)* of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

⟦(5) Fifth⟧ *(6) Sixth*, allowed unsecured claims of persons—

(A) * * *

* * * * * * *

⟦(6) Sixth⟧ *(7) Seventh*, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

⟦(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

⟦(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

⟦(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.⟧

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts *for a taxable year ending on or before the date of the filing of the petition*—

(i) ⟦for a taxable year ending on or before the date of the filing of the petition⟧ for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

⟦(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or⟧

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior

case under this title during that 240-day period, plus 90 days.

* * * * * * *

(B) a property tax ⟦assessed⟧ *incurred* before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

* * * * * * *

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph ⟦(3)⟧ *(4)* of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

* * * * * * *

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

* * * * * * *

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection ⟦(a)(1)⟧ *(a)(2)* of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

* * * * * * *

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection ⟦(a)(3)⟧ *(a)(1)*, (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

§ 508. Effect of distribution other than under this title

⟦(a) If a creditor receives, in a foreign proceeding, payment of, or a transfer of property on account of, a claim that is allowed under this title, such creditor may not receive any payment under this title on account of such claim until each of the other holders of claims on account of which such holders are entitled to share equally with such creditor under this title has received payment under this title equal in value to the consideration received by such creditor in such foreign proceeding.]

[(b)] If a creditor of a partnership debtor receives, from a general partner that is not a debtor in a case under chapter 7 of this title, payment of, or a transfer of property on account of, a claim that is allowed under this title and that is not secured by a lien on property of such partner, such creditor may not receive any payment under this title on account of such claim until each of the other holders of claims on account of which such holders are entitled to share equally with such creditor under this title has received payment under this title equal in value to the consideration received by such creditor from such general partner.

* * * * * * *

§ 511. Rate of interest on tax claims

(a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.

(b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 521. Debtor's duties

(a) The debtor shall—

[(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;]

(1) file—

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes ⟦consumer⟧ debts which are secured by property of the estate—

(A) * * *

(B) within ⟦forty-five days after the filing of a notice of intent under this section⟧ *30 days after the first date set for the meeting of creditors under section 341(a)*, or within such additional time as the court, for cause, within such ⟦forty-five day⟧ *30-day* period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title*, except as provided in section 362(h)*;

(3) if a trustee is serving in the case *or an auditor serving under section 586(f) of title 28*, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case *or an auditor serving under section 586(f) of title 28*, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title⟦, and⟧*;*

(5) appear at the hearing required under section 524(d) of this title⟦.⟧*;*

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, *and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.*

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 5 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and

copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

§ 522. Exemptions

(a) * * *

⟦(b) Notwithstanding⟧ *(b)(1) Notwithstanding* section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph ⟦(1)⟧ *(2)* or, in the alternative, paragraph ⟦(2)⟧ *(3)* of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph ⟦(1)⟧ *(2)* and the other debtor elect to exempt property listed in paragraph ⟦(2)⟧ *(3)* of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph ⟦(1)⟧ *(2)*, where such election is permitted under the law of the jurisdiction where the case is filed. ⟦Such property is—⟧

⟦(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,⟧

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

⟦(2)(A) any property⟧

(3) Property listed in this paragraph is—

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the ⟦180 days⟧ *730 days* immediately preceding the date of the filing of the petition⟦, or for a longer portion of such 180-day period than in any other place⟧ *or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place*; ⟦and⟧

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law⟦.⟧*; and*

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that—

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that—

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—

【(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title;】

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

*   *   *   *   *   *   *

(d) The following property may be exempted under subsection 【(b)(1)】 *(b)(2)* of this section:

(1) * * *

*   *   *   *   *   *   *

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

*   *   *   *   *   *   *

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt【—

⟦(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

⟦(ii) to the extent that such debt—

⟦(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

⟦(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.; or⟧ *of a kind that is specified in section 523(a)(5); or*

* * * * * * *

(4)(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term "household goods" means—

(i) clothing;

(ii) furniture;

(iii) appliances;

(iv) 1 radio;

(v) 1 television;

(vi) 1 VCR;

(vii) linens;

(viii) china;

(ix) crockery;

(x) kitchenware;

(xi) educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

(xii) medical equipment and supplies;

(xiii) furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

(xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

(xv) 1 personal computer and related equipment.

(B) The term "household goods" does not include—

(i) works of art (unless by or of the debtor, or any relative of the debtor);

(ii) electronic entertainment equipment with a fair market value of more than $500 in the aggregate (except 1 television, 1 radio, and 1 VCR);

(iii) items acquired as antiques with a fair market value of more than $500 in the aggregate;

(iv) jewelry with a fair market value of more than $500 in the aggregate (except wedding rings); and

(v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

* * * * * * *

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1) * * *

(2) the debtor could have avoided such transfer under [subsection (f)(2)] *subsection (f)(1)(B)* of this section.

* * * * * * *

(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed $1,000,000 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—

(1) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(3) a burial plot for the debtor or a dependent of the debtor; or

(4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in—

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C) a burial plot for the debtor or a dependent of the debtor; or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence,

if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $125,000 if—

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from—

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section ⟦507(a)(2)⟧ *507(a)(3)* or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, *or equivalent report or notice,* if required—

(i) was not filed *or given*; or

(ii) was filed *or given* after the date on which such return*, report, or notice* was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

* * * * * * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) * * *

* * * * * * *

⟦(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;]

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

* * * * * * *

[(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

[(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

[(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;]

(5) for a domestic support obligation;

* * * * * * *

[(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;]

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a [motor vehicle] *motor vehicle, vessel, or aircraft* if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

* * * * * * *

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) *to a spouse, former spouse, or child of the debtor and* not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, *or* a determination made in accordance with State or territorial law by a governmental unit [unless—

[(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

[(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;]*;*

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a [dwelling] unit that has condominium ownership [or], in a share of a cooperative [housing] corporation, [but only if such fee or assessment is payable for a period during which—

[(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

[(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,] *or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory* *ownership interest in such unit, such corporation, or such lot,*

but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed [by a court] *on a prisoner by any court* for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under [section 1915(b) or (f)] *subsection (b) or (f)(2) of section 1915* of title 28 *(or a similar non-Federal law)*, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 *(or a similar non-Federal law)*;

[(18) owed under State law to a State or municipality that is—

[(A) in the nature of support, and

[(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.); or]

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) * * *

(B) results, *before, on, or after the date on which the petition was filed,* from—

(i) * * *

* * * * * * *

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

* * * * * * *

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), [(6), or (15)] *or (6)* of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), ⟦(6), or (15)⟧ *or (6)*, as the case may be, of subsection (a) of this section.

* * * * * * *

(e) Any institution-affiliated party of ⟦a insured⟧ *an insured* depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) * * *

* * * * * * *

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under ⟦section 523, 1228(a)(1), or 1328(a)(1) of this title, or that⟧ *section 523, 1228(a)(1), or 1328(a)(1), or that* would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * * * * * *

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) * * *

⟦(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

⟦(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;⟧

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

* * * * * * *

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under

subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be—

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements—

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.".

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as—

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the

terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.".

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following—

(i) by making the statement: "Your first payment in the amount of $______ is due on ______ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.".

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.".

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.".

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $______, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $______, leaving $______ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ______.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.".

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement.".

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above.".

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

§ 525. Protection against discriminatory treatment

(a) * * *

* * * * * * *

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a *student* grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means ⟦the program operated under part B, D, or E of⟧ *any program operated under* title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

§ 526. Restrictions on debt relief agencies

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

§527. Disclosures

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide—

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that—

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much

service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.".

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including—

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

§ 528. Requirements for debt relief agencies

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes—

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

(a) * * *

(b) Property of the estate does not include—

(1) * * *

* * * * * * *

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A) * * *

(B)(i) * * *

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section *365 or* 542 of this title; **[**or**]**

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security

Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

[(5)**]** *(9)* any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) * * *

* * * * * * *

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal

place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

* * * * * * *

§ 545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) * * *

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists*, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law*;

* * * * * * *

§ 546. Limitations on avoiding powers

(a) * * *

* * * * * * *

【(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

【(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—

【(A) before 10 days after receipt of such goods by the debtor; or

【(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

【(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—

【(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or

【(B) secures such claim by a lien.】

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent,

within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

* * * * * * *

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, *financial participant,* or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, made by or to a repo participant *or financial participant*, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer **[**under a swap agreement**]**, made by or to a swap participant *or financial participant*, **[**in connection with a swap agreement**]** *under or in connection with any swap agreement* and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

[(g)**]** *(h)* Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor *and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods*, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7–209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Pre-

vention and Consumer Protection Act of 2005, or any successor to such section 7–209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

§ 547. Preferences

(a) * * *

(b) Except as provided in ⟦subsection (c)⟧ *subsections (c) and (i)* of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) * * *

* * * * * * *

(c) The trustee may not avoid under this section a transfer—

(1) * * *

⟦(2) to the extent that such transfer was—

⟦(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

⟦(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

⟦(C) made according to ordinary business terms;⟧

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) * * *

(B) that is perfected on or before ⟦20⟧ *30* days after the debtor receives possession of such property;

* * * * * * *

⟦(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

⟦(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

⟦(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or⟧

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600**[**.**]***; or*

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000.

* * * * * * *

(e)(1) * * *

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within **[**10**]** *30* days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such **[**10**]** *30* days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) * * *

(ii) **[**10**]** *30* days after such transfer takes effect between the transferor and the transferee.

* * * * * * *

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer *(including any transfer to or for the benefit of an insider under an employment contract)* of an interest of the debtor in property, or any obligation *(including any obligation to or for the benefit of an insider under an employment contract)* incurred by the debtor, that was made or incurred on or within **[**one year**]** *2 years* before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) * * *

* * * * * * *

(B)(i) * * *

(ii)(I) * * *

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; **[**or**]**

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured[.]*; or*

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

* * * * * * *

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within [one year] *2 years* before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

* * * * * * *

(d)(1) * * *

(2) In this section—

(A) * * *

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, *financial participant,* or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant *or financial participant* that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; [and]

(D) a swap participant *or financial participant* that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer[.]*; and*

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

* * * * * * *

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if—

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or

became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by—

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

* * * * * * *

§ 549. Postpetition transactions

(a) * * *

* * * * * * *

(c) The trustee may not avoid under subsection (a) of this section a transfer of *an interest in* real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of *an interest in* such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of ⟦such property⟧ *such real property*, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to ⟦the interest⟧ *such interest* of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

* * * * * * *

§ 552. Postpetition effect of security interest

(a) * * *

(b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, ⟦product⟧ *products*, offspring, or profits of such property, then such security interest extends to such proceeds, ⟦product⟧ *products*, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

* * * * * * *

§ 553. Setoff

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—

(1) * * *

(2) such claim was transferred, by an entity other than the debtor, to such creditor—

(A) * * *

(B)(i) * * *

(ii) while the debtor was insolvent *(except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561)*; or

(3) the debt owed to the debtor by such creditor was incurred by such creditor—

(A) * * *

* * * * * * *

(C) for the purpose of obtaining a right of setoff against the debtor *(except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561)*.

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), ❲362(b)(14),❳ *362(b)(17), 362(b)(27), 555, 556, 559, 560, 561,* 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) * * *

* * * * * * *

❲§ 555. Contractual right to liquidate a securities contract❳

§ 555. Contractual right to liquidate, terminate, or accelerate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, *financial participant,* or securities clearing agency to cause the ❲liquidation❳ *liquidation, termination, or acceleration* of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. ❲As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency.❳ *As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act),* *a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act), or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.*

[§ 556. Contractual right to liquidate a commodities contract or forward contract]

§ 556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract

The contractual right of a commodity broker*, financial participant,* or forward contract merchant to cause the [liquidation] *liquidation, termination, or acceleration* of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. [As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof and a right,] *As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right,* whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

* * * * * * *

[§ 559. Contractual right to liquidate a repurchase agreement]

§ 559. Contractual right to liquidate, terminate, or accelerate a repurchase agreement

The exercise of a contractual right of a repo participant *or financial participant* to cause the [liquidation] *liquidation, termination, or acceleration* of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant *or financial participant* liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. ⟦As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a national securities exchange, a national securities association, or a securities clearing agency, and a right,⟧ *As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right,* whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

⟦§ 560. Contractual right to terminate a swap agreement⟧

§ 560. Contractual right to liquidate, terminate, or accelerate a swap agreement

The exercise of any contractual right of any swap participant *or financial participant* to cause the ⟦termination of a swap agreement⟧ *liquidation, termination, or acceleration of one or more swap agreements* because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or ⟦in connection with any swap agreement⟧ *in connection with the termination, liquidation, or acceleration of one or more swap agreements* shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. ⟦As used in this section, the term "contractual right" includes a right,⟧ *As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the*

Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

§561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts; proceedings under chapter 15

(a) Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more (or the termination, liquidation, or acceleration of one or more)—

(1) securities contracts, as defined in section 741(7);

(2) commodity contracts, as defined in section 761(4);

(3) forward contracts;

(4) repurchase agreements;

(5) swap agreements; or

(6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b)(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a) except to the extent that the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor and traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a).

(3) No provision of subparagraph (A) or (B) of paragraph (2) shall prohibit the offset of claims and obligations that arise under—

(A) a cross-margining agreement or similar arrangement that has been approved by the Commodity Futures Trading

Commission or submitted to the Commodity Futures Trading Commission under paragraph (1) or (2) of section 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission; or

(B) any other netting agreement between a clearing organization (as defined in section 761) and another entity that has been approved by the Commodity Futures Trading Commission.

(c) As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

§562. Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements

(a) If the trustee rejects a swap agreement, securities contract (as defined in section 741), forward contract, commodity contract (as defined in section 761), repurchase agreement, or master netting agreement pursuant to section 365(a), or if a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates such contract or agreement, damages shall be measured as of the earlier of—

(1) the date of such rejection; or

(2) the date or dates of such liquidation, termination, or acceleration.

(b) If there are not any commercially reasonable determinants of value as of any date referred to in paragraph (1) or (2) of subsection (a), damages shall be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value.

(c) For the purposes of subsection (b), if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration, and the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant or the trustee objects to the timing of the measurement of damages—

(1) the trustee, in the case of an objection by a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant; or

(2) the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant, in the case of an objection by the trustee,

has the burden of proving that there were no commercially reasonable determinants of value as of such date or dates.

CHAPTER 7—LIQUIDATION

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

* * * * * * *

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

* * * * * * *

§ 704. Duties of trustee

(a) The trustee shall—

(1) * * *

* * * * * * *

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for col-

lection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; **[**and**]**

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee**[**.**]***;*

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that—

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b)(1) With respect to a debtor who is an individual in a case under this chapter—

(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

(B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

(2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or

(B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.

(c)(1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and

(iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

* * * * * * *

§ 706. Conversion

(a) * * *

* * * * * * *

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests *or consents to* such conversion.

* * * * * * *

[§ 707. Dismissal]

§ 707. Dismissal of a case or conversion to a case under chapter 11 or 13

(a) * * *

(b)*(1)* After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, [but not at the request or suggestion of] *trustee (or bankruptcy administrator, if any), or* any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts*, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title,* if it finds that the granting of relief would be [a substantial abuse] *an abuse* of the provisions of this chapter. [There shall be a presumption in favor of granting the relief requested by the debtor.] In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

(II) $10,000.

(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not

a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or

(II) $10,000.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.

(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was—

(i) on active duty (as defined in section 101(d)(1) of title 10); or

(ii) performing a homeland defense activity (as defined in section 901(1) of title 32).

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

(4)(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

(5)(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if—

(i) the court does not grant the motion; and

(ii) the court finds that—

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A small business that has a claim of an aggregate amount less than $1,000 shall not be subject to subparagraph (A)(ii)(I).

(C) For purposes of this paragraph—

(i) the term "small business" means an unincorporated business, partnership, corporation, association, or organization that—

(I) has fewer than 25 full-time employees as determined on the date on which the motion is filed; and

(II) is engaged in commercial or business activity; and

(ii) the number of employees of a wholly owned subsidiary of a corporation includes the employees of—

(I) a parent corporation; and

(II) any other subsidiary corporation of the parent corporation.

(6) Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(7)(A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than—

(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(ii) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(iii) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(B) In a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of subparagraph (A) if—

(i)(I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or

(II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and

(ii) the debtor files a statement under penalty of perjury—

(I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and

(II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

(c)(1) In this subsection—

(A) the term "crime of violence" has the meaning given such term in section 16 of title 18; and

(B) the term "drug trafficking crime" has the meaning given such term in section 924(c)(2) of title 18.

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

(3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation.

SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

* * * * * * *

§ 722. Redemption

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien *in full at the time of redemption*.

* * * * * * *

§ 724. Treatment of certain liens

(a) * * *

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title *(other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate)* and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—

(1) * * *

(2) second, to any holder of a claim of a kind specified in section 507(a)(1) *(except that such expenses, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title)*, 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

* * * * * * *

(e) Before subordinating a tax lien on real or personal property of the estate, the trustee shall—

(1) exhaust the unencumbered assets of the estate; and

(2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.

(f) Notwithstanding the exclusion of ad valorem tax liens under this section and subject to the requirements of subsection (e), the following may be paid from property of the estate which secures a tax lien, or the proceeds of such property:

(1) Claims for wages, salaries, and commissions that are entitled to priority under section 507(a)(4).

(2) Claims for contributions to an employee benefit plan entitled to priority under section 507(a)(5).

* * * * * * *

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed ⟦before the date on which the trustee commences distribution under this section;⟧ *on or before the earlier of—*

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

* * * * * * *

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), or (8) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section ⟦1009,⟧ 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

* * * * * * *

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) * * *

* * * * * * *

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within ⟦six⟧ *8* years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) * * *

(B)(i) * * *

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; ⟦or⟧

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter⟦.⟧*;*

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any)

determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

* * * * * * *

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) * * *

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; **[**or**]**

(3) the debtor committed an act specified in subsection (a)(6) of this section**[**.**]***; or*

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

* * * * * * *

[§ 728. Special tax provisions

[(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 1112 or 1208 of this title.

[(b) Notwithstanding any State or local law imposing a tax on or measured by income, the trustee shall make tax returns of income for the estate of an individual debtor in a case under this chapter or for a debtor that is a corporation in a case under this chapter only if such estate or corporation has net taxable income for the entire period after the order for relief under this chapter during which the case is pending. If such entity has such income, or if the debtor is a partnership, then the trustee shall make and file a return of income for each taxable period during which the case was pending after the order for relief under this chapter.

[(c) If there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a partner in such partnership, a governmental unit's claim for any unpaid liability of such partner for a State or local tax on or measured by income, to the extent that such liability arose from the inclusion in such partner's taxable income of earnings of such partnership that were not withdrawn by such partner, is a claim only against such partnership.

[(d) Notwithstanding section 541 of this title, if there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a partner in such partnership, then any State or local tax refund or reduction of tax of such partner that would have otherwise been property of the estate of such partner under section 541 of this title—

[(1) is property of the estate of such partnership to the extent that such tax refund or reduction of tax is fairly apportionable to losses sustained by such partnership and not reimbursed by such partner; and

[(2) is otherwise property of the estate of such partner.]

SUBCHAPTER III—STOCKBROKER LIQUIDATION

§ 741. Definitions for this subchapter

In this subchapter—

(1) * * *

* * * * * * *

[(7) "securities contract" means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency;]

(7) "securities contract"—

(A) means—

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or

index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(iv) any margin loan;

(v) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;

(vi) any combination of the agreements or transactions referred to in this subparagraph;

(vii) any option to enter into any agreement or transaction referred to in this subparagraph;

(viii) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii); or

(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

* * * * * * *

§ 752. Customer property

(a) The trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims and in priority to all other claims, except claims of the kind specified in section **[***507(a)(1)***]** *507(a)(2) of this title that are attributable to the administration of such customer property.*

* * * * * * *

§ 753. Stockbroker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants

Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, financial participant, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

§ 761. Definitions for this subchapter

In this subchapter—

(1) * * *

* * * * * * *

(4) "commodity contract" means—

(A) * * *

* * * * * * *

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; 【or】

* * * * * * *

(F) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

(G) any combination of the agreements or transactions referred to in this paragraph;

(H) any option to enter into an agreement or transaction referred to in this paragraph;

(I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or

(J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed

the damages in connection with any such agreement or transaction, measured in accordance with section 562;

* * * * * * *

§ 766. Treatment of customer property

*(a) * * **

* * * * * * *

(h) Except as provided in subsection (b) of this section, the trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims, except claims of a kind specified in section ⟦507(a)(1)⟧ 507(a)(2) of this title that are attributable to the administration of customer property. Such distribution shall be in the form of—

*(1) * * **

* * * * * * *

(i) If the debtor is a clearing organization, the trustee shall distribute—

(1) customer property, other than member property, ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' accounts other than proprietary accounts, and in priority to all other claims, except claims of a kind specified in section ⟦507(a)(1)⟧ 507(a)(2) of this title that are attributable to the administration of such customer property; and

(2) member property ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' proprietary accounts, and in priority to all other claims, except claims of a kind specified in section ⟦507(a)(1)⟧ 507(a)(2) of this title that are attributable to the administration of member property or customer property.

* * * * * * *

§ 767. Commodity broker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants

Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, financial participant, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

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CHAPTER 9—ADJUSTMENT OF DEBTS OF A MUNICIPALITY

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SUBCHAPTER I—GENERAL PROVISIONS

§ 901. Applicability of other sections of this title

(a) Sections 301, 344, 347(b), 349, 350(b), 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, [507(a)(1)] *507(a)(2)*, 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, *555, 556,* 557, *559, 560, 561, 562,* 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), *1123(d),* 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under this chapter.

* * * * * * *

SUBCHAPTER II—ADMINISTRATION

§ 921. Petition and proceedings relating to petition

(a) * * *

* * * * * * *

(d) If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter *notwithstanding section 301(b)*.

* * * * * * *

SUBCHAPTER III—THE PLAN

* * * * * * *

§ 943. Confirmation

(a) * * *

(b) The court shall confirm the plan if—

(1) * * *

* * * * * * *

(5) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in section [507(a)(1)] *507(a)(2)* of this title will receive on account of such claim cash equal to the allowed amount of such claim;

* * * * * * *

CHAPTER 11—REORGANIZATION

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SUBCHAPTER I—OFFICERS AND ADMINISTRATION

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SUBCHAPTER I—OFFICERS AND ADMINISTRATION

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§ 1102. Creditors' and equity security holders' committees

(a)(1) * * *

* * * * * * *

(3) On request of a party in interest in a case in which the debtor is a small business *debtor* and for cause, the court may order that a committee of creditors not be appointed.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

(b)(1) * * *

* * * * * * *

(3) A committee appointed under subsection (a) shall—

(A) provide access to information for creditors who—

(i) hold claims of the kind represented by that committee; and

(ii) are not appointed to the committee;

(B) solicit and receive comments from the creditors described in subparagraph (A); and

(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

* * * * * * *

§ 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; **[**or**]**

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor**[**.**]***; or*

(3) if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a

trustee or an examiner is in the best interests of creditors and the estate.

(b)*(1)* Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(2)(A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)—

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (d) shall terminate.

(C) The court shall resolve any dispute arising out of an election described in subparagraph (A).

* * * * * * *

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

§ 1106. Duties of trustee and examiner

(a) A trustee shall—

【(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;】

(1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704;

* * * * * * *

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; 【and】

(7) after confirmation of a plan, file such reports as are necessary or as the court orders【.】*; and*

(8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).

* * * * * * *

(c)(1) In a case described in subsection (a)(8) to which subsection (a)(8) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(8) of such claim and of the right of

such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice required by clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice required by clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1141, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(8) or the State child enforcement support agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

* * * * * * *

§ 1112. Conversion or dismissal

(a) * * *

⟦(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—

⟦(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

⟦(2) inability to effectuate a plan;

⟦(3) unreasonable delay by the debtor that is prejudicial to creditors;

⟦(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

⟦(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

⟦(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

⟦(7) inability to effectuate substantial consummation of a confirmed plan;

⟦(8) material default by the debtor with respect to a confirmed plan;

⟦(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

⟦(10) nonpayment of any fees or charges required under chapter 123 of title 28.⟧

(b)(1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

(2) The relief provided in paragraph (1) shall not be granted absent unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate, if the debtor or another party in interest objects and establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term "cause" includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule

2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

* * * * * * *

§ 1114. Payment of insurance benefits to retired employees

(a) * * *

* * * * * * *

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall [appoint] *order the appointment of* a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement. *The United States trustee shall appoint any such committee.*

* * * * * * *

(l) If the debtor, during the 180-day period ending on the date of the filing of the petition—

(1) modified retiree benefits; and

(2) was insolvent on the date such benefits were modified;

the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

[(l)] *(m)* This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

§1115. Property of the estate

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

§1116. Duties of trustee or debtor in possession in small business cases

In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall—

(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief—

(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;

(2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;

(3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;

(4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;

(5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;

(6)(A) timely file tax returns and other required government filings; and

(B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and

(7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.

SUBCHAPTER II—THE PLAN

§ 1121. Who may file a plan

(a) * * *

* * * * * * *

(d) ⟦On⟧ *(1) Subject to paragraph (2), on* request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

⟦(e) In a case in which the debtor is a small business and elects to be considered a small business—

⟦(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;

⟦(2) all plans shall be filed within 160 days after the date of the order for relief; and

⟦(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may—

⟦(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and

⟦(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.⟧

(e) In a small business case—

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than

not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.

* * * * * * *

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section ⟦507(a)(1), 507(a)(2)⟧ *507(a)(2), 507(a)(3)*, or 507(a)(8) of this title, and classes of interests;

* * * * * * *

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; ⟦and⟧

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee⟦.⟧*; and*

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

* * * * * * *

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) * * *

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title *or of a kind that section 365(b)(2) expressly does not require to be cured*;

* * * * * * *

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; ⟦and⟧

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

⟦(D)⟧ *(E)* does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

§ 1125. Postpetition disclosure and solicitation

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, *including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case,* that would enable ⟦a hypothetical reasonable investor typical of holders of claims or interests⟧ *such a hypothetical investor* of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan *and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information*; and

* * * * * * *

⟦(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business—

⟦(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

⟦(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

⟦(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.⟧

(f) Notwithstanding subsection (b), in a small business case—

(1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;

(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and

(3)(A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and

(C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

(g) Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

* * * * * * *

§ 1127. Modification of plan

(a) * * *

* * * * * * *

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

(f)(1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

* * * * * * *

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) * * *

* * * * * * *

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section [507(a)(1) or 507(a)(2)] *507(a)(2) or 507(a)(3)* of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section [507(a)(3)] *507(a)(1),* 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) * * *

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; [and]

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim [deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.] *regular installment payments in cash—*

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

* * * * * * *

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first

payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) * * *

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) * * *

(B) With respect to a class of unsecured claims—

(i) * * *

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section*.

* * * * * * *

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

SUBCHAPTER III—POSTCONFIRMATION MATTERS

§ 1141. Effect of confirmation

(a) * * *

* * * * * * *

(d)(1) * * *

(2) [The confirmation of a plan does not discharge an individual debtor] *A discharge under this chapter does not discharge a debtor who is an individual* from any debt excepted from discharge under section 523 of this title.

* * * * * * *

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

(ii) modification of the plan under section 1127 is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

* * * * * * *

§ 1146. Special tax provisions

⟦(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.

⟦(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.⟧

⟦(c)⟧ *(a)* The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

⟦(d)⟧ *(b)* The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of—

(1) * * *

* * * * * * *

SUBCHAPTER IV—RAILROAD REORGANIZATION

* * * * * * *

§ 1170. Abandonment of railroad line

(a) * * *

* * * * * * *

(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under ❲section 11347❳ *section 11326(a)* of title 49.

* * * * * * *

§ 1172. Contents of plan

(a) * * *

* * * * * * *

(c)(1) In approving an application under subsection (b) of this section, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under ❲section 11347❳ *section 11326(a)* of title 49.

* * * * * * *

CHAPTER 12—ADJUSTMENT OF DEBTS OF A FAMILY FARMER *OR FISHERMAN* WITH REGULAR ANNUAL INCOME

* * * * * * *

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

* * * * * * *

§ 1202. Trustee

(a) * * *

(b) The trustee shall—

(1) * * *

* * * * * * *

(4) ensure that the debtor commences making timely payments required by a confirmed plan; ❲and❳

(5) if the debtor ceases to be a debtor in possession, perform the duties specified in sections 704(8), 1106(a)(1), 1106(a)(2), 1106(a)(6), 1106(a)(7), and 1203❲.❳*; and*

(6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).

(c)(1) In a case described in subsection (b)(6) to which subsection (b)(6) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (b)(6) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1228, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (b)(6) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making that disclosure.

§ 1203. Rights and powers of debtor

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm *or commercial fishing operation*.

* * * * * * *

§ 1206. Sales free of interests

After notice and a hearing, in addition to the authorization contained in section 363(f), the trustee in a case under this chapter may sell property under section 363(b) and (c) free and clear of any interest in such property of an entity other than the estate ⟦if the property is farmland or farm equipment⟧ *if the property is farmland, farm equipment, or property used to carry out a commercial fishing operation (including a commercial fishing vessel)*, except that the proceeds of such sale shall be subject to such interest.

* * * * * * *

§ 1208. Conversion or dismissal

(a) * * *

* * * * * * *

(c) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—

(1) * * *

* * * * * * *

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; [or]

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation[.]*; and*

(10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

* * * * * * *

SUBCHAPTER II—THE PLAN

* * * * * * *

§ 1222. Contents of plan

(a) The plan shall—

(1) * * *

[(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and]

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or

(B) the holder of a particular claim agrees to a different treatment of that claim;

(3) if the plan classifies claims and interests, provide the same treatment for each claim or interest within a particular class unless the holder of a particular claim or interest agrees to less favorable treatment[.]*; and*

(4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) * * *

* * * * * * *

(10) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; [and]

(11) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1228(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

【(11)】 *(12)* include any other appropriate provision not inconsistent with this title.

* * * * * * *

§ 1225. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) * * *

* * * * * * *

(5) with respect to each allowed secured claim provided for by the plan—

(A) * * *

* * * * * * *

(C) the debtor surrenders the property securing such claim to such holder; 【and】

(6) the debtor will be able to make all payments under the plan and to comply with the plan【.】*; and*

(7) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; 【or】

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan【.】*; or*

(C) the value of the property to be distributed under the plan in the 3-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first distribution is due under the plan is not less than the debtor's projected disposable income for such period.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor *or for a domestic support obligation that first becomes payable after the date of the filing of the petition*; or

* * * * * * *

§ 1226. Payments

(a) * * *

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section ⟦507(a)(1)⟧ *507(a)(2)* of this title; and

* * * * * * *

§ 1228. Discharge

(a) ⟦As⟧ *Subject to subsection (d), as* soon as practicable after completion by the debtor of all payments under the plan*, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid*, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(10) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) * * *

* * * * * * *

(b) ⟦At⟧ *Subject to subsection (d), at* any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) * * *

* * * * * * *

(f) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that—

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

§ 1229. Modification of plan after confirmation

(a) * * *

* * * * * * *

(d) A plan may not be modified under this section—

(1) to increase the amount of any payment due before the plan as modified becomes the plan;

(2) by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceeds the debtor's disposable income for such month; or

(3) in the last year of the plan by anyone except the debtor, to require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed.

*   *   *   *   *   *   *

§ 1231. Special tax provisions

【(a) For the purpose of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.

【(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.】

【(c)】 *(a)* The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1225 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

【(d)】 *(b)* The court may authorize the proponent of a plan to request a determination, limited to questions of law, by 【a State or local governmental unit】 *any governmental unit* charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of—

(1) * * *

*   *   *   *   *   *   *

CHAPTER 13—ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

*   *   *   *   *   *   *

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

*   *   *   *   *   *   *

§ 1302. Trustee

(a) * * *

(b) The trustee shall—

(1) * * *

*   *   *   *   *   *   *

(4) advise, other than on legal matters, and assist the debtor in performance under the plan; 【and】

(5) ensure that the debtor commences making timely payments under section 1326 of this title**[**.**]***; and*

(6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).

* * * * * * *

(d)(1) In a case described in subsection (b)(6) to which subsection (b)(6) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (b)(6) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1328, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2) or (4) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (b)(6) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making that disclosure.

* * * * * * *

§ 1307. Conversion or dismissal

(a) * * *

* * * * * * *

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

(1) * * *

* * * * * * *

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; **[**or**]**

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521**[**.**]***; or*

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

* * * * * * *

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

[(e)**]** *(f)* The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

[(f)**]** *(g)* Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

§1308. Filing of prepetition tax returns

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond—

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of—

(i) the date that is 120 days after the date of that meeting; or

(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection,

if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under this subsection for—

(A) a period of not more than 30 days for returns described in paragraph (1); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph (2).

(c) For purposes of this section, the term "return" includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

SUBCHAPTER II—THE PLAN

* * * * * * *

§ 1322. Contents of plan

(a) The plan shall—

(1) * * *

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; [and]

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class[.]*; and*

(4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) * * *

* * * * * * *

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; [and]

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

[(10)] *(11)* include any other appropriate provision not inconsistent with this title.

* * * * * * *

[(d) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.]

(d)(1) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4,

the plan may not provide for payments over a period that is longer than 5 years.

(2) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4,

the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.

* * * * * * *

(f) A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute "disposable income" under section 1325.

* * * * * * *

§ 1324. Confirmation hearing

【After】 *(a) Except as provided in subsection (b) and after* notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan.

(b) The hearing on confirmation of the plan may be held not earlier than 20 days and not later than 45 days after the date of the meeting of creditors under section 341(a), unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) * * *

* * * * * * *

(5) with respect to each allowed secured claim provided for by the plan—

(A) * * *

(B)⟦(i) the plan provides that the holder of such claim retain the lien securing such claim; and⟧ *(i) the plan provides that—*

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; ⟦or⟧ *and*

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder; ⟦and⟧

(6) the debtor will be able to make all payments under the plan and to comply with the plan⟦.⟧*;*

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the ⟦three-year period⟧ *appli-*

cable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments *to unsecured creditors* under the plan.

⟦(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

⟦(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and

⟦(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.⟧

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"—

(A) subject to subparagraph (B), shall be—

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

* * * * * * *

§ 1326. Payments

⟦(a)(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.

⟦(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.⟧

(a)(1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount—

(A) proposed by the plan to the trustee;

(B) scheduled in a lease of personal property directly to the lessor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment; and

(C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.

(2) A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not

confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

(3) Subject to section 363, the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan.

(4) Not later than 60 days after the date of filing of a case under this chapter, a debtor retaining possession of personal property subject to a lease or securing a claim attributable in whole or in part to the purchase price of such property shall provide the lessor or secured creditor reasonable evidence of the maintenance of any required insurance coverage with respect to the use or ownership of such property and continue to do so for so long as the debtor retains possession of such property.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section ❲507(a)(1)❳ *507(a)(2)* of this title; ❲and❳

(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28❲.❳*; and*

(3) if a chapter 7 trustee has been allowed compensation due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b), and some portion of that compensation remains unpaid in a case converted to this chapter or in the case dismissed under section 707(b) and refiled under this chapter, the amount of any such unpaid compensation, which shall be paid monthly—

(A) by prorating such amount over the remaining duration of the plan; and

(B) by monthly payments not to exceed the greater of—

(i) $25; or

(ii) the amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent, and the result divided by the number of months in the plan.

* * * * * * *

(d) Notwithstanding any other provision of this title—

(1) compensation referred to in subsection (b)(3) is payable and may be collected by the trustee under that paragraph, even if such amount has been discharged in a prior case under this title; and

(2) such compensation is payable in a case under this chapter only to the extent permitted by subsection (b)(3).

* * * * * * *

§ 1328. Discharge

(a) ❲As❳ *Subject to subsection (d), as* soon as practicable after completion by the debtor of all payments under the plan*, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (includ-*

ing amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

[(1) provided for under section 1322(b)(5) of this title;

[(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or

[(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.]

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

(b) [At] *Subject to subsection (d), at* any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) * * *

* * * * * * *

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.

(h) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that—

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; ⟦or⟧

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan⟦.⟧*; or*

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—

(A) such expenses are reasonable and necessary;

(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

* * * * * * *

(c) A plan modified under this section may not provide for payments over a period that expires after ⟦three years⟧ *the applicable commitment period under section 1325(b)(1)(B)* after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

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CHAPTER 15—ANCILLARY AND OTHER CROSS-BORDER CASES

Sec.
1501. Purpose and scope of application.

SUBCHAPTER I—GENERAL PROVISIONS

SUBCHAPTER II—ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE COURT

SUBCHAPTER III—RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

SUBCHAPTER IV—COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

SUBCHAPTER V—CONCURRENT PROCEEDINGS

§ 1501. Purpose and scope of application

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(b) This chapter applies where—

(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

(2) assistance is sought in a foreign country in connection with a case under this title;

(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to—

(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

SUBCHAPTER I—GENERAL PROVISIONS

§ 1502. Definitions

For the purposes of this chapter, the term—

(1) "debtor" means an entity that is the subject of a foreign proceeding;

(2) "establishment" means any place of operations where the debtor carries out a nontransitory economic activity;

(3) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;

(6) "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title;

(7) "recognition" means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and

(8) "within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States

and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

§ 1503. International obligations of the United States

To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.

§ 1504. Commencement of ancillary case

A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

§ 1505. Authorization to act in a foreign country

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

§ 1506. Public policy exception

Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

§ 1507. Additional assistance

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

§ 1508. Interpretation

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

SUBCHAPTER II—ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE COURT

§ 1509. Right of direct access

(a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.

(b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—

(1) the foreign representative has the capacity to sue and be sued in a court in the United States;

(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

(3) a court in the United States shall grant comity or cooperation to the foreign representative.

(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

(e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

§ 1510. Limited jurisdiction

The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.

§ 1511. Commencement of case under section 301 or 303

(a) Upon recognition, a foreign representative may commence—

(1) an involuntary case under section 303; or

(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

§ 1512. Participation of a foreign representative in a case under this title

Upon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

§ 1513. Access of foreign creditors to a case under this title

(a) Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.

(b)(1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor.

(2)(A) Subsection (a) and paragraph (1) do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title.

(B) Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein.

§ 1514. Notification to foreign creditors concerning a case under this title

(a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(b) Such notification to creditors with foreign addresses described in subsection (a) shall be given individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letter or other formality is required.

(c) When a notification of commencement of a case is to be given to foreign creditors, such notification shall—

(1) indicate the time period for filing proofs of claim and specify the place for filing such proofs of claim;

(2) indicate whether secured creditors need to file proofs of claim; and

(3) contain any other information required to be included in such notification to creditors under this title and the orders of the court.

(d) Any rule of procedure or order of the court as to notice or the filing of a proof of claim shall provide such additional time to creditors with foreign addresses as is reasonable under the circumstances.

SUBCHAPTER III—RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

§ 1515. Application for recognition

(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by—

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

§1516. Presumptions concerning recognition

(a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.

(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.

(c) In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.

§1517. Order granting recognition

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.

(d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

§ 1518. Subsequent information

From the time of filing the petition for recognition of a foreign proceeding, the foreign representative shall file with the court promptly a notice of change of status concerning—

(1) any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment; and

(2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.

§ 1519. Relief that may be granted upon filing petition for recognition

(a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

(1) staying execution against the debtor's assets;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

(b) Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.

(c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(n) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

§ 1520. Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;

(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and

(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

(b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.

(c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

§ 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(n) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

§ 1522. Protection of creditors and other interested persons

(a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.

(b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.

(c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.

(d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

§ 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

§ 1524. Intervention by a foreign representative

Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party.

SUBCHAPTER IV—COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

§ 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.

(b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.

§ 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives

(a) Consistent with section 1501, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.

(b) The trustee or other person, including an examiner, authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a foreign court or a foreign representative.

§ 1527. Forms of cooperation

Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including—

(1) appointment of a person or body, including an examiner, to act at the direction of the court;

(2) communication of information by any means considered appropriate by the court;

(3) coordination of the administration and supervision of the debtor's assets and affairs;

(4) approval or implementation of agreements concerning the coordination of proceedings; and

(5) coordination of concurrent proceedings regarding the same debtor.

SUBCHAPTER V—CONCURRENT PROCEEDINGS

§ 1528. Commencement of a case under this title after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

§ 1529. Coordination of a case under this title and a foreign proceeding

If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) If the case in the United States pending at the time the petition for recognition of such foreign proceeding is filed—

(A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and

(B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

(2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding—

(A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and

(B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

§1530. Coordination of more than 1 foreign proceeding

In matters referred to in section 1501, with respect to more than 1 foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) Any relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.

(2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.

(3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

§1531. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.

§1532. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other credi-

tors of the same class is proportionately less than the payment the creditor has already received.

* * * * * * *

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 9—BANKRUPTCY

* * * * * * *

§ 156. Knowing disregard of bankruptcy law or rule

(a) DEFINITIONS.—In this section—

(1) the term "bankruptcy petition preparer" means a person, other than the debtor's attorney or an employee of such an attorney, who prepares for compensation a document for filing**[**.**]***; and*

(2) the term "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under **[**this title**]** *title 11*.

* * * * * * *

§ 157. Bankruptcy fraud

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

(1) files a petition under title 11*, including a fraudulent involuntary bankruptcy petition under section 303 of such title*;

(2) files a document in a proceeding under title 11*, including a fraudulent involuntary bankruptcy petition under section 303 of such title*; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11*, including a fraudulent involuntary bankruptcy petition under section 303 of such title*, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

§158. Designation of United States attorneys and agents of the Federal Bureau of Investigation to address abusive reaffirmations of debt and materially fraudulent statements in bankruptcy schedules

(a) IN GENERAL.—The Attorney General of the United States shall designate the individuals described in subsection (b) to have primary responsibility in carrying out enforcement activities in addressing violations of section 152 or 157 relating to abusive reaffirmations of debt. In addition to addressing the violations referred to in the preceding sentence, the individuals described under subsection (b) shall address violations of section 152 or 157 relating to materially fraudulent statements in bankruptcy schedules that are intentionally false or intentionally misleading.

(b) UNITED STATES ATTORNEYS AND AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION.—The individuals referred to in subsection (a) are—

(1) the United States attorney for each judicial district of the United States; and

(2) an agent of the Federal Bureau of Investigation for each field office of the Federal Bureau of Investigation.

(c) BANKRUPTCY INVESTIGATIONS.—Each United States attorney designated under this section shall, in addition to any other responsibilities, have primary responsibility for carrying out the duties of a United States attorney under section 3057.

(d) BANKRUPTCY PROCEDURES.—The bankruptcy courts shall establish procedures for referring any case that may contain a materially fraudulent statement in a bankruptcy schedule to the individuals designated under this section.

* * * * * * *

TITLE 28—UNITED STATES CODE

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Part I—Organization of Courts

* * * * * * *

CHAPTER 6—BANKRUPTCY JUDGES

* * * * * * *

§152. Appointment of bankruptcy judges

(a)(1) [The United States court of appeals for the circuit shall appoint bankruptcy judges for the judicial districts established in paragraph (2) in such numbers as are established in such paragraph.] *Each bankruptcy judge to be appointed for a judicial district, as provided in paragraph (2), shall be appointed by the court of appeals of the United States for the circuit in which such district is located.* Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

(2) The bankruptcy judges appointed pursuant to this section shall be appointed for the several judicial districts as follows:

Districts	Judges
* * * * * * *	
Georgia:	
Northern	8
Middle	[2] *3*
Southern	2
[Middle and Southern	1]
* * * * * * *	

CHAPTER 6—BANKRUPTCY JUDGES

Sec.
151. Designation of bankruptcy courts.

* * * * * * *

159. Bankruptcy statistics.

* * * * * * *

§ 157. Procedures

(a) * * *

(b)(1) * * *

(2) Core proceedings include, but are not limited to—

(A) * * *

* * * * * * *

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; [and]

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims[.]*; and*

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

* * * * * * *

§ 158. Appeals

(a) * * *

* * * * * * *

(c)(1) [Subject to subsection (b),] *Subject to subsections (b) and (d)(2),* each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless —

(A) * * *

* * * * * * *

(d)*(1)* The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

§ 159. Bankruptcy statistics

(a) The clerk of the district court, or the clerk of the bankruptcy court if one is certified pursuant to section 156(b) of this title, shall collect statistics regarding debtors who are individuals with primarily consumer debts seeking relief under chapters 7, 11, and 13 of title 11. Those statistics shall be in a standardized format prescribed by the Director of the Administrative Office of the United States Courts (referred to in this section as the "Director").

(b) The Director shall—

(1) compile the statistics referred to in subsection (a);

(2) make the statistics available to the public; and

(3) not later than July 1, 2008, and annually thereafter, prepare, and submit to Congress a report concerning the information collected under subsection (a) that contains an analysis of the information.

(c) The compilation required under subsection (b) shall—

(1) be itemized, by chapter, with respect to title 11;

(2) be presented in the aggregate and for each district; and

(3) include information concerning—

(A) the total assets and total liabilities of the debtors described in subsection (a), and in each category of assets and liabilities, as reported in the schedules prescribed pursuant to section 2075 of this title and filed by debtors;

(B) the current monthly income, average income, and average expenses of debtors as reported on the schedules and statements that each such debtor files under sections 521 and 1322 of title 11;

(C) the aggregate amount of debt discharged in cases filed during the reporting period, determined as the difference between the total amount of debt and obligations of a debtor reported on the schedules and the amount of such debt reported in categories which are predominantly nondischargeable;

(D) the average period of time between the date of the filing of the petition and the closing of the case for cases closed during the reporting period;

(E) for cases closed during the reporting period—

(i) the number of cases in which a reaffirmation agreement was filed; and

(ii)(I) the total number of reaffirmation agreements filed;

(II) of those cases in which a reaffirmation agreement was filed, the number of cases in which the debtor was not represented by an attorney; and

(III) of those cases in which a reaffirmation agreement was filed, the number of cases in which the reaffirmation agreement was approved by the court;

(F) with respect to cases filed under chapter 13 of title 11, for the reporting period—

(i)(I) the number of cases in which a final order was entered determining the value of property securing a claim in an amount less than the amount of the claim; and

(II) the number of final orders entered determining the value of property securing a claim;

(ii) the number of cases dismissed, the number of cases dismissed for failure to make payments under the plan, the number of cases refiled after dismissal, and the number of cases in which the plan was completed, separately itemized with respect to the number of modifications made before completion of the plan, if any; and

(iii) the number of cases in which the debtor filed another case during the 6-year period preceding the filing;

(G) the number of cases in which creditors were fined for misconduct and any amount of punitive damages awarded by the court for creditor misconduct; and

(H) the number of cases in which sanctions under rule 9011 of the Federal Rules of Bankruptcy Procedure were imposed against debtor's attorney or damages awarded under such Rule.

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Part II—Department of Justice

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CHAPTER 39—UNITED STATES TRUSTEES

* * * * * * *

§ 586. Duties; supervision by Attorney General

(a) Each United States trustee, within the region for which such United States trustee is appointed, shall—

(1) * * *

* * * * * * *

(3) supervise the administration of cases and trustees in cases under chapter 7, 11, 12, ❲or 13❳ *13, or 15* of title 11 by, whenever the United States trustee considers it to be appropriate—

(A) * * *

* * * * * * *

(G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress; ❲and❳

(H) in small business cases (as defined in section 101 of title 11), performing the additional duties specified in title 11 pertaining to such cases; and

❲(H)❳ *(I)* monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications;

* * * * * * *

(5) perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe; ❲and❳

❲(6) make such reports as the Attorney General directs.❳

(6) make such reports as the Attorney General directs, including the results of audits performed under section 603(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005;

(7) in each of such small business cases—

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall—

(i) begin to investigate the debtor's viability;

(ii) inquire about the debtor's business plan;

(iii) explain the debtor's obligations to file monthly operating reports and other required reports;

(iv) attempt to develop an agreed scheduling order; and

(v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state of the debtor's books and records, and verify that the debtor has filed its tax returns; and

(C) review and monitor diligently the debtor's activities, to identify as promptly as possible whether the debtor will be unable to confirm a plan; and

(8) in any case in which the United States trustee finds material grounds for any relief under section 1112 of title 11, the United States trustee shall apply promptly after making that finding to the court for relief.

* * * * * * *

(d)*(1)* The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11. The Attorney General may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.

(2) A trustee whose appointment under subsection (a)(1) or under subsection (b) is terminated or who ceases to be assigned to cases filed under title 11, United States Code, may obtain judicial review of the final agency decision by commencing an action in the district court of the United States for the district for which the panel to which the trustee is appointed under subsection (a)(1), or in the district court of the United States for the district in which the trustee is appointed under subsection (b) resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this paragraph if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

(e)(1) * * *

* * * * * * *

(3) After first exhausting all available administrative remedies, an individual appointed under subsection (b) may obtain judicial review of final agency action to deny a claim of actual, necessary expenses under this subsection by commencing an action in the district court of the United States for the district where the individual resides. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based upon the administrative record before the agency.

(4) The Attorney General shall prescribe procedures to implement this subsection.

(f)(1) The United States trustee for each district is authorized to contract with auditors to perform audits in cases designated by the United States trustee, in accordance with the procedures established under section 603(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(2)(A) The report of each audit referred to in paragraph (1) shall be filed with the court and transmitted to the United States trustee. Each report shall clearly and conspicuously specify any material misstatement of income or expenditures or of assets identified by the person performing the audit. In any case in which a material misstatement of income or expenditures or of assets has been reported, the clerk of the district court (or the clerk of the bankruptcy court if one is certified under section 156(b) of this title) shall give notice of the misstatement to the creditors in the case.

(B) If a material misstatement of income or expenditures or of assets is reported, the United States trustee shall—

(i) report the material misstatement, if appropriate, to the United States Attorney pursuant to section 3057 of title 18; and

(ii) if advisable, take appropriate action, including but not limited to commencing an adversary proceeding to revoke the debtor's discharge pursuant to section 727(d) of title 11.

* * * * * * *

§ 589a. United States Trustee System Fund

(a) * * *

(b) For the purpose of recovering the cost of services of the United States Trustee System, there shall be deposited as offsetting collections to the appropriation "United States Trustee System Fund", to remain available until expended, the following—

【(1) 27.42 percent of the fees collected under section 1930(a)(1) of this title;】

(1)(A) 40.63 percent of the fees collected under section 1930(a)(1)(A) of this title; and

(B) 70.00 percent of the fees collected under section 1930(a)(1)(B);

(2) 【one-half】 *75 percent* of the fees collected under section 1930(a)(3) of this title;

* * * * * * *

(4) 【one-half】 *100 percent* of the fees collected under section 1930(a)(5) of this title;

* * * * * * *

§ 589b. Bankruptcy data

(a) RULES.—The Attorney General shall, within a reasonable time after the effective date of this section, issue rules requiring uniform forms for (and from time to time thereafter to appropriately modify and approve)—

(1) final reports by trustees in cases under chapters 7, 12, and 13 of title 11; and

(2) periodic reports by debtors in possession or trustees in cases under chapter 11 of title 11.

(b) REPORTS.—Each report referred to in subsection (a) shall be designed (and the requirements as to place and manner of filing shall be established) so as to facilitate compilation of data and maximum possible access of the public, both by physical inspection at one or more central filing locations, and by electronic access through the Internet or other appropriate media.

(c) REQUIRED INFORMATION.—The information required to be filed in the reports referred to in subsection (b) shall be that which is in the best interests of debtors and creditors, and in the public interest in reasonable and adequate information to evaluate the efficiency and practicality of the Federal bankruptcy system. In issuing rules proposing the forms referred to in subsection (a), the Attorney General shall strike the best achievable practical balance between—

(1) the reasonable needs of the public for information about the operational results of the Federal bankruptcy system;

(2) economy, simplicity, and lack of undue burden on persons with a duty to file reports; and

(3) appropriate privacy concerns and safeguards.

(d) FINAL REPORTS.—The uniform forms for final reports required under subsection (a) for use by trustees under chapters 7, 12, and 13 of title 11 shall, in addition to such other matters as are required by law or as the Attorney General in the discretion of the Attorney General shall propose, include with respect to a case under such title—

(1) information about the length of time the case was pending;

(2) assets abandoned;

(3) assets exempted;

(4) receipts and disbursements of the estate;

(5) expenses of administration, including for use under section 707(b), actual costs of administering cases under chapter 13 of title 11;

(6) claims asserted;

(7) claims allowed; and

(8) distributions to claimants and claims discharged without payment,

in each case by appropriate category and, in cases under chapters 12 and 13 of title 11, date of confirmation of the plan, each modification thereto, and defaults by the debtor in performance under the plan.

(e) PERIODIC REPORTS.—The uniform forms for periodic reports required under subsection (a) for use by trustees or debtors in possession under chapter 11 of title 11 shall, in addition to such other matters as are required by law or as the Attorney General in the discretion of the Attorney General shall propose, include—

(1) information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;

(2) length of time the case has been pending;

(3) number of full-time employees as of the date of the order for relief and at the end of each reporting period since the case was filed;

(4) cash receipts, cash disbursements and profitability of the debtor for the most recent period and cumulatively since the date of the order for relief;

(5) compliance with title 11, whether or not tax returns and tax payments since the date of the order for relief have been timely filed and made;

(6) all professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not); and

(7) plans of reorganization filed and confirmed and, with respect thereto, by class, the recoveries of the holders, expressed in aggregate dollar values and, in the case of claims, as a percentage of total claims of the class allowed.

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Part III—Court Officers and Employees

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CHAPTER 57—GENERAL PROVISIONS APPLICABLE TO COURT OFFICERS AND EMPLOYEES

* * * * * * *

§ 960. Tax liability

(a) Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(b) A tax under subsection (a) shall be paid on or before the due date of the tax under applicable nonbankruptcy law, unless—

(1) the tax is a property tax secured by a lien against property that is abandoned under section 554 of title 11, within a reasonable period of time after the lien attaches, by the trustee in a case under title 11; or

(2) payment of the tax is excused under a specific provision of title 11.

(c) In a case pending under chapter 7 of title 11, payment of a tax may be deferred until final distribution is made under section 726 of title 11, if—

(1) the tax was not incurred by a trustee duly appointed or elected under chapter 7 of title 11; or

(2) before the due date of the tax, an order of the court makes a finding of probable insufficiency of funds of the estate to pay in full the administrative expenses allowed under section

503(b) of title 11 that have the same priority in distribution under section 726(b) of title 11 as the priority of that tax.

* * * * * * *

Part IV—Jurisdiction and Venue

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

* * * * * * *

§ 1334. Bankruptcy cases and proceedings

(a) * * *

(b) ⟦Notwithstanding⟧ *Except as provided in subsection (e)(2), and notwithstanding* any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) ⟦Nothing in⟧ *Except with respect to a case under chapter 15 of title 11, nothing in* this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

* * * * * * *

(d) Any decision to abstain or not to abstain ⟦made under this subsection⟧ *made under subsection (c)* (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. ⟦This subsection⟧ *Subsection (c) and this subsection* shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

⟦(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.⟧

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

* * * * * * *

CHAPTER 87—DISTRICT COURTS; VENUE

* * * * * * *

§ 1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11

(a) * * *

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than [$5,000,] *$15,000, or a debt (excluding a consumer debt) against a noninsider of less than $10,000,* only in the district court for the district in which the defendant resides.

[§ 1410. Venue of cases ancillary to foreign proceedings

[(a) A case under section 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be commenced only in the district court for the district where the State or Federal court sits in which is pending the action or proceeding against which the injunction is sought.

[(b) A case under section 304 of title 11 to enjoin the enforcement of a lien against a property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which such property is found.

[(c) A case under section 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the district court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case.]

§ 1410. Venue of cases ancillary to foreign proceedings

A case under chapter 15 of title 11 may be commenced in the district court of the United States for the district—

(1) in which the debtor has its principal place of business or principal assets in the United States;

(2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or

(3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.

* * * * * * *

Part V—Procedure

* * * * * * *

CHAPTER 123—FEES AND COSTS

§ 1930. Bankruptcy fees

(a) [Notwithstanding section 1915 of this title, the] *The* parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

【(1) For a case commenced under chapter 7 or 13 of title 11, $155.】

(1) For a case commenced under—

(A) chapter 7 of title 11, $200; and

(B) chapter 13 of title 11, $150.

* * * * * * *

(3) For a case commenced under chapter 11 of title 11 that doesnot concern a railroad, as defined in section 101 of title 11, 【$800】 *$1000*.

* * * * * * *

(f)(1) Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term "filing fee" means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

(2) The district court or the bankruptcy court may waive for such debtors other fees prescribed under subsections (b) and (c).

(3) This subsection does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for other debtors and creditors.

* * * * * * *

CHAPTER 131—RULES OF COURTS

* * * * * * *

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right. The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law. *The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement.*

* * * * * * *

SECTION 406 OF THE JUDICIARY APPROPRIATIONS ACT, 1990

SEC. 406. (a) * * *

(b) All fees as shall be hereafter collected for any service not of a kind described in any of the items enumerated as items 1 through 7 and as items 9 through 18, as in effect on November 21, 1989, of the bankruptcy miscellaneous fee schedule prescribed by the Judicial Conference of the United States [pursuant to 28 U.S.C. section 1930(b) and 33.87 percent of the fees hereafter collected under 28 U.S.C. section 1930(a)(1) and 25 percent of the fees hererafter collected under 28 U.S.C. section 1930(a)(3) shall be deposited as offsetting receipts to the fund established under 28 U.S.C. section 1931] *under section 1930(b) of title 28, United States Code, 31.25 of the fees collected under section 1930(a)(1)(A) of that title, 30.00 percent of the fees collected under section 1930(a)(1)(B) of that title, and 25 percent of the fees collected under section 1930(a)(3) of that title shall be deposited as offsetting receipts to the fund established under section 1931 of that title* and shall remain available to the Judiciary until expended to reimburse any appropriation for the amount paid out of such appropriation for expenses of the Courts of Appeals, District Courts, and other Judicial Services and the Administrative Office of the United States Courts. The Judicial Conference shall report to the Committees on Appropriations of the House of Representatives and the Senate on a quarterly basis beginning on the first day of each fiscal year regarding the sums deposited in said fund.

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FEDERAL DEPOSIT INSURANCE ACT

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SEC. 11. (a) * * *

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(e) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF CONSERVATOR OR RECEIVER.—

(1) * * *

* * * * * * *

(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—

(A) RIGHTS OF PARTIES TO CONTRACTS.—Subject to [paragraph (10)] *paragraphs (9) and (10)* of this subsection and notwithstanding any other provision of this Act (other than subsection (d)(9) of this section and section 13(e)), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right [to cause the termination or liquidation] *such person has to cause the termination, liquidation, or acceleration* of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

[(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or]

(ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i);

* * * * * * *

(C) CERTAIN TRANSFERS NOT AVOIDABLE.—

(i) IN GENERAL.—Notwithstanding paragraph (11), *section 5242 of the Revised Statutes of the United States or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers,* the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

* * * * * * *

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—For purposes of this [subsection—] *subsection, the following definitions shall apply:*

(i) QUALIFIED FINANCIAL CONTRACT.—The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation*, resolution, or order* to be a qualified financial contract for purposes of this paragraph.

[(ii) SECURITIES CONTRACT.—The term "securities contract"—

[(I) has the meaning given to such term in section 741 of title 11, United States Code, except that the term "security" (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934), and any interest in any mortgage loan or mortgage-related security; and

[(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

[(iii) COMMODITY CONTRACT.—The term "commodity contract" has the meaning given to such term in section 761 of title 11, United States Code.

[(iv) FORWARD CONTRACT.—The term "forward contract" has the meaning given to such term in section 101 of title 11, United States Code.

[(v) REPURCHASE AGREEMENT.—The term "repurchase agreement"—

[(I) has the meaning given to such term in section 101 of title 11, the United States Code, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934), any mortgage loan, and any interest in any mortgage loan; and

❲(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

❲(vi) SWAP AGREEMENT.—The term "swap agreement"—

❲(I) means any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

❲(II) includes any combination of such agreements and any option to enter into any such agreement.

❲(vii) TREATMENT OF MASTER AGREEMENT AS 1 SWAP AGREEMENT.—Any master agreement for any agreements described in clause (vi)(I) together with all supplements to such master agreement shall be treated as 1 swap agreement.

❲(viii) TRANSFER.—The term "transfer" has the meaning given to such term in section 101 of title 11, United States Code.❳

(ii) SECURITIES CONTRACT.—The term "securities contract"—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to in-

clude any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iii) COMMODITY CONTRACT.—The term "commodity contract" means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a

contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iv) FORWARD CONTRACT.—The term "forward contract" means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to

any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(v) REPURCHASE AGREEMENT.—The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repur-

chase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

For purposes of this clause, the term "qualified foreign government security" means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).

(vi) SWAP AGREEMENT.—The term "swap agreement" means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

Such term is applicable for purposes of this subsection only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.

(vii) TREATMENT OF MASTER AGREEMENT AS ONE AGREEMENT.—Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(viii) TRANSFER.—The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the depository institution's equity of redemption.

(E) CERTAIN PROTECTIONS IN EVENT OF APPOINTMENT OF CONSERVATOR.—Notwithstanding any other provision of this Act (❲other than paragraph (12) of this subsection, subsection (d)(9)❳ *other than subsections (d)(9) and (e)(10)* of this section, and section 13(e) of this Act), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) * * *

❲(ii) any right under any security arrangement relating to such qualified financial contracts; or❳

(ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i);

* * * * * * *

(F) CLARIFICATION.—No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with subsection (e)(1) of this section.

(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

(i) IN GENERAL.—Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of an insured depository institution in default.

(ii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term "walkaway clause" means a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a nondefaulting party.

(H) RECORDKEEPING REQUIREMENTS.—The Corporation, in consultation with the appropriate Federal banking agencies and the National Credit Union Administration Board, may prescribe regulations requiring more detailed recordkeeping by any insured depository institution with respect to qualified financial contracts (including market valuations) only if such insured depository institution is in a troubled condition (as such term is defined by the Corporation pursuant to section 32).

❲(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

⟦(A) transfer to 1 depository institution (other than a depository institution in default)—

⟦(i) all qualified financial contracts between—

⟦(I) any person or any affiliate of such person; and

⟦(II) the depository institution in default;

⟦(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

⟦(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

⟦(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

⟦(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).⟧

(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

(A) IN GENERAL.—In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

(i) transfer to one financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—

(I) all qualified financial contracts between any person or any affiliate of such person and the depository institution in default;

(II) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

(III) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

(IV) all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or

(ii) transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).

(B) TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.—In transferring any qualified financial contracts and related claims and property under subparagraph (A)(i), the conservator or receiver for the de-

pository institution shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

(C) TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.—In the event that a conservator or receiver transfers any qualified financial contract and related claims, property, and credit enhancements pursuant to subparagraph (A)(i) and such contract is cleared by or subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) DEFINITIONS.—For purposes of this paragraph, the term "financial institution" means a broker or dealer, a depository institution, a futures commission merchant, or any other institution, as determined by the Corporation by regulation to be a financial institution, and the term "clearing organization" has the same meaning as in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(10) NOTIFICATION OF TRANSFER.—

(A) IN GENERAL.—If—

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

[the conservator or receiver shall use such conservator's or receiver's best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer.] *the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver in the case of a receivership, or the business day following such transfer in the case of a conservatorship.*

(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

(i) RECEIVERSHIP.—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a receiver for the depository insti-

tution (or the insolvency or financial condition of the depository institution for which the receiver has been appointed)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) CONSERVATORSHIP.—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a conservator for the depository institution (or the insolvency or financial condition of the depository institution for which the conservator has been appointed).

(iii) NOTICE.—For purposes of this paragraph, the Corporation as receiver or conservator of an insured depository institution shall be deemed to have notified a person who is a party to a qualified financial contract with such depository institution if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

(C) TREATMENT OF BRIDGE BANKS.—The following institutions shall not be considered to be a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of paragraph (9):

(i) A bridge bank.

(ii) A depository institution organized by the Corporation, for which a conservator is appointed either—

(I) immediately upon the organization of the institution; or

(II) at the time of a purchase and assumption transaction between the depository institution and the Corporation as receiver for a depository institution in default.

[(B)] *(D)* BUSINESS DAY DEFINED.—For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which an insured depository institution is a party, the conservator or receiver for such institution shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the depository institution in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

⟦(11)⟧ *(12)* CERTAIN SECURITY INTERESTS NOT AVOIDABLE.—No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

⟦(12)⟧ *(13)* AUTHORITY TO ENFORCE CONTRACTS.—

(A) IN GENERAL.—The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of *or the exercise of rights or powers by* a conservator or receiver.

* * * * * * *

⟦(13)⟧ *(14)* EXCEPTION FOR FEDERAL RESERVE AND FEDERAL HOME LOAN BANKS.—No provision of this subsection shall apply with respect to—

(A) * * *

* * * * * * *

⟦(14)⟧ *(15)* SELLING CREDIT CARD ACCOUNTS RECEIVABLE.—

(A) * * *

* * * * * * *

⟦(15)⟧ *(16)* CERTAIN CREDIT CARD CUSTOMER LISTS PROTECTED.—

(A) * * *

* * * * * * *

(17) SAVINGS CLAUSE.—The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), and the Commodity Exchange Act.

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SEC. 13. (a) * * *

* * * * * * *

(e) AGREEMENTS AGAINST INTERESTS OF CORPORATION.—

(1) * * *

⟦(2) PUBLIC DEPOSITS.—An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 11(a)(2) shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.]

(2) EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.—An agreement to provide for the lawful collateralization of—

(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 11(a)(2), including an agreement to provide collateral in lieu of a surety bond;

(B) bankruptcy estate funds pursuant to section 345(b)(2) of title 11, United States Code;

(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

(D) one or more qualified financial contracts, as defined in section 11(e)(8)(D),

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.

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FEDERAL CREDIT UNION ACT

TITLE II—SHARE INSURANCE

* * * * * * *

PAYMENT OF INSURANCE

SEC. 207. (a) * * *

* * * * * * *

(c) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF CONSERVATOR OR LIQUIDATING AGENT.—

(1) * * *

* * * * * * *

(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—

(A) RIGHTS OF PARTIES TO CONTRACTS.—Subject to [paragraph (12)] *paragraphs (9) and (10)* of this subsection and notwithstanding any other provision of this Act (other than subsection (b)(9) of this section and section 208(a)(3)), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right [to cause the termination or liquidation] *such person has to cause the termination, liquidation, or acceleration* of any qualified financial contract with an insured credit union which arises upon the appointment of the Board as liquidating agent for such credit union at any time after such appointment;

⟦(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or⟧

(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);

* * * * * * *

(C) CERTAIN TRANSFERS NOT AVOIDABLE.—

(i) IN GENERAL.—Notwithstanding paragraph (11), *section 5242 of the Revised Statutes of the United States or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers,* the Board, whether acting as such or as conservator or liquidating agent of an insured credit union, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured credit union.

* * * * * * *

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—For purposes of this ⟦subsection—⟧ *subsection, the following definitions shall apply:*

(i) QUALIFIED FINANCIAL CONTRACT.—The term "qualified financial contract" means any securities contract, forward contract, repurchase agreement, and any similar agreement that the Board determines by regulation*, resolution, or order* to be a qualified financial contract for purposes of this paragraph.

⟦(ii) SECURITIES CONTRACT.—The term "securities contract"—

⟦(I) has the meaning given to such term in section 741 of title 11, United States Code, except that the term "security" (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934, and any interest in any mortgage loan or mortgage-related security; and

⟦(II) does not include any participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such participation within the meaning of such term.

⟦(iii) FORWARD CONTRACT.—The term "forward contract" has the meaning given to such term in section 101 of title 11, United States Code.

⟦(iv) REPURCHASE AGREEMENT.—The term "repurchase agreement"—

⟦(I) has the meaning given to such term in section 101 of title 11, the United States Code, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include mortgage-related securities (as such term is defined in section 3(a)(41) of the

Securities Exchange Act of 1934, any mortgage loan, and any interest in any mortgage loan; and

❲(II) does not include any participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such participation within the meaning of such term.

❲(v) TRANSFER.—The term "transfer" has the meaning given to such term in section 101 of title 11, United States Code.❳

(ii) SECURITIES CONTRACT.—The term "securities contract"—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), to-

gether with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iii) COMMODITY CONTRACT.—The term "commodity contract" means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is re-

ferred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iv) FORWARD CONTRACT.—The term "forward contract" means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(v) REPURCHASE AGREEMENT.—The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eli-

gible bankers' acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

For purposes of this clause, the term "qualified foreign government security" means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).

(vi) SWAP AGREEMENT.—The term "swap agreement" means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option,

future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

Such term is applicable for purposes of this subsection only and shall not be construed or applied so as to challenge or affect the characterization, definition, or *treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.*

(vii) TREATMENT OF MASTER AGREEMENT AS ONE AGREEMENT.—Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(viii) TRANSFER.—The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the depository institution's equity of redemption.

(E) CERTAIN PROTECTIONS IN EVENT OF APPOINTMENT OF CONSERVATOR.—Notwithstanding any other provision of this Act (【other than paragraph (12) of this subsection, subsection (b)(9)】 *other than subsections (b)(9) and (c)(10)* of this section, and section 208(a)(3) of this Act), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) * * *

【(ii) any right under any security arrangement relating to such qualified financial contracts; or】

(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);

* * * * * * *

(F) CLARIFICATION.—No provision of law shall be construed as limiting the right or power of the Board, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Board to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with subsection (c)(1) of this section.

(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

(i) IN GENERAL.—Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Im-

provement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of an insured credit union in default.

(ii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term "walkaway clause" means a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a nondefaulting party.

(H) RECORDKEEPING REQUIREMENTS.—The Board, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping by any insured credit union with respect to qualified financial contracts (including market valuations) only if such insured credit union is in a troubled condition (as such term is defined by the Board pursuant to section 212).

[(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—In making any transfer of assets or liabilities of a credit union in default which includes any qualified financial contract, the conservator or liquidating agent for such credit union shall either—

[(A) transfer to 1 credit union (other than a credit union in default)—

[(i) all qualified financial contracts between—

[(I) any person or any affiliate of such person; and

[(II) the credit union in default;

[(ii) all claims of such person or any affiliate of such person against such credit union under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such credit union);

[(iii) all claims of such credit union against such person or any affiliate of such person under any such contract; and

[(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

[(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).]

(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

(A) IN GENERAL.—In making any transfer of assets or liabilities of a credit union in default which includes any qualified financial contract, the conservator or liquidating agent for such credit union shall either—

(i) transfer to 1 financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has

been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—

(I) all qualified financial contracts between any person or any affiliate of such person and the credit union in default;

(II) all claims of such person or any affiliate of such person against such credit union under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such credit union);

(III) all claims of such credit union against such person or any affiliate of such person under any such contract; and

(IV) all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or

(ii) transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).

(B) TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.—In transferring any qualified financial contracts and related claims and property under subparagraph (A)(i), the conservator or liquidating agent for the credit union shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

(C) TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.—In the event that a conservator or liquidating agent transfers any qualified financial contract and related claims, property, and credit enhancements pursuant to subparagraph (A)(i) and such contract is cleared by or subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) DEFINITIONS.—For purposes of this paragraph—

(i) the term "financial institution" means a broker or dealer, a depository institution, a futures commission merchant, a credit union, or any other institution, as determined by the Board by regulation to be a financial institution; and

(ii) the term "clearing organization" has the same meaning as in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(10) NOTIFICATION OF TRANSFER.—

(A) IN GENERAL.—If—

(i) * * *

(ii) the transfer includes any qualified financial contract,

[the conservator or liquidating agent shall use such conservator's or liquidating agent's best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time), on the business day following such transfer.] *the conservator or liquidating agent shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the liquidating agent in the case of a liquidation, or the business day following such transfer in the case of a conservatorship.*

(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

(i) LIQUIDATION.—A person who is a party to a qualified financial contract with an insured credit union may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a liquidating agent for the credit union institution (or the insolvency or financial condition of the credit union for which the liquidating agent has been appointed)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the liquidating agent; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) CONSERVATORSHIP.—A person who is a party to a qualified financial contract with an insured credit union may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a conservator for the credit union or the insolvency or financial condition of the credit union for which the conservator has been appointed).

(iii) NOTICE.—For purposes of this paragraph, the Board as conservator or liquidating agent of an insured credit union shall be deemed to have notified a person who is a party to a qualified financial contract with such credit union if the Board has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

(C) TREATMENT OF BRIDGE BANKS.—The following institutions shall not be considered to be a financial institu-

tion for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of paragraph (9):

(i) A bridge bank.

(ii) A credit union organized by the Board, for which a conservator is appointed either—

(I) immediately upon the organization of the credit union; or

(II) at the time of a purchase and assumption transaction between the credit union and the Board as receiver for a credit union in default.

[(B)] *(D)* BUSINESS DAY DEFINED.—For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of a conservator or liquidating agent with respect to any qualified financial contract to which an insured credit union is a party, the conservator or liquidating agent for such credit union shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the credit union in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

[(11)] *(12)* CERTAIN SECURITY INTERESTS NOT AVOIDABLE.—No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any credit union except where such an interest is taken in contemplation of the credit union's insolvency or with the intent to hinder, delay, or defraud the credit union or the creditors of such credit union.

[(12)] *(13)* AUTHORITY TO ENFORCE CONTRACTS.—

(A) IN GENERAL.—The conservator or liquidating agent may enforce any contract, other than a director's or officer's liability insurance contract or a credit union bond, entered into by the credit union notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of *or the exercise of rights or powers by* a conservator or liquidating agent.

* * * * * * *

[(13)] *(14)* EXCEPTION FOR FEDERAL RESERVE AND FEDERAL HOME LOAN BANKS.—No provision of this subsection shall apply with respect to—

(A) * * *

* * * * * * *

(15) SAVINGS CLAUSE.—The meanings of terms used in this subsection are applicable for purposes of this subsection only,

and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in section (a)(47) of the Securities Exchange Act of 1934), and the Commodity Exchange Act.

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FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991

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TITLE IV—MISCELLANEOUS PROVISIONS

Subtitle A—Payment System Risk Reduction

CHAPTER 1—BILATERAL AND CLEARING ORGANIZATION NETTING

* * * * * * *

SEC. 402. DEFINITIONS.

For purposes of this chapter—

(1) * * *

* * * * * * *

(2) CLEARING ORGANIZATION.—The term “clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar organization—

(A) that provides clearing, netting, or settlement services for its members and—

(i) * * *

(ii) which is registered as a clearing agency under the Securities Exchange Act of 1934*, or is exempt from such registration by order of the Securities and Exchange Commission*; or

(B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act*, that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act, or that is a multilateral clearing organization (as defined in section 408 of this Act)*.

* * * * * * *

(6) DEPOSITORY INSTITUTION.—The term “depository institution” means—

(A) a depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act (other than clause (vii));

【(B) a branch or agency as defined in section 1(b) of the International Banking Act of 1978;】

(B) an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System, if the national bank or State member bank is not eligible to make application to become an insured bank under section 5 of the Federal Deposit Insurance Act;

(C) a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978;

⟦(C)⟧ *(D)* a corporation chartered under section 25(a) of the Federal Reserve Act; or

⟦(D)⟧ *(E)* a corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act.

* * * * * * *

(11) MEMBER.—The term "member" means a member of or participant in a clearing organization, and includes the clearing organization *and any other clearing organization with which such clearing organization has a netting contract*.

* * * * * * *

(14) NETTING CONTRACT.—

(A) IN GENERAL.—The term "netting contract"—

⟦(i) means a contract or agreement between 2 or more financial institutions or members, that—

⟦(I) is governed by the laws of the United States, any State, or any political subdivision of any State, and

⟦(II) provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) among the parties to the agreement; and⟧

(i) means a contract or agreement between 2 or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or close out values relating to such obligations or entitlements) among the parties to the agreement; and

* * * * * * *

(15) PAYMENT.—The term "payment" means a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.

SEC. 403. BILATERAL NETTING.

⟦(a) GENERAL RULE.—Notwithstanding any other provision of law, the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract.⟧

(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and

(10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

* * * * * * *

(f) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

SEC. 404. CLEARING ORGANIZATION NETTING.

[(a) GENERAL NETTING RULE.—Notwithstanding any other provision of law, the covered contractual payment obligations and covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract.]

(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

* * * * * * *

(h) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 members of a clearing organization shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

* * * * * * *

SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED NATIONAL BANKS, UNINSURED FEDERAL BRANCHES AND AGENCIES, CERTAIN UNINSURED STATE MEMBER BANKS, AND EDGE ACT CORPORATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of law, paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act shall apply to an uninsured national bank or uninsured Federal branch or Federal agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, except that for such purpose—

(1) any reference to the "Corporation as receiver" or "the receiver or the Corporation" shall refer to the receiver appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank;

(2) any reference to the "Corporation" (other than in section 11(e)(8)(D) of such Act), the "Corporation, whether acting as such or as conservator or receiver", a "receiver", or a "conservator" shall refer to the receiver or conservator appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver or conservator appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank; and

(3) any reference to an "insured depository institution" or "depository institution" shall refer to an uninsured national bank, an uninsured Federal branch or Federal agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act.

(b) LIABILITY.—The liability of a receiver or conservator of an uninsured national bank, uninsured Federal branch or agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

(c) REGULATORY AUTHORITY.—

(1) IN GENERAL.—The Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency and the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank that operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, in consultation with the Federal Deposit Insurance Corporation, may each promulgate regulations solely to implement this section.

(2) SPECIFIC REQUIREMENT.—In promulgating regulations, limited solely to implementing paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System each shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

(d) DEFINITIONS.—For purposes of this section, the terms "Federal branch", "Federal agency", and "foreign bank" have the same meanings as in section 1(b) of the International Banking Act of 1978.

SEC. [407] *407A*. NATIONAL EMERGENCIES.

The provisions of this subtitle may not be construed to limit the authority of the President under the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

* * * * * * *

SECURITIES INVESTOR PROTECTION ACT OF 1970

* * * * * * *

SEC. 5. PROTECTION OF CUSTOMERS.

(a) * * *

(b) COURT ACTION.—

(1) * * *

(2) JURISDICTION AND POWERS OF COURT.—

(A) * * *

* * * * * * *

(C) EXCEPTION FROM STAY.—

(i) Notwithstanding section 362 of title 11, United States Code, neither the filing of an application under subsection (a)(3) nor any order or decree obtained by SIPC from the court shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, as those terms are defined in sections 101, 741, and 761 of title 11, United States Code, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the debtor, whether or not with respect to one or more of such contracts or agreements.

(ii) Notwithstanding clause (i), such application, order, or decree may operate as a stay of the foreclosure on, or disposition of, securities collateral pledged by the debtor, whether or not with respect to one or more of such contracts or agreements, securities sold by the debtor under a repurchase agreement, or securities lent under a securities lending agreement.

(iii) As used in this subparagraph, the term "contractual right" includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.

* * * * * * *

SEC. 6. GENERAL PROVISIONS OF A LIQUIDATION PROCEEDING.

(a) * * *

* * * * * * *

(e) COSTS AND EXPENSES OF ADMINISTRATION.—All costs and expenses of administration of the estate of the debtor and of the liquidation proceeding shall be borne by the general estate of the debtor to the extent it is sufficient therefor, and the priorities of distribution from the general estate shall be as provided in section 726 of title 11 of the United States Code. Costs and expenses of administration shall include payments pursuant to section 8(e) and section 9(c)(1) (to the extent such payments recovered securities which were apportioned to the general estate pursuant to subsection (d)) and costs and expenses of SIPC employees utilized by the trustee pursuant to section 7(a)(2). All funds advanced by SIPC to a trustee for such costs and expenses of administration shall be recouped from the general estate under section ⟦507(a)(1)⟧ *507(a)(2)* of title 11 of the United States Code.

* * * * * * *

SECTION 302 OF THE BANKRUPTCY JUDGES, UNITED STATES TRUSTEES, AND FAMILY FARMER BANKRUPTCY ACT OF 1986

SEC. 302. EFFECTIVE DATES; APPLICATION OF AMENDMENTS.

(a) * * *

* * * * * * *

⟦(f) REPEAL OF CHAPTER 12 OF TITLE 11.—Chapter 12 of title 11 of the United States Code is repealed on October 1, 1998. All cases commenced or pending under chapter 12 of title 11, United States Code, and all matters and proceedings in or relating to such cases, shall be conducted and determined under such chapter as if such chapter had not been repealed. The substantive rights of parties in connection with such cases, matters, and proceedings shall continue to be governed under the laws applicable to such cases, matters, and proceedings as if such chapter had not been repealed.⟧

TRUTH IN LENDING ACT

* * * * * * *

CHAPTER 2—CREDIT TRANSACTIONS

* * * * * * *

§ 127. Open end consumer credit plans

(a) * * *

* * * * * * *

(b) The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) * * *

* * * * * * *

(11)(A) In the case of an open end credit plan that requires a minimum monthly payment of not more than 4 percent of the balance on which finance charges are accruing, the following statement, located on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 2% minimum monthly payment on a balance of $1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: ____________." (the blank space to be filled in by the creditor).

(B) In the case of an open end credit plan that requires a minimum monthly payment of more than 4 percent of the balance on which finance charges are accruing, the following statement, in a prominent location on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. Making a typical 5% minimum monthly payment on a balance of $300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call this toll-free number: ____________." (the blank space to be filled in by the creditor).

(C) Notwithstanding subparagraphs (A) and (B), in the case of a creditor with respect to which compliance with this title is enforced by the Federal Trade Commission, the following statement, in a prominent location on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 5% minimum monthly payment on a balance of $300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call the Federal Trade Commission at this toll-free number: ____________." (the blank space to be filled in by the creditor). A creditor who is

subject to this subparagraph shall not be subject to subparagraph (A) or (B).

(D) Notwithstanding subparagraph (A), (B), or (C), in complying with any such subparagraph, a creditor may substitute an example based on an interest rate that is greater than 17 percent. Any creditor that is subject to subparagraph (B) may elect to provide the disclosure required under subparagraph (A) in lieu of the disclosure required under subparagraph (B).

(E) The Board shall, by rule, periodically recalculate, as necessary, the interest rate and repayment period under subparagraphs (A), (B), and (C).

(F)(i) The toll-free telephone number disclosed by a creditor or the Federal Trade Commission under subparagraph (A), (B), or (G), as appropriate, may be a toll-free telephone number established and maintained by the creditor or the Federal Trade Commission, as appropriate, or may be a toll-free telephone number established and maintained by a third party for use by the creditor or multiple creditors or the Federal Trade Commission, as appropriate. The toll-free telephone number may connect consumers to an automated device through which consumers may obtain information described in subparagraph (A), (B), or (C), by inputting information using a touch-tone telephone or similar device, if consumers whose telephones are not equipped to use such automated device are provided the opportunity to be connected to an individual from whom the information described in subparagraph (A), (B), or (C), as applicable, may be obtained. A person that receives a request for information described in subparagraph (A), (B), or (C) from an obligor through the toll-free telephone number disclosed under subparagraph (A), (B), or (C), as applicable, shall disclose in response to such request only the information set forth in the table promulgated by the Board under subparagraph (H)(i).

(ii)(I) The Board shall establish and maintain for a period not to exceed 24 months following the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, a toll-free telephone number, or provide a toll-free telephone number established and maintained by a third party, for use by creditors that are depository institutions (as defined in section 3 of the Federal Deposit Insurance Act), including a Federal credit union or State credit union (as defined in section 101 of the Federal Credit Union Act), with total assets not exceeding $250,000,000. The toll-free telephone number may connect consumers to an automated device through which consumers may obtain information described in subparagraph (A) or (B), as applicable, by inputting information using a touch-tone telephone or similar device, if consumers whose telephones are not equipped to use such automated device are provided the opportunity to be connected to an individual from whom the information described in subparagraph (A) or (B), as applicable, may be obtained. A person that receives a request for information described in subparagraph (A) or (B) from an obligor through the toll-free telephone number disclosed under subparagraph (A) or (B), as applicable, shall disclose in response to such request only the information set forth in the table promulgated by the Board under subparagraph (H)(i). The dollar amount contained

in this subclause shall be adjusted according to an indexing mechanism established by the Board.

(II) Not later than 6 months prior to the expiration of the 24-month period referenced in subclause (I), the Board shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the program described in subclause (I).

(G) The Federal Trade Commission shall establish and maintain a toll-free number for the purpose of providing to consumers the information required to be disclosed under subparagraph (C).

(H) The Board shall—

(i) establish a detailed table illustrating the approximate number of months that it would take to repay an outstanding balance if a consumer pays only the required minimum monthly payments and if no other advances are made, which table shall clearly present standardized information to be used to disclose the information required to be disclosed under subparagraph (A), (B), or (C), as applicable;

(ii) establish the table required under clause (i) by assuming—

(I) a significant number of different annual percentage rates;

(II) a significant number of different account balances;

(III) a significant number of different minimum payment amounts; and

(IV) that only minimum monthly payments are made and no additional extensions of credit are obtained; and

(iii) promulgate regulations that provide instructional guidance regarding the manner in which the information contained in the table established under clause (i) should be used in responding to the request of an obligor for any information required to be disclosed under subparagraph (A), (B), or (C).

(I) The disclosure requirements of this paragraph do not apply to any charge card account, the primary purpose of which is to require payment of charges in full each month.

(J) A creditor that maintains a toll-free telephone number for the purpose of providing customers with the actual number of months that it will take to repay the customer's outstanding balance is not subject to the requirements of subparagraph (A) or (B).

(K) A creditor that maintains a toll-free telephone number for the purpose of providing customers with the actual number of months that it will take to repay an outstanding balance shall include the following statement on each billing statement: "Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For more information, call this toll-free number: ________." (the blank space to be filled in by the creditor).

(12) If a late payment fee is to be imposed due to the failure of the obligor to make payment on or before a required payment due date, the following shall be stated clearly and conspicuously on the billing statement:

(A) The date on which that payment is due or, if different, the earliest date on which a late payment fee may be charged.

(B) The amount of the late payment fee to be imposed if payment is made after such date.

(c) DISCLOSURE IN CREDIT AND CHARGE CARD APPLICATIONS AND SOLICITATIONS.—

(1) * * *

* * * * * * *

(6) ADDITIONAL NOTICE CONCERNING "INTRODUCTORY RATES".—

(A) IN GENERAL.—Except as provided in subparagraph (B), an application or solicitation to open a credit card account and all promotional materials accompanying such application or solicitation for which a disclosure is required under paragraph (1), and that offers a temporary annual percentage rate of interest, shall—

(i) use the term "introductory" in immediate proximity to each listing of the temporary annual percentage rate applicable to such account, which term shall appear clearly and conspicuously;

(ii) if the annual percentage rate of interest that will apply after the end of the temporary rate period will be a fixed rate, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing of the temporary annual percentage rate in the tabular format described in section 122(c)), the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period; and

(iii) if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing in the tabular format prescribed by section 122(c)), the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation.

(B) EXCEPTION.—Clauses (ii) and (iii) of subparagraph (A) do not apply with respect to any listing of a temporary annual percentage rate on an envelope or other enclosure in which an application or solicitation to open a credit card account is mailed.

(C) CONDITIONS FOR INTRODUCTORY RATES.—An application or solicitation to open a credit card account for which a disclosure is required under paragraph (1), and that offers a temporary annual percentage rate of interest

shall, if that rate of interest is revocable under any circumstance or upon any event, clearly and conspicuously disclose, in a prominent manner on or with such application or solicitation—

(i) a general description of the circumstances that may result in the revocation of the temporary annual percentage rate; and

(ii) if the annual percentage rate that will apply upon the revocation of the temporary annual percentage rate—

(I) will be a fixed rate, the annual percentage rate that will apply upon the revocation of the temporary annual percentage rate; or

(II) will vary in accordance with an index, the rate that will apply after the temporary rate, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation.

(D) DEFINITIONS.—In this paragraph—

(i) the terms "temporary annual percentage rate of interest" and "temporary annual percentage rate" mean any rate of interest applicable to a credit card account for an introductory period of less than 1 year, if that rate is less than an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation; and

(ii) the term "introductory period" means the maximum time period for which the temporary annual percentage rate may be applicable.

(E) RELATION TO OTHER DISCLOSURE REQUIREMENTS.—Nothing in this paragraph may be construed to supersede subsection (a) of section 122, or any disclosure required by paragraph (1) or any other provision of this subsection.

(7) INTERNET-BASED SOLICITATIONS.—

(A) IN GENERAL.—In any solicitation to open a credit card account for any person under an open end consumer credit plan using the Internet or other interactive computer service, the person making the solicitation shall clearly and conspicuously disclose—

(i) the information described in subparagraphs (A) and (B) of paragraph (1); and

(ii) the information described in paragraph (6).

(B) FORM OF DISCLOSURE.—The disclosures required by subparagraph (A) shall be—

(i) readily accessible to consumers in close proximity to the solicitation to open a credit card account; and

(ii) updated regularly to reflect the current policies, terms, and fee amounts applicable to the credit card account.

(C) DEFINITIONS.—For purposes of this paragraph—

(i) the term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks; and

(ii) the term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

* * * * * * *

(h) PROHIBITION ON CERTAIN ACTIONS FOR FAILURE TO INCUR FINANCE CHARGES.—A creditor of an account under an open end consumer credit plan may not terminate an account prior to its expiration date solely because the consumer has not incurred finance charges on the account. Nothing in this subsection shall prohibit a creditor from terminating an account for inactivity in 3 or more consecutive months.

SEC. 127A. DISCLOSURE REQUIREMENTS FOR OPEN END CONSUMER CREDIT PLANS SECURED BY THE CONSUMER'S PRINCIPAL DWELLING.

(a) APPLICATION DISCLOSURES.—In the case of any open end consumer credit plan which provides for any extension of credit which is secured by the consumer's principal dwelling, the creditor shall make the following disclosures in accordance with subsection (b):

(1) * * *

* * * * * * *

(13) STATEMENT REGARDING **[**CONSULTATION OF TAX ADVISOR.—A statement that the**]** *TAX DEDUCTIBILITY.—A statement that—*

(A) the consumer should consult a tax advisor regarding the deductibility of interest and charges under the plan**[**.**]***; and*

(B) in any case in which the extension of credit exceeds the fair market value (as defined under the Internal Revenue Code of 1986) of the dwelling, the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes.

* * * * * * *

§ 128. Consumer credit not under open end credit plans

(a) For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(1) * * *

* * * * * * *

(15) In the case of a consumer credit transaction that is secured by the principal dwelling of the consumer, in which the extension of credit may exceed the fair market value of the dwelling, a clear and conspicuous statement that—

(A) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(B) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(b)(1) * * *

* * * * * * *

(3) In the case of a credit transaction described in paragraph (15) of subsection (a), disclosures required by that paragraph shall be made to the consumer at the time of application for such extension of credit.

* * * * * * *

CHAPTER 3—CREDIT ADVERTISING

* * * * * * *

§ 144. Advertising of credit other than open end plans

(a) * * *

* * * * * * *

(e) Each advertisement to which this section applies that relates to a consumer credit transaction that is secured by the principal dwelling of a consumer in which the extension of credit may exceed the fair market value of the dwelling, and which advertisement is disseminated in paper form to the public or through the Internet, as opposed to by radio or television, shall clearly and conspicuously state that—

(1) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(2) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

* * * * * * *

SEC. 147. ADVERTISING OF OPEN END CONSUMER CREDIT PLANS SECURED BY THE CONSUMER'S PRINCIPAL DWELLING.

(a) * * *

(b) TAX DEDUCTIBILITY.—[If any]

(1) IN GENERAL.—If any advertisement described in subsection (a) contains a statement that any interest expense incurred with respect to the plan is or may be tax deductible, the advertisement shall not be misleading with respect to such deductibility.

(2) CREDIT IN EXCESS OF FAIR MARKET VALUE.—Each advertisement described in subsection (a) that relates to an extension of credit that may exceed the fair market value of the dwelling, and which advertisement is disseminated in paper form to the public or through the Internet, as opposed to by radio or television, shall include a clear and conspicuous statement that—

(A) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(B) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

*   *   *   *   *   *   *

U.S. House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

March 23, 2005

RECEIVED
MAR 2 3 2005
Committee on the Judiciary

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Sensenbrenner:

On March 16, 2005, the Committee on the Judiciary ordered reported S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. As you know, the Committee on Financial Services was granted an additional referral upon the bill's introduction pursuant to the Committee's jurisdiction under Rule X of the Rules of the House of Representatives over banks and banking, credit, and securities and exchanges.

Because of your willingness to consult with the Committee on Financial Services regarding this matter, your continuing support for our requested changes, and the need to move this legislation expeditiously, I will waive consideration of the bill by the Financial Services Committee. By agreeing to waive its consideration of the bill, the Financial Services Committee does not waive its jurisdiction over S. 256. In addition, the Committee on Financial Services reserves its authority to seek conferees on any provisions of the bill that are within the Financial Services Committee's jurisdiction during any House-Senate conference that may be convened on this legislation. I ask your commitment to support any request by the Committee on Financial Services for conferees on S. 256 or related legislation.

I request that you include this letter and your response as part of your committee's report on the bill and the *Congressional Record* during consideration of the legislation on the House floor.

Thank you for your attention to these matters.

Yours truly,

Michael G. Oxley
Chairman

MGO/td

The Honorable F. James Sensenbrenner, Jr.
Page 2

cc: The Honorable J. Dennis Hastert, Speaker
The Honorable Barney Frank
The Honorable Spencer Bachus
The Honorable Richard H. Baker
The Honorable John V. Sullivan, Parliamentarian

ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

March 24, 2005

The Honorable Michael G. Oxley
Chairman
House Committee on Financial Services
2129 Rayburn HOB
Washington, D.C. 20515

Dear Chairman Oxley:

This letter responds to your letter dated March 23, 2005, concerning S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." I agree that the bill contains matters within the jurisdiction of the House Committee on Financial Services, and I appreciate your willingness to waive your right to a referral of consideration of S. 256 so that we may proceed to the floor. Your waiver does not prejudice the jurisdictional interest and prerogatives of your committee.

Pursuant to your request, a copy of your letter and this letter will be included in the Committee Report.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

cc: The Honorable J. Dennis Hastert
The Honorable John Conyers, Jr.
The Honorable Barney Frank

FJS/rt

MARKUP TRANSCRIPT

BUSINESS MEETING

MARCH 16, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order, and a working quorum is present.

Pursuant to notice, I now call up the bill Senate 256, the "Bankruptcy Abuse and Consumer Protection Act of 2005," for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, S. 256, the "Bankruptcy Abuse and Consumer Protection Act of 2005," is not reprinted here but can be accessed at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109__cong__bills&docid=f:s256rfh.txt.pdf:*]

Chairman SENSENBRENNER. And the Chair recognizes himself for 5 minutes to explain the bill.

Today we consider a bill with an extensive history before this Committee and the Congress. S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" represents the culmination of nearly 8 years of intense and detailed consideration by this Committee. Over the course of the last four Congresses, this legislation has benefitted immensely from an exhaustive hearing and amendment process as well as meaningful bipartisan and bicameral negotiations.

Last week, the Senate passed this legislation by a vote of 74 to 25, marking the fifth time that body has registered its overwhelming support for bankruptcy reform legislation in the last four Congresses. The House has also repeatedly expressed its overwhelming support. To date, the House has passed bankruptcy reform measures on eight occasions since the 105th Congress. This legislation reflects the product of intensive process before this Committee. Over the past four Congresses, the Judiciary Committee and the Subcommittee on Commercial and Administrative Law have held 18 hearings on the need for bankruptcy reform, 11 of which were devoted specifically to predecessors of S. 256. In addition, the Senate Judiciary Committee has held 11 hearings on bankruptcy reform, including a hearing held last month.

During the 106th Congress, this Committee entertained 59 amendments over the course of a 5-day markup on H.R. 833, which included 29 recorded votes. Of these amendments, 27 were agreed to. On the floor, 11 more amendments were considered. After passage on the House floor during the 106th Congress, conferees spent nearly 7 months engaged in an informal conference to reconcile differences between the House- and Senate-passed versions of bankruptcy reform legislation. During the 107th Congress, this Committee considered an additional 18 amendments during the course of its markup on S. 256 predecessor, and five more amendments were considered on the House floor.

After House passage of bankruptcy reform legislation in the 107th Congress, conferees formally met on three occasions and ultimately agreed, after an 11-month period of negotiation, to a bipartisan conference report. Finally, during the last Congress, the Judiciary Committee entertained nine amendments to bankruptcy legislation, and the House considered five more.

It's no secret that I will strongly encourage Members of this Committee to vigorously oppose all amendments to S. 256 as passed by the Senate based on this extensive record. The reasons are obvious. As the record makes clear, this legislation is the product of exhaustive consideration by the Congress. It is a well-crafted package of extensive bipartisan and bicameral negotiation and compromise.

As introduced, the bill is substantively identical to legislation that passed the House by an overwhelming vote margin, not on one but on two occasions in the last Congress. Although the Senate-passed bill we consider today includes a series of amendments, they all received bipartisan support and many were agreed to by unanimous consent.

Second, and perhaps most importantly, the need for bankruptcy reform is long overdue and crucial to our Nation's economy and the well-being of our citizens. Every day that goes by without these reforms, more abuse and fraud goes undetected. Every abusive bankruptcy filing adversely affects hard-working Americans in the form of higher interest rates and increased cost of goods and services. America's economy should not suffer any longer from the billions of dollars of losses associated with profligate and abusive bankruptcy filings. We need to close the so-called mansion loophole now. We need to ensure that deadbeat parents can no longer use bankruptcy to shed their child and spousal support obligations. We need to make Chapter 12, a specialized form of bankruptcy relief for family farmers, a permanent component of the Bankruptcy Code and need to extend that relief to family fishermen. And we need to enact important administrative reforms by direct appeals, streamlined reorganization procedures, and additional bankruptcy judges that will reduce unnecessary burdens upon the current system by those who must administer and use it.

In short, we need to restore a measure of personal responsibility and accountability to the bankruptcy system, and S. 256 advances this crucial goal. I will, accordingly, urge my colleagues to report this bill without amendment.

I yield back the balance of my time and recognize the gentleman from Michigan for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman and Members. This is the first time I've heard us urge that amendments be rejected before they've even been named, identified, or offered. So I suppose this is a very serious effort as the majority continues their assault on the American consumer. Last month, and starting from this Committee, we passed into law special interest class legislation—class action legislation which slams the door on court statehouses for millions of individuals harmed by fraud, deception, civil rights, and labor abuses.

Now, today we take up the bankruptcy bill which massively tilts the playing field in favor of credit card companies and against ordinary workers and families.

Last year, nearly 1.5 million ordinary working individuals filed for bankruptcy. Their average income was less than $25,000, and the principal causes for their filings were layoffs and medical bills. In my judgment, it would be a grave mistake to punish these individuals while rewarding credit card companies and business lobbyists at a time when corporate greed is being reported regularly and has already destroyed or harmed the lives of millions of American workers.

To those who think the bill is a fair compromise that only punishes wealthy debtors, then check on how this bill gives creditors massive new rights to bring threatening motions against low-income debtors, how the bill permits credit card companies to reclaim common household goods, if anybody would want them, of little value to anybody but themselves but very important to the debtor's family.

Check in this legislation we are considering how it makes next to impossible for people below the poverty line to keep their house or their car in bankruptcy. For those who might think that the bill protects alimony and child support problems in families, look and see if they find where the bill, as I have found, creates major new categories of non-dischargeable debt that compete directly against the collection of child support and alimony payments; whether they're—we're aware of the fact the bill allows landlords to evict even battered women without bankruptcy court approval, even if the eviction poses a threat to the woman's physical well-being.

If you think the bill cracks down on creditor abuse, then look again because the bill does absolutely nothing to discourage abusive, underage lending, nothing to discourage reckless lending to the developmentally disabled, nothing to regulate the price of so-called sub-prime lending to persons with no means or little ability to repay their debt, and nothing to crack down on unscrupulous payday lenders that prey on the members of our Armed Forces.

The bill—does the bill fix the problems of homestead exemption abuse? Well, look again, because there we don't repeal or even cap homestead—the homestead exemption. The bill does nothing to prevent the very worst abuses of the Bankruptcy Code, for example, avoiding claims for bilking seniors out of billions of dollars of their life savings or denying workers their hard-earned pension payments. It ignores in this legislation, after all these years, the asset trust loophole whereby high-income individuals stash away millions of dollars in special trusts to avoid their debts in bankruptcy as we go after ordinary workers who may have been forced into bankruptcy by medical bills.

I urge every Member of this Committee to reconsider the real-life consequences of what we're doing in one of the worst consumer bills I have ever had the sorrow to have to speak against in this Committee. This is a bad bill. The time has come that we stop writing these bills for credit card companies and that these businesses that use their political muscle must be stopped. Here's a great place to do it today.

I thank the Chairman.

Chairman SENSENBRENNER. The time of the gentleman has expired. Without objection, all Members may insert opening statements in the record at this point.

Are there amendments?

Mr. WATT. Mr. Chairman?

Mr. CANNON. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. If I could enter into colloquy with the Chairman, I am pleased that we are reporting this legislation today, but I would note that the bankruptcy judgeship numbers in the Senate bill are outdated and do not reflect the current numbers submitted by the Judicial Conference this year. Additional judgeships are sorely needed in a number of districts across the country, including in my State of Utah. I am wondering, Mr. Chairman, if we can deal with this issue in some manner, either a technical bill or a free-standing bill, and if the Chairman will commit to doing that in the near future.

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. CANNON. Certainly.

Chairman SENSENBRENNER. It is the hope of the Chairman that additional judgeships and not just bankruptcy judges can be dealt with later on this year in response to an updated Judicial Conference recommendation where the judgeships are needed, and this includes article III judges as well.

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. Are there amendments?

Mr. WATT. Mr. Chairman?

Mr. CONYERS. I have an amendment.

Chairman SENSENBRENNER. The gentleman from Michigan. The clerk will report the amendment.

The CLERK. Amendment to S. 256 offered by Mr. Conyers, page 687, after line 18, insert the following: "(and make such technical and conforming change as may be appropriate"——

Mr. CONYERS. Mr. Chairman, I ask that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Conyers

Page ~~687,~~ 68 after line 18, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. 206. DISALLOWANCE OF CLAIMS FILED ON HIGH-COST PAYDAY LOANS MADE TO SERVICEMEMBERS.

(a) In General.—Section 502(b) of title 11, United States Code, is amended—

(1) in paragraph (8), by striking or'' at the end;

(2) in paragraph (9), by striking the period at the end; and

(3) by adding at the end the following:

"(10) such claim results from an assignment (including a loan or an agreement to deposit military pay into a joint account from which another person may make withdrawals, except when the assignment is for the benefit of a spouse or dependent of the debtor) of the debtor's right to receive—

"(A) military pay made in violation of section 701(c) of title 37; or

"(B) military pension or disability benefits made in violation of section 5301(a) of title 38; or

"(11) such claim is based on a debt of a servicemember or a dependent of a servicemember that—

"(A) is secured by, or conditioned upon—

"(i) a personal check held for future deposit; or

"(ii) electronic access to a bank account; or

"(B) requires the payment of interest, fees, or other charges that would cause the annual percentage rate (as defined by section 107 of the Truth in Lending Act (15 U.S.C. 1606)) on the obligation to exceed 36 percent.".

(b) CONFORMING AMENDMENT.—Section 523 of title 11, United States Code, is amended by adding at the end the following:

"(f) Notwithstanding paragraphs (2), (4), and (6) of subsection (a), a debt is dischargeable in a case under this title if it is based on an assignment of the debtor's right to receive—

"(1) military pay made in violation of section 701(c) of title 37; or

"(2) military pension or disability benefits made in violation of section 5301(a) of title 38.".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Thank you very much.

Ladies and gentlemen of the Committee, this is going to be the amendment that just checks where we all are and what the temperature is in the room. This is an amendment in support of our military personnel to crack down on unscrupulous payday lenders that circle our military bases, who target members of our armed services with high interest rate loans. It would deny these companies a claim in bankruptcy where they make a loan secured by a military paycheck, pension, or disability payment if the annual interest rate and fees exceed 36 percent a year, a number that I don't think anybody in this room would even think twice about signing up for.

This is happening to our military personnel as we meet today. The military service constitutes a significant and real hardship for soldiers and their families that are called into action. We have had 16,000 active-duty members of the military who've had to file for bankruptcy relief over a 12-month period. The Pentagon found that 4 years ago nearly a third of all military families reported a drop in income, obviously, when a spouse was deployed. For members of the National Guard and Reserve, the rate was even higher. More than 40 percent reported lost income when a provider—a spouse provider was deployed to active duty.

If you need another reason, it is this: The greedy payday lenders are directly and aggressively targeting our Nation's armed services. The National Consumer Law Center report found that scores of consumer-abusing businesses directly target the active-duty military men and women daily. These payday lenders are the loan sharks of the 21st century that offer small, short-term loans at interest rates that are incredible. They use deceptive names, like "Force One Lending," "Armed Forces Loans." They go after military members because they know they have a steady source of income, small as it is, and many of these military members are young, have family obligations, and are often strapped for cash and are easy to find.

During a time of war, it's imperative that we go to the extra mile to protect the men and women of our armed forces. These individuals face not only the challenge of protecting our country, but the difficulty of managing their finances when they are called to service. When the Soldier and Sailors Relief Act can be used to delay tax payments, suspend legal proceedings, and reduce interest payments, none of the relief is automatic. Moreover, these protections only apply if the service member can establish that he or she has not been materially affected, quote-unquote, by being called to duty and ends as soon as the duty ends. Unlike the bankruptcy laws, the Relief Act buys some time, but not forgiveness.

The last thing we should be doing is putting our military personnel into this kind of loan shark debacle, and I am urging the Members that if you want to disregard one of the Chairman's requests that you vote down all amendments, that this be the one amendment that you do support. And I return my time.

Ms. WATERS. Mr. Chairman, on the amendment? Mr. Chairman?

Mr. CANNON. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Let me first express——

Chairman SENSENBRENNER. Recognized for 5 minutes.

Mr. CANNON. Thank you. Let me first of all express my concern for the issue raised by the gentleman from Michigan, which is a profoundly important issue. I've been surprised around the country at the proliferation of these check-cashing, lending institutions which I think are a terrible problem, and I would hope that the gentleman would recognize that I and all the Members of this full Committee recognize the problem that our servicemen have. It is a difficult problem, a complex problem. We deal with it here in Congress on many different levels. For instance, we've dealt with the pay issue with legislation here. In the past we have amended recently the servicemen—Servicemembers Civil Relief Act, and that provides for a cap on interest rates at 6 percent on debts incurred prior to a person's active entry into military service and sets forth procedures for requesting a reduction and clarifies how that works.

So we as a Congress, as a body, I don't think there's any question but that left and right, Republicans and Democrats, are all concerned about military and the burdens that they have as they serve our country. And so I want to first of all express my agreement with Mr. Conyers and about his expression of concern.

But this is a complex issue, and as we deal with bankruptcy, I think we just need to be thoughtful and careful about how we deal with it. This amendment was included in Mr. Durbin's amendment in the Senate, and that was defeated 38 to 58, not because people have a problem with military, but because of the complexity of the bill that we're dealing with today. The Sessions amendment, which was submitted in lieu of the Durbin amendment, passed by 63 to 32 on the other side. So we have dealt with the issue, I think, to some degree. But in this complex environment, I just think it's important that we recognize that we need to get a bill passed today. And I suspect in the end much of this debate is going to be—and Mr. Conyers himself has pointed out that the issue here is, you know, are we going to do something with this bill, and the answer is America needs a bill, and we need a bill that we can get signed by the President, which means I think there ought to be a fairly high threshold before we make changes.

There are protections in the current bill. It has a needs-based test which includes numerous safe harbors and exceptions for special circumstances. As amended, the special circumstances exception specifically mentions a debtor who is subject to a call or order to active duty in the armed services. As amended, the needs-based test has a special exception just for debtors who are disabled veterans if the indebtedness occurred primarily during a period when the debtor was on active duty or performing a homeland defense activity.

As amended, the bill specifies that the absolute safe harbor from all types of dismissal motions under section 707(b) applies to a veteran, and, as amended, the bill excuses a debtor if he or she is on active military duty in a military combat zone from the mandatory credit counseling and financial management training requirements.

I think we have done a number of things along this line. I think the bill is good. We can't make—we can't legislate a perfect bill that is going to deal with all the circumstances of everybody in America.

Mr. CONYERS. Would the gentleman, my friend, yield for a moment?

Mr. CANNON. I would be pleased to yield to the gentleman.

Mr. CONYERS. First of all, the Durbin bill—the Durbin amendment had lots of other things surrounded with it. That's why I took it out. I took out the military exemption.

Number two, tell me what it is you don't like about exempting military people unequivocally, not playing around, from bankruptcy from these loan sharks?

Mr. CANNON. Well, reclaiming my time, the gentleman has expressed the issue with great clarity. I appreciate that. And the answer is that all people who deal with debt have to have some responsibility. And a blanket exemption for any group, including a group as large as the military, I think is problematic. So what we need to do is deal with the possibilities for assisting and protecting them from extreme activities, but not removing any kind of personal responsibility from their lives which, as I understand your amendment, it would do.

Ms. WATERS. Mr. Chairman?

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Ms. WATERS. On the amendment?

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. CANNON. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. WATERS. Thank you very much, Mr. Chairman. I am so pleased and so happy about John Conyers' amendment. This is a subject that I've spent an awful lot of time on, and it's a subject that needs to be addressed by the Congress of the United States.

I am shocked that the gentleman from Utah could even come up with any excuses about why we can't protect the military from these scavengers who surround our military bases and who place——

Mr. CANNON. Would the gentlelady yield?

Ms. WATERS. No, I will not. Who place up neon signs about easy money, green money, come and get it as fast as you can. They have some of the most outrageous advertisements where they solicit our military. They have set them up as sitting ducks all over America at these military bases. They are paying between 400 and 1,000 percent interest when you calculate it on a yearly basis. For those people who wave the red, white, and blue flag and talk about how much they love America, how much they care about our military, how much they want to be of assistance to our military families, and yet cannot take this bill, this bankruptcy legislation, which is—actually should be named the "Credit Card Company Protection Act of 2005," and do something for our military is just shameful. It is outright shameful.

And I want every Member of this Committee and everybody that is looking or listening to pay attention today to what is going on. We have a very simple amendment by John Conyers that would deal with the fact that military families are ladened with debt from these scavengers, many of whom are supporters of too many Members of Congress with their big military—with their big contributions, and who seem to have some measure of protection from the

Members of Congress who won't go after them. Whether it is this Committee or the Financial Services Committee, for those people who will not stand up for our military against these scavengers, it needs to be noted everywhere, and the press needs to pay an awful lot of attention to this, because this is a way by which we could give them some kind of help. These are unsuspecting families.

Do you know that we are recruiting young people who are 19 and 20 and 21 years old who have never managed any money, who have never had any debt, who have never had any credit? And the first thing that happens to them, they go into the military, some at 21 years old, with a wife and maybe two children, find out that the military pay does not carry them to the end of the month, and there the scavengers are waiting for them with bait. And they lend them money, and they have to sign a personal check. And if they don't come back within 2 weeks and pay that $200 or $300, then they threaten them with the personal check that they're going to put them in jail if they don't pay the money.

And then they flip the loan if they can't pay it, and they pile on more interest to it, and that's where you get this 400 to 1,000 percent interest that piles up for these military people.

Unfortunately, my friend on the opposite side of the aisle from Utah has no excuse, and that which he pointed to, to try and make you believe that there is some protection for the military is not protection. There's nothing in this bill, unless we adopt John Conyers' amendment, that would protect these poor military families from these scavengers and these people who are gouging them for the meager pay that they get to take care of their families. And to tell you the truth, whenever someone who votes against this amendment stands up and talks about how much they love the military, I'm going to call them out on it, and I'm going to call them out on the fact that they had an opportunity here today to do just a little something for these military families.

These payday loan scavengers are the worst.

Mr. CANNON. Would the gentle——

Ms. WATERS. No, I will not yield——

Mr. CONYERS. Would the gentlelady yield?

Ms. WATERS. No, I will not yield. I will yield to the gentleman from Michigan.

Mr. CONYERS. I just want to make it clear what you said about what's in the bill helping military people get a break in bankruptcy. It applies only to the disabled military, only, and nobody else. So there is no protection in——

Ms. WATERS. On my own time, yes, Mr. Leader, I know. That's why I wanted to make it clear, because the gentleman from Utah tried to confuse the public and make them think that somehow it was already covered.

Now, anybody who says it's too complicated, the bill, to cover them——

Chairman SENSENBRENNER. The time of——

Ms. WATERS.—does not make good sense.

Chairman SENSENBRENNER.—the gentlewoman has expired.

Ms. WATERS. And so I would ask everybody to please vote——

Chairman SENSENBRENNER. Who seeks recognition?

Ms. WATERS.—for this amendment?

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. ISSA. And I do rise—I won't stand, but I do rise in opposition to this amendment. And if the gentlelady will take note, I am a veteran. My brother is a disabled veteran. And I have 40,000 Marines, more than half of whom are serving in Iraq right now. And looking at this piece—this amendment, I have serious reservations on its merit. And I would like to speak to that. This fairly narrow piece of legislation looks good until you see that it is not talking about interest. It is talking about interest and fees. With all due respect to the gentlelady's example, if you were to borrow $200 for 2 weeks and they were simply to charge you $2 as a fee as part of writing up the paperwork, which is not an insignificant thing, that's 26 percent all by itself.

The fact is that when you look at 36 percent—I have a problem with usury-type interest, but when you write a piece of legislation and you include fees on an extremely short-term loan—because if this were a 1-week loan on $200, and they said, well, you know, I'll give you $198 today for your $200 promissory note, well, that's 52 percent. And that's the practical reality that on small loans for short periods of time, a very small fee, a reasonable fee, particularly considering the potential risk, can, in fact, end up being in excess of what seems to be an extraordinarily high number.

I would love to deal with this piece of legislation—or this amendment in another piece of legislation, and I'd love to deal with it in a way in which it would clearly still allow the small loans, if appropriate, to go to somebody without including the fee language which makes it essentially——

Mr. CONYERS. Would my friend——

Mr. ISSA.—impossible to make small loans——

Mr. CONYERS.—from California yield for one question.

Mr. ISSA. I certainly would yield to——

Mr. CONYERS. And I thank you. Now, look, let's be frank here. Let's take the fee out of the amendment that I offered. Would you support it then?

Mr. ISSA. I look forward to——

Mr. CONYERS. Would you support it then?

Mr. ISSA. Reclaiming my time, I look forward to this type of reform being something that we work on in a comprehensive way. I would be more than happy to work with the gentleman to author a separate piece of legislation—I suspect the Chairman would help support it—that would look at these issues very specifically, as I said, without the fee or with some sort of a reasonable thing on the fee, and I think that would be wonderful.

Mr. CANNON. Would the gentleman yield?

Mr. ISSA. I would be glad to yield to the gentleman.

Mr. CANNON. Thank you. I suspect that the place to deal with this would be the Servicemembers Civil Relief Act, and I think it's highly appropriate to deal with it in that regard.

If I might take another moment of the gentleman's time?

Mr. ISSA. Please.

Mr. CANNON. I appreciate the fact that Ms. Waters referred to me as "a friend" because I think that she is. We've gained a significant amount of respect for each other, and I appreciate that. I think that the debate cast in harsh terms like "shame" is unfortunate because this is not a matter of shame. This is a matter of policy, and there may be a difference of opinion about how policy affects the world. But I think, Mr. Issa, what you're suggesting is that there needs to be ways for people to get credit who need credit. And the last thing we want to do on either side of the aisle is shove people out of the market either because the costs are too high or because the risks are so great that no one will take the cost. And so it's, I believe, a much more complicated issue, as you've able expressed, Mr. Issa, than it is portrayed to be at this point.

Let me just point out that 19-year-olds who enter the military, and older people, may be young, may be inexperienced, but they're not dumb. And they have the ability to make decisions. And if we try and insulate them from the effects of the decisions, they will make bad decisions for their whole lives. I've trained my kids in their credit card usage—very painfully, I might point out, mostly for them. But if they don't have some pain in their lives over these issues, they don't learn.

And I have enormous respect for the military, enormous respect for the young people who join the military. They come from all kinds of backgrounds and from all kinds of decision perspectives. And because of that, I think that we owe it to them to not include this——

Ms. JACKSON LEE. Mr. Chairman?

Mr. CANNON.—amendment. I would request that the Committee vote against the amendment.

Chairman SENSENBRENNER. The time belongs to the gentleman from California.

Mr. ISSA. Reclaiming my time, and in conclusion, Mr. Chairman, I look forward to working with the gentleman from Michigan on these types of issues in the days to come, and will be voting against the amendment, urge my colleagues to vote against the amendment because this is not the right place, right time. But I would like us all to agree to work on this in the future, and I yield back.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, I very much urge support for the gentleman's amendment. It illustrates just one of the imbalances in this bill, which is simply a collection of 60 or 70 different ways to stick one's hands into the pockets of low- and middle-income people in a time of distress and take the money out and give it to the big banks and credit card companies.

One of the things this bill does in many different ways it to make a discharge in bankruptcy more elusive. Making discharge in bankruptcy more elusive will make it harder for consumers to get a fresh start and continue to make consumer purchases, which is one of the mainsprings of our economy. Household debt has reached record levels. With that come more bankruptcies, but no serious economist would argue that a precipitous drop in consumer spending would help our economy.

Bankruptcy is a tradeoff. The safety net encourages risk taking in business, allows distressed families to remain in the economy, and maintains demand for products businesses must sell to survive. Bankruptcy doesn't cause default any more than a hospital causes people to be sick.

We have been told as a justification for this bill that bankruptcy is a free ride. The facts are the contrary. A debtor in Chapter 7 must give up all non-exempt assets in order to obtain a discharge. Secured debts must be paid, or the property is subject to foreclosure. The bankruptcy remains on the debtor's record for 10 years, and the debtor may not refile for 6 years. It is harder to get a job, an apartment, or a loan. As a majority witness who had been a debtor told the Committee a few years ago, had she known the consequences of filing, she might not have done so.

No one believes that people should avoid paying their debts if they can afford to do so. The question is, rather, does this bill make sense? Members should ask themselves why the overwhelming majority of bankruptcy professionals, scholars, trustees, creditor lawyers, corporation lawyers, and judges are appalled with this bill. There is a terrible disconnect between Congress and the people who actually have to make the system function. Regardless of their role or interest, they almost universally oppose this bill. Yet here in Congress, the demands of the special interests who have a stake in some provision in this bill are generally viewed as a great idea that requires no further consideration.

Over the years, we have heard from, among other people, Ken Klee, one of the leading bankruptcy scholars and business bankruptcy lawyers in the country, former Republican bankruptcy counsel to this Committee. He has drafted Supreme Court briefs signed by Members of this House, and he strongly opposed the bill.

We have heard from consumer rights organizations, women's groups, child advocacy groups, unions, civil rights groups, and every national bankruptcy organization in the country that this bill will hurt consumers, businesses, families, children, employees, minorities, and the economy. It will raise costs to the system and disrupt the efficient management of bankruptcy proceedings. This bill would turn the Government into a debt collector for private industry.

Let me remind you what George Wallace, a representative of the Creditors Coalition, told this Committee a few years ago. I asked him if he was familiar with the many ways under current law that a creditor could pursue his rights in bankruptcy, including obtaining documents, examining the debtor under oath, and objecting to a discharge of debts. He said, and I quote, "I have done these things, and they take a fair amount of time, and I bill my clients for them. They're expensive."

I asked him, "Why should the Government spend money to do the job that creditors should be doing?" He responded, "Because it is a Government program. It is not the job of the creditor."

That's what this bill is—a Government program for big banks who don't want to spend their own money to collect their own debts, the debts that they freely entered into. Talk about welfare cheats.

Mr. Chairman, we know, unfortunately, this bill is going to pass. It's going to pass with a good number of votes. Someone asked me the other day why he should vote against this bill despite the manifold demerits in the bill, when it was clear it was going to pass anyway. And I think that the answer is that when this bill really takes hold, 2, 3, 4 years down the road, when middle-income people, low-income people, our constituents, start finding out it's impossible to get a fresh start, they cannot get out from under their credit card debts, they're paying higher and higher interest rates, more and more money, it costs more money to file, there are more and more coercive instruments on the part of the creditor's lawyers to force debtors to reaffirm debts and to surrender their rights, and the bankruptcy system becomes less and less usable for people, they're going to ask, "Who the heck did this?" And I hope that Members of Congress—that too many Members of Congress won't have to be ashamed in front of their constituents, as I am sure they will.

So I urge adoption of this amendment and defeat of this bill because this is a day of shame, and when we pass it on the floor, it will be a day of worse shame that will probably go down in history as one of the worst days in the history of the Congress in this century.

Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. The question——

Ms. JACKSON LEE. Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and thank you for the opportunity to participate in the legislative process. And I do not say this with reflection on the responsibility that we have inasmuch as the Senate has moved forward on this legislation. But I will say the speed at which we're now addressing this particular legislation, the speed in which it will find its way to the floor of the House, and the sense that I am getting from my colleagues on the other side of the aisle—and might I welcome two new Democrats who I see are sitting on this side. It gives us a good number. Thank you. Mr. Inglis, I am delighted, my Chairman. We welcome you and look forward to you supporting our amendments. But it gives me great hope and inspiration.

But as I look at the speed in which we move to the floor of the House—I understand we might be on the floor as early as the beginning of April—might I simply say that the fix is in, that this is a prime example of class warfare, because this bill is wrapped with special interests. It clearly does not evidence thoughtfulness as it relates to the crux of the need for helping Americans save and helping Americans understand credit and balancing between Americans who consume credit and those who market credit. I would use a lesser word, but I think I'll keep it at a level of sophistication at this point.

I support the Conyers amendment, and I am so disappointed and saddened, frankly, by my colleagues who I know have spent time in Iraq and Afghanistan, and if they have spent time in Iraq and Afghanistan, they have spoken not only to young soldiers, but they've spoken to reservists, Mr. Chairman. If you speak to reservists, you will know that they have been taken out of their prime of their life or they have been called into battle in the midst of their life where they have wives or husbands or family responsibility. In taking them out of their cycle of income, they have caused them to lose a major part of the breadwinner's contribution to the family, jeopardized them and put them in the line for bankruptcy.

Therefore, many of them have turned to the scavengers who have accelerated the rates on payday loans. It is a conspicuous and large problem. It saddens me to think that because it was associated with Senator Durbin rather than an issue that might have come to the attention of my colleagues on the other side of the aisle, and now in the wisdom of our Ranking Member, Mr. Conyers has put it forward as a single standing amendment, we can't get the support.

Allow me to put into the record the words of David Broder of *The Washington Post.* His headline says, "A Bankrupt 'Reform,' "—"reform" in quotes. "A Bankrupt 'Reform.' "

This reform, which parades as an effort to stop folks from spending lavishly and then stiffing creditors by filing for bankruptcy protection, is a perfect illustration of how the political money system tilts the law against average Americans. The simple fact that for 8 straight years it has gained a place on a crowded congressional calendar is testimony to the impact of the millions of dollars that banks and credit card companies have spent on lobbyists and campaign contributions. Two terms ago, it was $4 million that was utilized to lobby Members of Congress to vote for this legislation. I would imagine it is now double that amount.

We have a long list of individuals who oppose this legislation, and the reason why it will pass with no amendments is because, as I said, the fix is in. The American middle class is the backbone of America, yet this bankrupt legislation is going to exercise a means test to stand in the doorway of disallowing individuals to come in and to file bankruptcy.

One of the bloggers said, if this doesn't teach Americans not to have medical emergencies or get laid off, I don't know what will. Come to my city in 2003 and 2002, and watch the 4,000 Enron employees that were laid off, losing most of their livelihood, putting them in a dastardly downspin, causing them to lose their homes, having college students to come out of college, and simply driving them to the depths of depression. How you can pass this legislation in the light of devastation of our communities, middle class and others, is a tragedy. I would only hope that this particular amendment would reach the levels of common sense and have you think back on the soldiers that are now on the front line without the resources to pay their bills, taken advantage of by payday loans, and then being denied—having these payday loan—loaners come after them in a bankruptcy proceeding.

This is a common-sense amendment. This legislation will listen to us today. It will almost sound like blah, blah, blah, blah, blah, because, in fact, the legislation will pass out of this Committee. Very few amendments will pass out of this Committee. And the theme of class warfare will again be victorious, as this makes its way to the floor of the House and the people of America will suffer——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE. I hope the amendment passes. I yield back.

Chairman SENSENBRENNER. The question is on the Conyers amendment. Those in favor will say aye? Opposed, no? In the——

Mr. CONYERS. Mr. Chairman, may I demand a record vote?

Chairman SENSENBRENNER. You may. The question is on agreeing to the Conyers amendment. Those in favor will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

[No response.]

The CLERK. Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks, no. Mr. Gohmert?

Mr. GOHMERT. No.

The CLERK. Mr. Gohmert, no. Mr. Conyers?

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye. Mr. Berman?

Mr. BERMAN. Aye.

The CLERK. Mr. Berman, aye. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
Mr. SMITH OF WASHINGTON. Aye.
The CLERK. Mr. Smith, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Chairman SENSENBRENNER. The gentleman from Iowa, Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Aye.

The CLERK. Mr. Scott, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? If not, the clerk will report.

[Pause.].

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner?

The CLERK. Mr. Chairman, Mr. Weiner is not recorded.

Mr. WEINER. I vote aye.

The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?

[No response.]

Chairman SENSENBRENNER. The clerk will try again to report.

The CLERK. Mr. Chairman, there are 15 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Mr. Chairman, I wonder if I might be recognized to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I have some amendments, but there are a couple of things, points that I want to make that I really can't make in the context of an amendment, and I don't want to violate the rules.

As the Ranking Member of the Subcommittee that this bill original—or some bankruptcy bill originally originated in, this one didn't make it to our Subcommittee because of the expedited consideration.

I just want to express generally the major concern that I have with this legislation, and I can't do it in the context of an amendment because it would go so basically to the structure of the bill that it would just—basically dismantle the whole bill.

The most troubling thing about this bill from my perspective—and I've said it before, and I hope people are listening to it—is that at the outset we acknowledge that there were major abuses and problems in the bankruptcy system and that those abuses needed to be addressed across the board.

Because the industry knew that it was going to be impossible to get a bill passed without cutting a deal with the consumer groups on behalf of the poorest people, basically what happened was a deal was cut to encourage the consumer groups to go away and be quiet, and that deal was that we would impose something called a means test, which basically exempts people below the means test from virtually every provision in this bill.

The result of that is very troubling in this sense: First of all, it goes absolutely contrary to everything I have heard my Republican colleagues say they stand for related to individual responsibility because basically what it says is if you fall below the means test, you are going to be exempted from worrying about the abuses that you engage in and so, therefore, we're just going to look the other way.

And so abuses that are taking place in the system now for people who fall below the means test can continue unabated.

At the same time, people above the means test get a bunch of rules applied to them regardless of whether they are abusing the bankruptcy system or not. So the whole purpose that we set out to achieve to do bankruptcy reform was missed because of this means test thing.

But a more troubling thing is a public policy concern that I think is just—is devastating because the effect of this means test is that you're going to end up with two bankruptcy courts, in effect. You're going to end up with a pauper's bankruptcy court and a higher-income bankruptcy court, and it's going to give judges and courts the authority to treat people so differently even though their problems in bankruptcy theoretically should be viewed as the same.

It is so contrary to our whole system of principles that it is just troubling as a matter of public policy.

Mr. CANNON. Would the gentleman yield?

Mr. WATT. No, let me just——

Mr. CANNON. Because I agree with you.

Mr. WATT. And I just—I couldn't——

Chairman SENSENBRENNER. The time of the gentleman——

Mr. WATT. I ask unanimous consent for 30 seconds to take back the time that——

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I couldn't—I couldn't structure an amendment to deal with this, but I think the public needs to know how terrible a public policy we are creating in this bill. It has nothing to do with the content of the bill that you can amend and correct. But the structure of this bill is so contrary to everything that our legal system stands for and everything that our bankruptcy system has historically stood for that it is absolutely incredible.

Chairman SENSENBRENNER. The time of——

Mr. CANNON. Mr. Chairman, I ask unanimous consent that the gentleman be granted another 30 seconds.

Mr. WATT. And I'll yield it to my gentleman friend——

Chairman SENSENBRENNER. Reluctantly, without objection.

Mr. WATT. I yield it to my——

Mr. CANNON. I appreciate the yielding and also the Chairman's willingness to go on. Let me just say that what Mr. Watt has said is profound, and it's true, and it's very important. We disagree only on the point of creating two courts. I think as a practical matter that may happen. I hope that our bankruptcy judges are not—don't fall into that trap. But the issue truly for me is twofold here: personal responsibility—and a means test does exactly what Mr. Watt has suggested, and I think that's a problem, but it's a problem we have to deal with in a practical way.

And so in the first place, a means test—or the individual responsibility is important. Secondly, availability of credit is important. That's fundamentally important in this process——

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

Mr. WATT. I ask unanimous consent for 30 additional seconds and yield it to the gentleman from Utah.

Chairman SENSENBRENNER. Without objection.

Mr. CANNON. And I will only finish by saying that the availability of credit to all people—you know, people start out poor in life. I started out very poor. Many people do. But the availability of credit is a way for people to get out of that trap, and in part, this bill is about reducing that cost.

Thank you, Mr. Chairman. Thank you, Mr. Watt.

Chairman SENSENBRENNER. The time of all of the gentlemen have really expired.

By my calculation, we have approximately an hour's worth of votes and a debate on a motion to recommit on the supplemental appropriation bill. And, thus, I think it is time to recess the Committee until either 12:30 or 30 minutes after the end of the last vote, whichever comes later.

The Committee stands recessed.

Mr. WATT. Did you say whichever comes later, Mr. Chairman?

Chairman SENSENBRENNER. Yes, sir.

[Recess.]

AFTERNOON SESSION

[12:47 p.m.]

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

When the Committee recessed for the lunch hour and the votes, pending was a motion to report the bill Senate 256 favorably to the House. Are there further amendments? The gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. Amendment 01a.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. 01a.

Chairman SENSENBRENNER. That's "A" as in apple?

Mr. WATT. Yes.

The CLERK. Amendment to S. 256, offered by Mr. Watt and Mr. Delahunt——

Mr. WATT. Mr. Chairman, I ask unanimous consent——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

01a

Amendment to S. 256

Offered by Mr. Watt and Mr. Delahunt

At the appropriate place, insert the following:

1. **SEC. __. TERMS OF CONSUMER CREDIT; PROHIBITION AGAINST USURY.**

Section 502(b) of title 11, United States Code, is amended as follows:

at the end of subparagraph (8) strike "or"

at the end of subparagraph (9) strike "." and insert "; or" and add the following:

"(10) such claim is for a debt on an extension of credit on which an annual rate of interest in excess of 50 percent was imposed, or in excess of a limit on allowable interest under applicable non-bankruptcy law"

Chairman SENSENBRENNER. The gentleman from North Carolina is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. And this actually follows very closely on with the Conyers amendment that was considered before we broke for the votes.

I have the honor of serving both on this Judiciary Committee and on the Financial Services Committee, and Representative Miller from North Carolina and myself, also from North Carolina, have been trying to structure, in consultation with Republicans and Democrats, a bipartisan predatory lending bill in the Financial Services Committee so that we could create a national predatory lending standard. Some States have different standards, and we're trying to craft something that will be either a national floor or a national standard. Depending on who you talk to, there's some disagreement about whether it ought to be preemptive or not.

But be that as it may, the gist of this amendment would be to exempt the predatory loans that have interest rates in excess of 50 percent. The gentleman from California had some concerns about fees. This interest is solely about interest rates. It doesn't involve fees.

It's surprising to know that there are extensions of credit which are made where the interest rate is above 50 percent per year. And this bill does nothing to address that, obviously. If we had had hearings, we probably would have determined—gotten into the record that during the 8 years since this legislation was first introduced, the number of credit card solicitations in this country has doubled to 5 billion a year. Between 1993 and 2000 consumers increased their credit from $77 billion to $3 trillion. During that 8-year period bankruptcy petitions increased by 17 percent. But credit card company profits increased by 163 percent. And while I don't indict the entire credit card industry, we can't ignore the evidence of exorbitant interest rates imposed on modest extensions of credit. Ordinary citizens desperate for help are being taken advantage of by companies charging from 300 to over 1,000 percent interest on some loans.

And so I think this is a problem that needs to be addressed, and we need to not make people have to pay or acknowledge in bankruptcy these predatory loans that there is a growing agreement within the industry and outside the industry are just getting out of control and out of hand.

Now, I heard very clearly that the Chairman is not desirous of having any amendments to this bill, so I am patently aware that all of this is perhaps a charade. But if there's ever anything we're going to do to the bill, I certainly hope that we will send this message that interest rates of over 50 percent per year just are unacceptable, and I would ask your support for this amendment in that regard.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Recognized for 5 minutes.

Mr. CANNON. Thank you. May I just direct a question to the Chair and the Ranking Member? In the prior amendment, I think we heard virtually all of the general arguments. I understand there are some technical arguments that may relate to some of the future amendments. But we've heard most of the arguments that were made last cycle.

Has the Chair and the Ranking Member, have you come to any kind of a conclusion about how many amendments we might expect today?

Chairman SENSENBRENNER. Well, if the gentleman will yield, from the Chair's standpoint I know of no amendments on the Republican side of the aisle.

Mr. CANNON. We're amazed at the discipline that you have created on this side. Do we have any——

Mr. WATT. If the gentleman would yield, I will tell him how many I have.

Mr. CANNON. Please.

Mr. WATT. That's all I can speak for. I think I have six. And actually, a lot of them relate to things that have occurred in the interim since we started considering this bill 8 years ago. I mean, you all's argument has been that there's no need to make any—to have any hearings, but there are substantial changed conditions that have taken place over the—over the period of time that we've been debating this bill. And this bill has been kind of marching in place, same construct, same problems, same concerns, but times have changed. And some of those times involve industry practices such as increased predatory lending that hopefully all of us agree are just unacceptable. And if we had gone to a hearing and a markup in our Subcommittee, or—well, I understand you all started this bill on the other side so that you wouldn't make any amendments over here. But if somebody had had some hearings on it, maybe some of these things could have been done.

Mr. CANNON. Well, reclaiming my time, if I might, Mr. Watt, just ask a question. When you talk about preemption, that refers to the—if there's a State interest limit law that is higher than 50 percent, then you would preempt that with this bill? I doubt that there are any State laws with a 50 percent rate, but when you mention preemption, that is, preempting State law, that is what you're referring to, I take it?

Mr. WATT. No, that's—I was actually giving you all background about other things that are going on. This deals with outstanding loans that have interest rates of 50 percent or above.

Mr. CANNON. Okay.

Mr. WATT. It's not about preemption or non-preemption. We're going to deal with that issue when we do the general predatory lending bill in the Financial Services Committee. This is about bankruptcy and——

Mr. CANNON. But it would——

Mr. WATT.—whether you discharge loans that have interest rates above 50 percent or don't do that.

Mr. CANNON. Let me just urge my colleagues to vote against the amendment. In the first place, on the Senate this was debated and a similar amendment with a 30-percent usury cap was voted down 24 to 74. I guess——

Mr. WATT. That's why we raised it.

Mr. CANNON. Pardon me. I guess part of the problem is what Mr. Issa talked about earlier, which is how do you calculate the interest rate when you've got costs involved and if you——

Mr. WATT. Would the gentleman yield?

Mr. CANNON. In just a moment. I think Mr. Issa pointed out that if you take a $2 fee on a $200 loan for a week because it's a paycheck loan, that is a 100%—or, no, it's a very high interest rate. And so—it's 52. I've got to do the numbers here. I'm not as quick as you, Darrell.

So I am concerned about that. I don't think the amendment does what the gentleman would like it to do, which is, I think we have a general agreement that personal responsibility is significant, and people need to be responsible for what kind of loans they are. In our market what we—what I'm trying to do here is create a market for loans where people get much, much lower-cost capital because they are responsible for themselves. And I have a few seconds left. I'd be happy to yield.

Mr. WATT. I thank the gentleman for yielding. I would just point out to him that this says nothing about fees. This is all about interest rates. And if the credit card companies and the lenders don't know how to calculate interest, we're in real, real trouble. We know what interest is. And if the construct of the bill really dealt with personal responsibility for everybody, I mean, we had that discussion before we——

Mr. CANNON. Could I reclaim my time just briefly on this point? Because what will happen then is that short-term lenders will raise their costs, their fees, and so you'll have a lower interest rate. I mean, how do we deal with that for the record here today? Since what will happen is you'll get a higher fee——

Chairman SENSENBRENNER. The gentleman——

Mr. WATT. Would the gentleman yield? I ask unanimous consent for 30 additional seconds.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. So I can answer to the—answer the question that was asked. Does the gentleman yield?

Mr. CANNON. Certainly.

Mr. WATT. I would just say to you that we are dealing with an existing problem, not what happens in the future. These are outstanding loans, not prospective loans, right?

Mr. CANNON. But people will make loans this week and next week and the week after that, and as soon as we pass this law, I think——

Mr. WATT. I mean, you——

Mr. CANNON. I would urge the Members of the Committee to reject this amendment. Thank you. I yield back.

Chairman SENSENBRENNER. The gentleman——

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I mean, as I sit here listening to the debate, I think Mr. Watt has been very clear that this does not involve fees. It doesn't involve penalties. It simply involves interest. I mean, we're talking about 50 percent interest. And we should remind ourselves that, you know, 3-month Treasury bills are now about 2.75 percent, a 30-year mortgage is 5.6 percent. How can we really in good conscience reject this? I mean, 50 percent interest, I mean, that's—that's Mafia figures. I mean, this should be the—let's crack down on the Mafia amendment offered by the gentleman from North Carolina. I mean, this isn't interest. Maybe you're right. This isn't interest. This is the vig.

Mr. CANNON. Would the gentleman yield just for a question?

Mr. DELAHUNT. Of course.

Mr. CANNON. I don't have to go cash my check—in fact, I think ours is—mine is done electronically. But many, many people in America are doing that. Are you familiar with that system and what's going on there? I mean, I don't understand how this quite general language helps poor people who are in a State where they need to get a check cashed or have some other very short-term, high-cost credit?

Mr. DELAHUNT. Reclaiming my time, because the gentleman has been very clear, I think, in indicating that those costs, as you just described them now, are not part of the calculation that goes into interest. Now, we talked a lot about personal responsibility, and I concur. But I think why we have a division in terms of whether this bill is good sound policy is that there has been no discussion about corporate responsibility.

Mr. WATT. Would the gentleman yield for a second?

Mr. DELAHUNT. I yield.

Mr. WATT. I just want to make clear, you make it sound like I'm trying to do something to help poor people. If somebody poor is abusing the bankruptcy system—I made this point before we left for lunch—I think that's a real problem with this bill. There's really no way to deal with that because you've exempted them under the means test.

This is about personal responsibility or corporate responsibility of lenders that are charging 50 percent per year, and so it's not about personal responsibility of individuals. I don't think it is reasonable for lenders to be charging 50 percent a year. And so to turn the question to one as if it's about personal responsibility of individuals is to just acknowledge that personal responsibility or corporate responsibility of lenders is somehow sacrosanct and off limits; whereas, personal responsibility of individuals is the highest priority.

I just don't understand that. That doesn't fit in my value system. Now, if it fits in yours, then I think you ought to vote against this amendment.

Mr. DELAHUNT. Reclaiming my time, I think what we're saying to those lenders that have no scruples, have no parameters, just go to it, by rejecting this amendment. And again, we're talking about 50-percent interest. We're saying the door is open, do whatever you want. And it sends a message to the American people that large credit companies do not have to be concerned because Congress is with them and supports them, and yet somebody who has an income of $25,000 a year and is trying to pay off a credit card bill of $10,000, given the kind of interest rates that we all know are assessed, as well as the fees and the penalties, they can't do it.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. DELAHUNT. I yield back.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Texas.

Ms. JACKSON LEE. Mr. Chairman, let me rise to support the gentleman from North Carolina's and Mr. Delahunt's amendment on predatory lending and utilize the terminology that I used earlier today, which is the unfortunateness of this legislation being a poster child for class warfare.

The middle class happened to be known as the backbone of America. These predatory lending incidences or opportunities really do confront the working and middle class, particularly in African American communities and other communities that happen to be minority or urban-centered. And it would seem, if this is going to be a bill that talks about responsibility, that we should take responsibility for the abusive, usurious rates that plague communities who are attempting to secure, whether it be loans to pay off other bills or whether it be to take advantage of a credit system that allows them to buy furniture or to secure a property, we should be responsible for allowing the recklessness of this system to burden individuals who are simply trying to participate in the American dream. And then they wind up waking up one morning with a family of four or six or seven or eight, and the property that they bought or the washing machine that they thought they would get, making payments on a weekly basis or a monthly basis because of the way they have to do it, maybe their income, maybe they are the working poor, maybe they are lower middle class, and then to come up against this usurious rate, some catastrophic incident has occurred, a medical need, a divorce, and they wind up with this debt. And the bulk of the debt is interest.

If we are trying to put forward legislation that is thoughtful and really does answer the concerns of those who are coming to the debtors court, if we want to take away all of the jurisdiction of the judges which might look at this burdensome process, then this is an appropriate amendment.

So I'd ask my colleagues in the course of their deliberation—and, again, the fix is in, but we're going to process ourselves through the process. I think the gentlemen's—plural—Mr. Watt and Mr. Delahunt's amendment is completely appropriate because it does provide some balance to this legislation for those who would be severely burdened by usurious rates not of their causing, because they attempted simply to participate in this credit system and to pay off debts by getting another loan or to buy furniture or to buy property.

With that, I yield back my time.

Mr. CANNON. Would the gentlelady yield? Would the gentlelady yield?

Ms. JACKSON LEE. I'd be happy to yield for an inquiry.

Mr. CANNON. I'd actually just like to make a couple comments. You have a little bit of time left, and that would save an extra 5 minutes, I think, of time, if——

Ms. JACKSON LEE. I'm yielding to the gentleman.

Mr. CANNON. Thank you. I appreciate that.

You know, we have a really interesting discussion here, and I expressed my appreciation earlier for what Mr. Watt said, which I thought was very, very thoughtful. To add to that, people are poor for many reasons. The biggest reason for being poor is because people are young, because they're getting their education, they're getting started, they're maybe having a family early. Many, many people started out life poor. There are other reasons—people who have mental incapacity or who have lack of education. A lot of things affect poverty.

In the environment of personal responsibility, what I want to see and what I think this bill does to a very large degree is create a market that is unfettered, and in that market people have choices, and they have a choice to prepare themselves for good credit and lower-cost credit over time. You expect as a young person to pay more for your credit than you do when you're older and you have more opportunities because you've been careful with your credit.

It seems to me that that's the core of the kind of debate that we ought to be dealing with here.

Ms. JACKSON LEE. Would the gentleman—I'd like to reclaim my time.

Mr. CANNON. Could I make just one other comment?

Ms. JACKSON LEE. If you'd make it quickly. I want to reclaim my time.

Mr. CANNON. You're almost out. Thank you. I——

Ms. JACKSON LEE. I have to respond to the gentleman on that point. I didn't not hear Mr. Watt's earlier point. But let me just say this: Your focus on responsibility is somewhat distorted. People are vulnerable in coming to the bankruptcy courts because they've been taken advantage by the bombardment of credit cards, with no criteria, usurious rates, and a system of capitalism that encourages people to purchase. I don't know how you can—I believe in personal responsibility as well. But when you issue out credit cards like candy, when you don't allow people to pay for a rent-a-car with cash, and every system of government or every process of purchase people are asking for a credit card, then you are building us on a house of cards of credit. And, therefore, I think it is wrong to suggest that people are irresponsible or should be responsible when they are being victimized by this onslaught of credit card poisoning.

And so I would simply say this bill is unbalanced, Mr. Chairman, and it needs to be balanced toward those who are victimized by those who use them as simply puppets to their system.

Thank you for the credit cards that do good things, but let them realize that this bill does not regulate them. It just allows them to burden and to up the usurious rates and——

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Ms. JACKSON LEE. I thank the Chairman for his indulgence. I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt. Those in favor will say aye? Opposed, no? The noes appear to have it.

Mr. WATT. Mr. Chairman, I ask for a recorded vote.

Chairman SENSENBRENNER. A recorded vote will be ordered. Those in favor of the Watt amendment will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

Mr. WATT. Mr. Chairman, do we have a quorum, a voting quorum on an amendment?

Chairman SENSENBRENNER. We have a working quorum, which is 14.

Mr. WATT. Is that enough to vote on an amendment? I don't know. I'm not——

Chairman SENSENBRENNER. Yes. A working quorum is necessary to debate and vote on amendments. A reporting quorum, which is 21, is necessary to report the bill.

The clerk will call the roll. The question is on the Watt amendment.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
[No response.]
The CLERK. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Are there Members who wish to cast or change their vote? The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 9 ayes and 15 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. Watt 02.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to S. 256, offered by Mr. Watt——

Mr. WATT. I ask unanimous consent the amendment be considered as read.

Chairman SENSENBRENNER. The gentleman will hold off until the amendment is at least distributed to some Members.

The CLERK. On page 10——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

02

Amendment to S. 256

Offered by Mr. Watt (N.C.)

On page 10, lines 21-22, delete "less than 18 years of age" and on line 24, after "school" insert the following:

", or actual tuition costs per child, exclusive of room and board, to attend a postsecondary education institution, including private or public, non-profit colleges and universities, community colleges, and trade and technical schools offering programs of vocational or occupational training lasting less than two years"

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. And my good friend from Utah couldn't have provided a more appropriate segue into this amendment than to remind us that most people are poor because they are young and uneducated. And this amendment goes directly to that point.

Under the current version of this bill, school expenses for minor children up to $1,500 per child annually are allowable as expenses under the means test. My amendment expands——

Chairman SENSENBRENNER. The gentleman will suspend. We have a problem with your microphone.

Mr. WATT. That is probably a blessing, considered a blessing by most people.

Chairman SENSENBRENNER. Well, we do have the court reporter to record your comments for posterity.

[Pause.]

Mr. WATT. Are we okay? Testing. "O, say can you see"——

[Laughter.]

Chairman SENSENBRENNER. I think the gentleman from North Carolina is auditioning for a free ticket to the Nationals to sing the National Anthem there.

Mr. WATT. I was trying to see if you all would stand.

Chairman SENSENBRENNER. The gentleman is recognized.

[Laughter.]

Mr. WATT. Trying to get people to stand, Mr. Chairman. That's all.

I'm not sure where you all ceased to hear me, but I wanted to thank my friend from Utah for setting the stage for this amendment by reminding us that most people are poor because they are young and uneducated. The current version of the bill allows up to $1,500 per child for school expenses under the means test. However, most college-age students remain dependent on their parents and rely upon parental support to attend college or other postsecondary institutions. A college degree is a valuable investment? I think Mister—my good friend from Utah would agree with that, and often is the key for lower-income Americans to break the cycle of poverty.

Unfortunately, the average cost of a year's tuition, room and board, and fees at a private college last year was $22,541. The average cost of a year's tuition, room and board, and fees at a public university last year was $8,470. That information, by the way, comes from the College Board, not from me. I didn't make it up. For 2004–2005 school year, tuition fees in 4-year public universities soared at 11 percent, while at private universities they rose 6 percent, according to the College Board. And if I can just give you a personal experience, when my kids went to college, the increase in their tuition from 1 year to the next was more than I paid per year to go to the State university that I went to. So that gives you some appreciation that I have some personal appreciation for this.

So all we're doing is trying to get you all to allow us to help people break this cycle of poverty that my good friend from Utah referred to that keeps so many people poor, and not visit the sins of parents—if you think that incurring debt and going into bankruptcy is a sin, don't visit the sins of the parents on the children, because then you are punishing other folks who—they didn't incur these debts.

So, please, consider this amendment and I ask for your support and yield back. Sorry I serenaded you.

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Thank you. I enjoyed——

Chairman SENSENBRENNER. He does not have to sing, by the way.

Mr. CANNON. I enjoyed the music, but Mel does this a lot better than I do so I'm not going to sing. Thank you.

I appreciate what the gentleman is saying. College costs have gone up. Just two points.

One is that this eliminates any kind of cap—there's a $1,500 cap in the current bill, and it's for essentially adults. Now, I grant you that 18-year-olds are young people, but, again, I hope that my children have a rough experience with the world as they get to be 18 and beyond so that they realize that there's nothing out there to protect them other than their own wit and capabilities and that

Government, I think, is not a very good protector. And so I would urge people to vote against this amendment. This is a finely crafted bill. I think what we have in the bill is really a very appropriate number, and while I'd like to be able to solve all the problems of everyone in the world of getting access to education, we've done much with Pell grants and with loans and other support, and I think that the place to deal with that issue is not in this bill but in other aspects of what we're doing here in Congress generally.

So I would urge people to vote against this amendment and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the Watt amendment. Those in favor will say aye? Opposed, no? The noes appear to have it.

Mr. WATT. Mr. Chairman, I ask for a recorded vote.

Chairman SENSENBRENNER. A recorded vote will be ordered. Those in favor of the Watt amendment will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their votes? The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.

The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 10 ayes and 17 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

Mr. WATT. Mr. Chairman, may I be recognized for a unanimous consent request?

Chairman SENSENBRENNER. The gentleman from North Carolina, for what purpose do you seek recognition?

Mr. WATT. To ask unanimous consent to insert in the record at this point a copy of a report entitled "Robbing Perkins to Pay Pell: The Bush College Aid Proposal," and a letter from Ranking Member Obey and Ranking Member George Miller talking about the results of that report.

Chairman SENSENBRENNER. Without objection, the material referred to by the gentleman from North Carolina will be included in the record.

[The material referred to follows:]

Congress of the United States
House of Representatives
Washington, DC 20515

March 15, 2005

New Report: Bush Plan Cuts College Aid for 500,000

Dear Colleague:

Attached for your information is a new report documenting the continuing failure of the Administration to adequately help the nation's students achieve earn a college degree. This report finds that:

- ✓ Since 2001, the cost of attending a public four-year college has increased more than $2,300, but President Bush's response primarily has been to freeze Pell Grants. Now he proposes to increase the maximum Pell Grant by $100 to $4,150 in 2006, but this small raise would pay only 4 percent of the college cost increase since 2001.

- ✓ The President finances this small Pell increase by cutting other student aid programs. As a result, nearly 500,000 college students could actually see their financial aid *cut* next year under a plan the President claims would make college more affordable.

- ✓ If President Bush's proposal is enacted, the maximum Pell Grant will have risen only 19 percent during his two terms, less than a third of estimated college cost growth between 2001 and 2009. During the Clinton years, the maximum Pell Grant increased nearly 40 percent faster than the increase in college costs.

- ✓ Under the President's proposal, Pell Grants will continue to lose purchasing power. By 2010, the maximum Pell Grant will likely finance just 29 percent of student expenses at a public four-year college, down from 36 percent in 2004 and 72 percent in 1976.

- ✓ President Bush has failed to provide relief for rising college costs. In contrast, House Democrats have proposed to make college tuition more affordable by renewing States' commitment to higher education funding, providing incentives for colleges to provide affordable tuition, and requiring schools to pursue more cost effective methods of providing quality college degrees.

We hope you will find this new staff report useful.

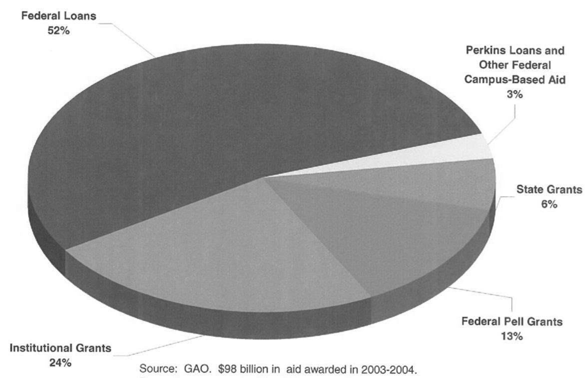
Sincerely,

DAVID OBEY
Ranking Member
Committee on Appropriations

GEORGE MILLER
Ranking Member
Committee on Education and Workforce

PRINTED ON RECYCLED PAPER

ROBBING PERKINS TO PAY PELL: THE BUSH COLLEGE AID PROPOSAL



Source: GAO. $98 billion in aid awarded in 2003-2004.
Percentages may not add to 100 percent due to rounding.

A REPORT PREPARED BY THE DEMOCRATIC STAFF OF
THE HOUSE COMMITTEE ON APPROPRIATIONS AND
THE COMMITTEE ON EDUCATION AND THE WORKFORCE
MARCH 15, 2005
AVAILABLE AT: WWW.HOUSE.GOV/APPROPRIATIONS_DEMOCRATS

SUMMARY

Pell Grants are the foundation of America's commitment to college access and opportunity. Today, 5.3 million low- and middle-income students rely on Pell scholarships up to a maximum of $4,050 to afford a postsecondary education.

President Bush recently trumpeted his budget proposals to increase Pell Grant college assistance for low- and middle-income students. Nonetheless, by any measure, the President has not lived up to his promises. Nor does his budget come close to meeting the financial needs of deserving students who want to earn a college degree. The President has neglected to mention that:

- ✓ The President's new pledge to boost the Pell Grant by $500 over the next five years leaves the maximum Pell Grant $550 short of his 2000 campaign promise.
- ✓ Since 2001, the cost of attending a public four-year college has increased more than $2,300, but President Bush's response primarily has been to freeze Pell Grants. Now he proposes to increase the maximum Pell Grant by $100 to $4,150 in 2006, but this small raise would pay only 4 percent of the college cost increase since 2001.
- ✓ The President finances this small Pell increase by cutting other student aid programs. As a result, nearly 500,000 college students could actually see their financial aid *cut* next year under a plan the President claims would make college more affordable.
- ✓ If President Bush's proposal is enacted, the maximum Pell Grant will have risen only 19 percent during his two terms, less than a third of estimated college cost growth between 2001 and 2009. During the Clinton years, the maximum Pell Grant increased nearly 40 percent faster than the increase in college costs.
- ✓ Under the President's proposal, Pell Grants will continue to lose purchasing power. By 2010, the maximum Pell Grant will likely finance just 29 percent of a student's education expenses at a public four-year college, down from 36 percent in 2004 and 72 percent in 1976.
- ✓ President Bush has failed to provide relief for rising college costs. In contrast, House Democrats have proposed to make college tuition more affordable by renewing States' commitment to higher education funding, providing incentives for colleges to provide affordable tuition, and requiring schools to pursue more cost effective methods of providing quality college degrees.

This report examines the Administration's proposals for Pell Grants and other discretionary student financial aid programs.

WHAT THE PRESIDENT TOLD STUDENTS AND THEIR FAMILIES

The Administration proposes a yearly increase of $100 in the maximum Pell Grant over the next five years (from 2006 to 2010) to $4,550 and assumes a freeze at that level thereafter through 2015.[i] In order to finance the increases, the 2006 budget includes $13.2 billion in discretionary funds for the cost of operating the Pell Grant program at the current maximum award level of $4,050. It includes mandatory funds to finance Pell Grant award increases over the base level and to pay off a $4.3 billion budget shortfall in the program that has accrued since 2001.[ii]

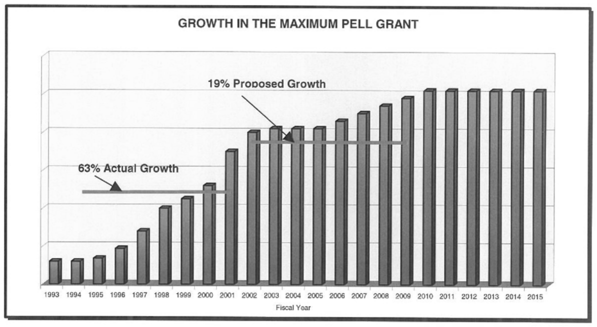
WHAT THE PRESIDENT DIDN'T SAY

Pell Grant increases were fought by Bush and Republicans. When President Bush took office in 2001, Congress had just adopted a Democratic-led increase of $450 in the maximum Pell Grant to $3,750 – the largest in the program's history. Over the objections of the Administration, the maximum grant was increased again by $250 to $4,000 in 2002 and by $50 to $4,050 in 2003. The Administration proposed to freeze the maximum grant in 2004 and again in 2005. Republican leaders in Congress accepted this deep freeze in Pell Grant assistance.

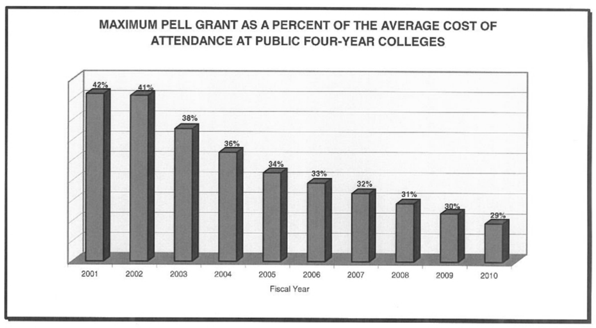
The Administration will eliminate Pell Grants in 2005 for 81,000 students. Just weeks before announcing his 2006 Pell Grant proposals, the Administration changed how the Federal government computes students' aid eligibility, cutting the deduction allowed for payment of state and local taxes. As a result, 81,000 students will no longer receive a Pell award in 2005,[iii] and over a million students will see cuts in their Pell awards. The Government Accountability Office determined that had a similar proposal been adopted, it would have required most student aid applicants to pay about $500 more on average toward their college expenses.

Pell Grants will remain below the level Bush promised five years ago. During his 2000 campaign, President Bush promised to raise the maximum Pell Grant for all college freshmen students from $3,300 to $5,100. Under his 2006 budget, however, first-year students would receive nearly $1,000 *less* than the amount he promised five years ago. And by 2010, the maximum Pell Grant for college freshman would still be $550 less than his earlier pledge.

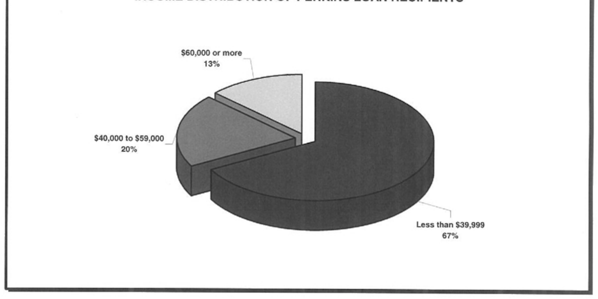
Pell Grants will grow more slowly under the Bush Administration than during the previous eight years. During President Clinton's two terms, the maximum Pell Grant increased 63 percent, from $2,300 to $3,750 – nearly 40 percent faster than the growth in the cost of attending a public four-year college during that period. However, if President Bush's proposal is enacted, the maximum Pell Grant will have risen only 19 percent, from $3,750 to $4,450, during Bush's eight years in office – less than a third of an estimated 67 percent growth in cost of attendance between 2001 and 2009.[iv]



Pell Grants will continue to lose purchasing power. Under the President's proposal for Pell Grants, students would see a small average annual increase in their Pell awards of about 2.4 percent between 2005 and 2010. Between 1984 and 2004, the average cost of attendance at public four-year colleges rose at an average annual rate of 5.8 percent. If college costs were to increase at the same annual rate through 2010 (a conservative assumption given recent double digits increases in college tuition), the maximum Pell Grant would finance just 29 percent of a student's education expenses at a public four-year college in 2010,[v] down from 36 percent in 2004 and 72 percent in 1976.



Robbing Perkins to pay Pell Grants. The President finances his Pell Grant increase by terminating Perkins Loans, which provide low-interest (5 percent) loans to students who demonstrate substantial need. Two-thirds of Perkins students come from families with annual incomes of $40,000 or less. The Administration would not only halt all new Federal investments in the program but also recall over ten years all Federal capital – about $6 billion – invested in Perkins revolving loan funds over the years.[vi] Under the Administration's plan, no new Perkins Loans would be made beginning in 2006.



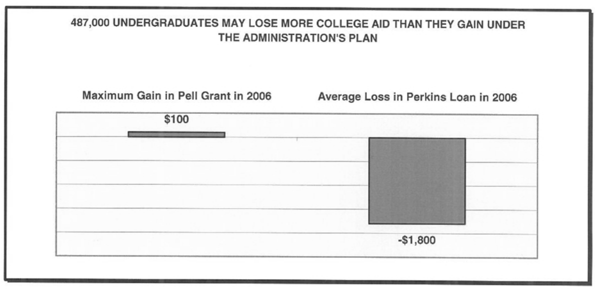
INCOME DISTRIBUTION OF PERKINS LOAN RECIPIENTS

The Administration suggests that terminating Perkins Loans is justified because these resources will be invested into Pell Grants for low- and moderate-income students. However, the Administration's proposal is shortsighted for several reasons. First, because colleges and universities must add one dollar from their own resources to match every three dollars of Federal Perkins capital they receive, the $6 billion in Federal capital currently held in Perkins revolving funds has leveraged roughly $2 billion in additional need-based student aid. Second, as Perkins Loans are repaid, the funds become available to assist other needy students, multiplying the impact of the Federal government's initial investment. Because these funds can be reused, the Perkins Loan program has provided over $21 billion in loans to millions of families across the country. Third, through loan forgiveness, Perkins recipients are encouraged to pursue public service careers in teaching shortage areas such as special education, math and science, as well as careers in nursing, law enforcement, VISTA/Peace Corps and the military.

In 2005, about 567,000 students are expected to receive Perkins Loans[vii]: about 487,000 undergraduates with loans averaging $1,800 and 79,000 graduate students with loans averaging $3,200.[viii] Campus officers at nearly 1,800 colleges and universities use Perkins Loans to address student financial need after Pell Grants and other types of financial aid have been awarded. About 90 percent of Perkins Loan recipients rely on guaranteed student loans to pay their college expenses, 61 percent receive Pell Grants and roughly one-third receive help from Supplemental Educational Opportunity Grants or College Work-Study.[ix]

Percentage of Perkins Loan Recipients Who Receive Other Forms of Student Aid	
Pell Grant	61%
Supplemental Educational Opportunity Grant	37%
College Work-Study	34%
Federal Family Education Loan or Direct Student Loan	90%

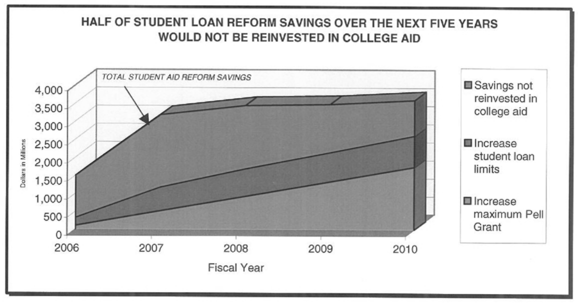
Perkins recipients may find it difficult to find additional aid to completely offset the loss of these loans under the Administration's plan. Of the 487,000 undergraduate Perkins Loan recipients, even those with the greatest financial need (the 61 percent who qualify for Pell Grants) would gain at most a $100 increase in their maximum Pell Grant in 2006 ($500 more by 2010). In 2006, these undergraduates would suffer a loss 18 times their gain in Pell assistance.



While it is possible that some colleges may continue to provide their 25 percent share of Perkins awards and some students may qualify for additional Federal guaranteed student loans, the increased loan limits proposed by the Administration would still fall short of the loss in Perkins assistance.[x]

Half of student loan reform savings over the next five years would not be reinvested in college aid. In addition to its proposal to end Perkins Loans, the Administration proposes extensive changes to the Federal guaranteed student loan programs to achieve budget savings of $15.1 billion over the next five years ($33.3 billion over ten years).[xi] These proposals include permanently closing some loopholes that allow lenders to earn excessive 9.5 percent subsidies on certain student loans, reducing other subsidies to lenders and increasing risk sharing, adjusting guarantee agency re-insurance and default retention payments, and restructuring student loan consolidation.

The Administration proposes, however, to reinvest only $4.6 billion over the next five years ($15.0 billion over ten years) of the savings generated from student loan reforms into Pell Grants. About $3.3 billion over the next five years ($7.7 billion over ten years) would be used to raise the amounts that students may borrow under the guaranteed student loan programs. The remainder of the savings – $7.2 billion over five years ($10.7 billion over ten years) – would not be reinvested in college aid.



Retreating on other student financial assistance. In addition to Perkins Loans, the Federal government supports a number of student assistance programs that are designed to provide flexibility to campus administrators in addressing unmet student financial needs. Funding for these assistance programs has failed to keep pace with growth in college costs and enrollment during the Bush Administration.

The President's Budget For Other Discretionary Student Aid Programs
(Dollars in Millions)

	Amount Needed To Maintain Purchasing Power[xii]	FY 2006 Request	Difference	
			dollars	percent
College Work-Study	$1,552	$990	-$561	-36.2%
Supplemental Educational Opportunity Grants	$1,061	$779	-$282	-26.6%
Leveraging Educational Partnerships	$84	$0	-$84	-100.0%

College Work-Study provides students with earnings from part-time, practical work experience. If College Work-Study funding were to keep pace with increases in the cost of attendance at public four-year colleges and enrollment growth since 2001, $1.6 billion would be needed for the program in 2006. In contrast, President Bush proposes to freeze work-study funding at $990 million in 2006, $561 million less than the amount that would maintain its purchasing power. Similarly, the Administration's request for Supplemental Educational Opportunity Grants for students with extraordinary financial need falls $282 million short of the amount needed to maintain their purchasing power since 2001. Leveraging Educational Assistance Partnership (LEAP) grants provide an incentive for states to invest their own resources in need-based college scholarships. In 2006, $84 million would be needed to maintain their purchasing power since 2001. However, President Bush proposes to terminate LEAP grants.

CONCLUSION

College students are not the "winners" under President Bush's college aid proposal that the Administration would like Americans to believe. Since 2001, the cost of attending a public four-year college or university has risen 26 percent – over $2,300. However, the proposed $100 increase for the maximum Pell Grant in 2006 would pay only 4 percent of increased college costs since 2001. If President Bush's proposal for an additional $500 in Pell Grant assistance over five years is enacted, the maximum Pell Grant will have risen less than a third of estimated college cost growth between 2001 and 2009. As a result, the purchasing power of Pell Grants will continue to decline.

President Bush has failed to provide relief for rising college costs. In contrast, House Democrats have proposed to make college tuition more affordable by renewing States' commitment to higher education funding, providing incentives for colleges to provide affordable tuition, and requiring schools to pursue more cost effective methods of providing quality college degrees.

The importance of obtaining a college degree has only increased in the 21st century knowledge economy. However, the President has presented a budget that not only fails to adequately help the nation's students achieve their college dreams, but also makes it even more difficult in the future to invest in college access and opportunity.

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[7]The Administration proposes several other changes to the Pell Grant Program, including making Pell Grants available year-round, limiting Pell Grant eligibility to 16 semesters and indexing the minimum Pell Grant award to the maximum award beginning in 2007. The Administration also proposes to spend a maximum of $33 million for "enhanced" Pell Grants of up to $1,000 each for students who participate in the State Scholars Program and $50 million matched by an equal amount of private funding to provide up to $5,000 each for students who study math and science. The two latter proposals, however, would assist 56,000 students – about 1 percent of all Pell Grant recipients.

[8] This shortfall occurred due to a sharp increase, coinciding with the 2001 economic downturn, in the number of students qualifying for Pell Grants

[9]Department of Education unpublished analysis.

[iv]Growth in average cost of attendance at public four-year colleges calculated from data in The College Board, Trends in College Pricing, 2004, Table 4b. Cost of attendance includes tuition, fees, and room and board.

[v] See the following table for maximum Pell Grant, estimated average cost of attendance at public four-year colleges and maximum Pell Grant as a percentage of cost of attendance.

MAXIMUM PELL GRANT AS A PERCENT OF COST OF ATTENDANCE

School Year/ Fiscal Year	Maximum Pell Grant	Cost of Attendance (CoA) at a Public Four-Year Institution	Maximum Pell Grant as a Percentage of CoA
2004	4,050	11,354	36%
2005	4,050	12,013	34%
2006	4,150	12,711	33%
2007	4,250	13,449	32%
2008	4,350	14,230	31%
2009	4,450	15,057	30%
2010	4,550	15,931	29%

Notes: 2004 actual average cost of attendance from The College Board, Trends in College Pricing, 2004, Table 4b. Cost of attendance estimates for 2005 through 2010 assume that the average cost of attendance at public four-year colleges will increase 5.8 percent per year between 2004 and 2010, based on the historical 20-year average between 1984 and 2004. Maximum Pell Grants in 2005 through 2010 are the amounts proposed by the Administration.

[vi]Under the Administration's proposal, all Federal capital contributions to Perkins revolving loan funds except amounts needed to reimburse colleges and universities for Perkins loan cancellations would be recalled.

[vii]Department of Education, Fiscal Year 2006 Justifications of Appropriations Estimates to the Congress, vol. II.

[viii] Department of Education data in the Fiscal Year 2006 Justifications of Appropriations Estimates to the Congress indicate that in 2002 86 percent of Perkins Loan recipients were undergraduates and 14 percent were graduate students. Applying these percentages to the Department's estimate of 566,834 Perkins Loan recipients in 2005 yields 487,477 undergraduate recipients and 79,357 graduate recipients.

[ix] Estimates by the American Council on Education, Center for Policy Analysis, based on data from the U.S. Department of Education's National Postsecondary Student Aid Study (NPSAS): 1999-2000. This is the most recent data available.

[x] The Administration proposes to raise the Federal guaranteed subsidized loan limit for 1st year undergraduates by $875, from $2,625 to $3,500. The limit for 2nd year undergraduates would be increased by $1,000, from $3,500 to $4,500. Corresponding increases in aggregate loan limits are also proposed.

Under a best case scenario, for example, in 2006, a typical Perkins Loan recipient who loses the federal share of his or her average Perkins Loan - $1,350 (75% of $1,800) - in the sophomore year would at most gain an additional $100 in Pell Grant assistance if he or she qualifies and an additional $1,000 in guaranteed student loan borrowing authority. The additional $1,100 would not be enough to completely offset the $1,350 loss in Perkins assistance. The gap would be greater ($700) if the student lost the entire $1,800 Perkins Loan.

[xi]Fiscal Year 2006 Budget of the U.S. Government, Table S-6. Mandatory Proposals.

[xii] The "Amount Needed to Maintain Purchasing Power" is calculated by multiplying each program's fiscal year 2001 appropriation by a cost of attendance factor (cost of attendance in 2006 divided by actual cost of attendance in 2001 ($12,711/$9,032 = 1.4073) and by an enrollment factor (higher education enrollment in 2006 divided by higher education enrollment in 2001 (16,887,000/15,484,000 = 1.0906). Fiscal year 2001 appropriations were $1,011,000,000 for College Work-Study, $691,000,000 for Supplemental Educational Opportunity Grants, and $55,000,000 for Leveraging Educational Assistance Partnerships. Cost of attendance in 2001 is from The College Board, Trend in College Pricing, 2004 and in 2006 is estimated as described in endnote v. Enrollment figures are from the National Center for Education Statistics, Projections of Education Statistics to 2013, November 2003.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. Are there further amendments? The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I have an amendment at the desk, Nadler number 1.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. NADLER. Nadler number 1.

The CLERK. Amendment to S. 256 offered by Mr. Nadler. At an appropriate place, insert the following (“and”——

Mr. NADLER. Mr. Chairman, move to dispense with the reading.

Chairman SENSENBRENNER. Let’s look at it first.

Mr. NADLER. Okay.

The CLERK. “(and make such technical and conforming changes as may be appropriate): Section—Nondischargeability of debts incurred through violations of civil rights laws. (a) Debts incurred through violations of civil rights laws.—Section 523(a) of title 11, United States Code, as amended by section 224, is amended—(1) in paragraph (18) by strike ‘or’ at the end; (2) in paragraph (19) by striking the period at the end and inserting”——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Nadler

At an appropriate place, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. ___. NONDISCHARGEABILITY OF DEBTS INCURRED THROUGH VIOLATIONS OF CIVIL RIGHTS LAWS.

(a) DEBTS INCURRED THROUGH VIOLATIONS OF CIVIL RIGHTS LAWS.—Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

(1) in paragraph (18) by striking "or" at the end;

(2) in paragraph (19) by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(20) that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor (including any court-ordered damages, fine, penalty, or attorney fee or cost owed by the debtor), that arises from—

"(A) the violation by the debtor of any offense described in section 244 (relating to discrimination against a person wearing the uniform of the Armed Forces), section 245 (relating to federally protected rights), section 246 (relating to the deprivation of relief benefits), section 247 (relating to damage to religious property; obstruction of persons in the free exercise of religious beliefs), or section 248 (relating to the freedom of access to clinic entrances), of title 18, United States Code;

"(B) an offense under State law that consists of conduct that would be a civil rights crime described in subparagraph (A) of this paragraph;

"(C) a violation under section 1983 of title 42 of the United States Code, or

"(D) the intentional actions of the debtor that violate a valid court order enforcing a civil rights law described in subparagraphs (A) or (B) of this paragraph.".

(b) RESTITUTION.—Section 523(a)(13) of title 11, United States Code, is amended by inserting "or under the criminal law of a State" after "title 18".

Chairman SENSENBRENNER. The gentleman from Utah?

Mr. NADLER. Excuse me. Don't I have a chance to explain the bill.

Chairman SENSENBRENNER. The gentleman from Utah?

Mr. CANNON. Mr. Chairman, I would like to reserve a point of order.

Chairman SENSENBRENNER. The gentleman—a point of order is reserved. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

This amendment would make debts arising from civil—from judgments from civil rights violations nondischargeable. The amendment includes every civil rights violation listed in the Federal criminal code, any civil judgment arising under a civil rights violation, including a section 1983 action, which is to say a judgment against someone for violating someone's civil rights under color of law, or an intentional violation of a valid court order enforcing a civil rights law described in the amendment. It also includes offenses under State law that consist of conduct that would be a civil rights crime described in the Federal criminal codes. Finally, it repairs an omission in the current code that makes fines and restitution ordered under the Federal criminal code nondischargeable, but does not make fines and restitution ordered under State law nondischargeable. My amendment would add the State law.

So if you violate the right to vote, the right to work, the rights of a person wearing the uniform of the United States military, the right to the free exercise of religion, the right of freedom of access to clinic entrances, or any other federally protected civil rights, you will not be able to abuse the Bankruptcy Code either to escape your debts or to force your victims to chase you across the country through bankruptcy courts trying to collect lawful judgments.

We know that is a common strategy, and even where it fails, the uncertainty in the law gives the tort feasors the opportunity to inflict more damage and more expense on their victims. This bill expands the types of nondischargeable debts. It makes nondischargeable even small cash advances leading up to the filing of a case. It's not enough money to keep your kids in Huggies, Mr. Chairman, but we're protecting the helpless credit card companies.

If you use—anyway, this is the wrong page. This amendment simply makes all these different judgments arising from State or Federal civil rights violations not dischargeable in bankruptcy, including violations of 1983, which is a violation of civil rights under color of law, and that's an abuse of the code and we should not allow it, and I urge the amendment.

Chairman SENSENBRENNER. Does the gentleman from Utah insist upon his point of order?

Mr. CANNON. Thank you, Mr. Chairman. I'd make a point of order that the amendment does not amend a specific section or specific text.

Chairman SENSENBRENNER. You wish to argue in favor of your point of order?

Mr. NADLER. I don't understand the point of order. What do you mean it doesn't amend a specific section?

Chairman SENSENBRENNER. The gentleman from Utah has the right to argue in favor of his point of order.

Mr. NADLER. I'm just asking a question.

Mr. CANNON. I think it's fairly obvious. The amendment on its face says that "at the appropriate place insert," and makes—I believe that the rules of Committee——

Mr. NADLER. It doesn't say that.

Mr. CANNON. No, the amendment says "at an appropriate place insert the following (and make such technical and conforming changes as may be appropriate." I believe the rules of the Committee require that an amendment specifically amend a section or particular language within a section.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman from New York wish to be heard in opposition to the point of order?

Mr. NADLER. Yes. This——

Chairman SENSENBRENNER. Or does he wish to concede the point of order?

Mr. NADLER. No. I wish to contest the point of order. This is a standard form of amendment. We do it all the time in this Committee, and I'm not aware of the rule you're talking about. And if there is such a rule, it's never enforced. This is a standard form that is done every week in this Committee. If you look at all the amendments we've done, probably half of them are done in this form.

Chairman SENSENBRENNER. Well, the Chair is prepared to rule.

Mr. WATT. Mr. Chairman, may I be heard?

Chairman SENSENBRENNER. The Chair is prepared to rule. Chapter 27 of Deschler's Precedents, Section 1.2/8, says that an amendment must contain instructions to the clerk as to the portion of the text it seeks to amend. This amendment does not do that, and the Chair is prepared to sustain the point of order——

Mr. NADLER. Mr. Chairman, I'll withdraw the amendment. It'll be resubmitted in a few minutes.

Chairman SENSENBRENNER. Okay. The amendment——

Mr. NADLER. In proper form.

Chairman SENSENBRENNER. The amendment is withdrawn.

Are there further amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. I have an—now, let me make sure that this is drafted in the same—not in the same way. No, it's okay.

I have an amendment at the desk, amendment number 2.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. NADLER. Number 2.

Chairman SENSENBRENNER. The clerk will report Nadler number 2.

The CLERK. Amendment to S. 256, offered by Mr. Nadler, "Page 213, line 11, strike the close quotation marks and the period at the end."

"Page 213, after Line 11, inst the following (and make such technical and conforming changes as may be appropriate):"

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Nadler

Page 213, line 11, strike the close quotation marks and the period at the end.

Page 213, after line 11, insert the following (and make such technical and conforming changes as may be appropriate):

"(iii) The court may extend the time periods specified in this paragraph if the debtor establishes by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable on the date of the order for relief.".

Page 218, line 9, strike "The" and insert "Unless the debtor establishes by clear and convincing evidence that there are circumstances beyond the debtor's control that were not foreseeable on the date of the order of relief, the".

Page 218, line 12, strike "The" and insert "Unless the debtor establishes by clear and convincing evidence that there are circumstances beyond the debtor's control that were not foreseeable on the date of the order of relief, the''.

Page 223, after line 17, insert the following (and make such technical and conforming changes as may be appropriate):

``(5) The court may extend the time period specified in paragraph (2) if the debtor establishes by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable on the date the assurance of payment was due.

Page 229, line 23, strike the close quotation marks and the period at the end.

Page 233, line 5, insert ``(a)'' before ``In'',

Page 234, after line 23, insert the following:

``(b) The court may extend the time periods specified in paragraphs (1) and (3) of subsection (a) if the debtor establishes by clear and convincing evidence that an extension is justified by circumstances that there are beyond the debtor's control that were not foreseeable on the date of the order of relief.''.

Page 236, line 4, strike ''and'' at the end.

Page 236, after line 4, insert the following (and make such technical and conforming changes as may be appropriate):

''(C) the debtor establishes by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable on the date of the order of relief; and''.

Page 231, line 15, insert ''or the debtor establishes by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable on the date of the order for relief'' after ''1121(e)(3)''.

Chairman SENSENBRENNER. And the gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you. Thank you, Mr. Chairman.

Mr. Chairman, the Judiciary Committee has received testimony from many sources, most recently from the Commercial Law League of America, the Nation's oldest creditors rights organization, that the business provisions in this bill will destroy businesses, especially small businesses. The substitute—that is, this amendment—would correct this problem by giving distressed companies the needed flexibility that will enable many of them to reorganize successfully as opposed to liquidate in a Chapter 11 proceeding.

Organized labor has also spoken out against the small business provisions of this bill because they recognize that a failed reorganization hits workers the hardest. They're the ones who lose their jobs. They're the ones who lose their benefits. They're the ones who see their pensions evaporate.

If you have had a large and small business bankruptcy in your district, you know what happens when a company goes under. Preserving value in a company through successful rehabilitation where it is possible benefits everyone—the employees, the creditors, the communities. This bill, however, has rigid and inflexible deadlines that is not found in the current code, especially those dealing with the time in which a company may propose a plan of reorganization. It also places absolute limits on the time in which a business must decide whether to assume or reject a commercial lease, even if they are current in their rent payments. That limit could prove disastrous in cases involving businesses with hundreds of stores. Does anyone know about the Kmart bankruptcy or the Cinema Multiplex bankruptcies? How would arbitrary deadlines have affected those cases?

Other arbitrary rules that would force the conversion of a case to liquidation are dangerous to our economy and to American business, especially small businesses. When this bill first appeared in 1997, everyone was singing "Happy days are here again." There were few fears that massive bankruptcies in our airline industry, the collapse of much of our tech industry, the implosion of such market bellwethers as Enron and WorldCom or the coal or steel industries were just over the horizon.

It would be foolhardy for the Members of this Committee to ignore what is going on in the real world just because we have voted for this bill in the past. In the case of these business provisions, they could mean the loss of thousands of jobs, the unnecessary liquidation as opposed to reorganization of valuable and still viable businesses, and the loss of business and value for trade creditors and communities.

Let's take an example from the business pages—from the financial pages. The last time we marked up this bill, I noted that that morning's New York Times had reported that United Airlines was seeking an extension on its April 8th deadline for filing a plan of reorganization until October 6th. Why were they seeking this extension? According to the report, the extra time would give United the chance to gauge the consequences of any war with Iraq on the airline industry, unquote.

Is there anyone here other than one of United's competitors who does not think that that made sense at that time? Would we have wanted to insist that United file a plan without getting a handle on what is about to happen? Would the Members of the Committee prefer to just liquidate the whole thing?

According to the Times, "The Air Transport Association said in a report yesterday that a long conflict could prompt the industry to cut 70,000 more jobs on top of the 100,000 lost since the September 11th attacks in 2001." It said, "Several carriers could be forced in bankruptcy along with United and US Airways, which had filed for Chapter 11 protection last summer." In fact, an ATA spokesman was quoted in the London Financial Times as stating that the war could add another $4 billion to airline losses on top of the $5.7 billion forecast and cut a further 2,200 daily flights.

In court papers, United requested the extension to avoid premature formulation of a Chapter 11 plan and to ensure that the formulated plan takes into account the interests of the company, its employees, and its creditors. That was then.

Judge Weidoff is still keeping United in the air and people are still working. Could you imagine what would have happened if we had tied his hands the way this bill would? Is there any doubt what would have happened to that case? United would have been liquidated, the employees laid off, and the creditors not gotten their debts repaid. Shouldn't the law allow courts to review the facts and decide whether or not such flexibility as in the Bankruptcy Code has long required in the best interest of the creditors and the estate?

Mr. Chairman, our job is to make the system work better, not to wreck it. Chapter 11 is a model that other countries are trying to emulate. They look to our system of rehabilitating going concerns values where possible as preferable to their emphasis on liquidation. Just as the rest of the world is realizing that our system encourages risk taking and promotes the rehabilitation of distressed businesses, this bill—or this provision would take our system back in the other direction. Perhaps this Committee could listen to the sound of the market forces before acting.

I urge the adoption of this amendment to allow the system to remain somewhat flexible so that businesses can be saved instead of liquidated. Thank you. I yield back.

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Section 404 of the bill, under current law, Chapter—this refers to section 404. Under current law, a Chapter 11 debtor or lessee must assume or reject a nonresidential lease within 60 days. This 60-day period, however, can be and often is routinely extended by the court. Section 404 of the current bill fixes the deadline by which the debtor must assume or reject a lease. It requires a nonresidential lessee to either assume or reject within 120 days of the filing of bankruptcy or by the date that the court confirms the plan of reorganization. This period can be extended for an additional 90 days on the motion of the lessee or the lessor. And then there are further provisions for extension.

Let me just point out that section 404 is a result of extensive negotiation over the preceding three Congresses. This bill is not hostile to lessees. As a matter of fact one of the principal groups of nonresidential lessees, the National Retail Federation, is one of the bill's strongest supporters on this particular point.

The provision gives landowners greater certainty in dealing with bankrupt tenants because it sets a firm time frame by which the debtor must decide whether to continue with a lease of a shopping center and the ability it produces means ultimately we get better rates more equitable rates, and promotes competition among landlords. Bankruptcy Code section 502 limits the amount of damages that a landlord can claim as an administrative expense, priority if a tenant assumes a lease, and then rejects the lease at a later time. This prevents landlords from getting a financial windfall at the expense of unsecured creditors. It's a well-thought-out and well-balanced part of the whole bill.

Now, many of these issues deal with small businesses, and we have very, very wide-ranging groups supporting these small business provisions, like the National Bankruptcy Review Commission, Executive Office of the United States Trustees, bankruptcy judges, the National Association of Credit Management, and the American Bankruptcy Institute.

This section gives teeth to those charged with the oversight of these cases, including the courts, the United States trustees and parties in interest. It only requires small business debtors to do what they should do and be doing while they're in Chapter 11, that is, pay their post-petition obligations as they become due and make progress toward confirmation.

Deadlines in these provisions are not absolute. Most can be extended upon a proper showing of cause. And this streamlines the process by providing for flexible rules for disclosure statements and plans.

Again, the bill can be criticized at various points and narrow perspectives, but as a whole, and in particular with this section, the section that's attempted to be amended here by Mr. Nadler, the bill is well considered and well balanced, and I would urge my colleagues to reject this amendment.

Thank you, Mr. Chairman. I yield back.

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I yield to the gentleman from New York.

Mr. NADLER. Thank you. Mr. Chairman, the provisions—what's wrong with the provisions in the bill that this seeks to enact is that they are rigid. One, first of all, most of what Mister—the gentleman from Utah talked about was lessees. Lessees and lessors are only one part of what we're talking about here. And if you look at the amendment, it says repeatedly the court may extend the time period specified in this paragraph if the debtor established by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable on the date for the order of relief.

Again, unless the debtor established by clear and convincing evidence that there are circumstances beyond the debtor's control that were not foreseeable on the date of the order of relief. Unless the debtor established by clear and convincing evidence that there are—et cetera.

The court may extend the time period specified in paragraph 2 if the debtor established by clear and convincing evidence that an extension is justified by circumstances beyond the debtor's control that were not foreseeable.

In other words, we're giving the judge in this amendment the ability—in the interest of the creditors, in the interest of the debtors, in the interest of the employees, in the interest of everybody, the ability in case of unforeseeable developments, the ability to extend otherwise rigid deadlines, deadlines that in the abstract may make sense. Deadlines that may say 90 days and then a one-time extension of another 60 days may sound reasonable but in a given case may not prove to be reasonable.

The code has always given the judges some discretion, and all this amendment says, the burden of proof is on the debtor. The burden of proof for a debtor who wants an extension of time is on the debtor to prove by clear and convincing evidence. The second highest standard of evidence that he needs the extension because of circumstances beyond his control that were not foreseeable at the time of the order.

And if the judge believes that he has established that beyond—by clear and convincing evidence, at that point why shouldn't the judge have the ability to extend a deadline and maybe save a company, save the jobs, save the community, get the creditors the ability to have more of their debts repaid? It doesn't make sense to be this rigid.

Now, judges are going to be reluctant to extend deadlines repeatedly, especially when you put the burden of proof on the debtor and say not only does it have to be clear and convincing evidence, but it has to be circumstances that are beyond his control and totally unforeseeable at the time the order was given. I don't see what sense it makes to deny some flexibility when you may save 20,000 jobs or a community or get—or for that matter, that may redound to the benefit of the creditor, too.

So why wouldn't we give this kind of flexibility—I shouldn't say "give"—keep this kind of flexibility in the system?

I yield back to the gentleman. I thank him for yielding.

Chairman SENSENBRENNER. Does the gentleman from California yield back?

Mr. BERMAN. I do.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I won't take 5 minutes. I just want to make the point that this discussion has pointed up once again how we miss opportunities to address problems by not having hearings and going through regular order. I don't think either one of these gentlemen is trying to do anything unreasonable, but we are operating in a system here that you all have set that basically is making a mockery of the legislative process. It's clear that you're not going to allow one comma, one period, one capital letter, anything to be done to this bill because you don't want it to go to conference. I understand that. But it makes this markup a charade. And it makes us look like we're just—this is just an irrelevant process, that the Senate has shaped this bill, and this bill is too important to the American consumer, debtor, and creditor to have this happen to it. And our institution is too important for us to make our institution have this kind of impact.

So, I mean, I—if I sound a little frustrated, it's because I am a little frustrated, because we're just playing games here. And so I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from New York, Mr. Nadler. Those in favor will say aye? Opposed, no? The noes appear to have it. The noes—a rollcall will be ordered. Those in favor of the Nadler amendment will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no. Mr. Franks?

Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
Mr. SMITH OF WASHINGTON. Aye.
The CLERK. Mr. Smith, aye. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.
Mr. SCOTT. Aye.

The CLERK. Mr. Scott, aye.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 13 ayes and 18 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

Mr. SCHIFF. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Smith.

Mr. SCHIFF. Schiff.

Chairman SENSENBRENNER. Schiff. I'm sorry.

Mr. SCHIFF. It is going to be very confusing on this Committee now.

Mr. Chairman, I have an amendment at the desk numbered 006.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to S. 256 offered by Mr. Schiff. Page 19, after line 21, insert the following (and make such technical and conforming changes as may be appropriate):

"(8)(A) No judge, United States trustee"——

Chairman SENSENBRENNER. Without objection the amendment will be considered as read and the gentleman from California is recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Schiff

Page 19, after line 21, insert the following (and make such technical and conforming changes as may be appropriate):

"(8)(A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the debtor is an identity theft victim.

"(B) For purposes of this paragraph—

"(i) the term 'identity theft' means a fraud committed or attempted using the personally identifiable information of another individual; and

"(ii) the term 'identity theft victim' means a debtor with respect to whom not less than 51 percent of the aggregate value of allowed claims is a result of identity theft using the personally identifiable information of the debtor.".

Mr. SCHIFF. Mr. Chairman, I thank you. My amendment would simply provide that if at least 51 percent of the creditor claims against you in bankruptcy are the result of identity theft, you should not be forced out of the protections of Chapter 7. This is an amendment similar to that offered by Senator Nelson of Florida, but is significantly narrower than the amendment that was offered in the Senate.

A few years ago the manager of an identity theft program at the FTC commented on how identity theft was becoming rampant in the country. She commented that not only can identity theft wreak havoc on the credit of a victim, but it can even force them into bankruptcy. Since then the problem has grown at epidemic rates. Identity theft has now topped the list of consumer complaints filed with the FTC for the last 4 years in a row. In September 2003 the FTC released a comprehensive survey concluding that a staggering 27 million Americans have been the victims of identity theft in at least the 5 years, costing consumers and businesses an estimated $53 billion in 2002 alone.

In fact, the home States of several Members of this Committee are at the top of the list of identity theft victims, with Texas ranking No. 4, Florida ranking No. 5, and my own home State of California ranking No. 3 in the number of victims of identity theft per capita, with over 37,000 complaints reported by consumers, costing over $40 million just last year.

We've also heard of the recent breaches of massive databases holding personal information. Identity thieves posing as legitimate customers gained access to ChoicePoint's database of 19 billion public records. The company has acknowledged that hackers had access to data on 145,000 people and that stolen information has since been used in at least 750 identity theft scams.

Just last week databases belonging to LexisNexis were also compromised with hackers stealing information on at least 32,000 people. With these epidemic level increases comes the likelihood that more innocent individuals will be forced to file bankruptcy.

Just last month a man was sentenced in New York to 2 years in prison for using a former girlfriend's identity to commit fraud. The scheme lasted several months, during which the perpetrator took out three personal loans from private loan agencies in the victim's name, purchased an Audi and a Chevy pickup truck. Ultimately the fraud resulted in the theft of over 300,000, forcing the victim to declare bankruptcy.

There are a great many examples of this. November of last year a women in Pennsylvania similarly victimized, similarly forced to file bankruptcy right before Christmas.

We shouldn't turn our backs on these individuals. Last year this Committee supported legislation Mr. Carter and I sponsored to crack down on criminals who perpetrate identity theft. Now this Committee has the opportunity to directly address the plight of some of the victims of this crime forced into bankruptcy. The amendment is simple and very narrowly drawn. It merely says that if at least 51 percent, slightly more than half of the claims against you in bankruptcy are the result of bankruptcy—the result of identity theft, something you had no control over, you should not be forced out of the protections of Chapter 7.

I know that there has been a desire among the majority to keep the bill in its pristine state, but this is a good amendment. I think it's one that ought to enjoy bipartisan support, as our identity theft did last year, and I would urge you to accept it. This is more narrow than what was offered in the Senate. It would specifically address the problem where the major reason why you would be forced out of Chapter 7 is because you are a victim of identity theft, and I urge my colleagues to join support, and I reserve the balance of my time.

Chairman SENSENBRENNER. The gentleman will have to yield back.

Mr. SCHIFF. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I'm just sort of working through this amendment now, and it's obviously—it's obvious to me that it's an important idea and maybe something that we'd want to consider in the context of future changes, a technical blurb, something like that. For the purposes of this bill, besides the fact that we want to do a reasonable bill, and I think that this bill is available to amend if we get new reasons. Thus far I don't think we've heard many.

But this is a new issue, and I appreciate the fact that it is more narrowly drafted than the Senate counterpart, but there's some problems that I have in this bill, and I think those are substantial, and that's why I think if we do anything with this we'd have to do it—I would encourage the Members to vote against it so we can deal with it at some future time.

In the first place we're fairly vague about the identity theft and how it's established and what that means. In the second place, what happens if a person has a significant amount of identity theft—losses caused by identity theft and then becomes wealthy and has the ability to otherwise deal with these things? And so——

[Laughter.]

Mr. SCHIFF. Would the gentleman yield?

Mr. CANNON. Yes, in just a moment. Let me just say in summary from my perspective, I don't, I don't have a handle on how we deal with this, how it would fit in, and it would clearly disrupt the whole process of moving forward a bill. So I would encourage my colleagues to reject this amendment. And who asked to——

Mr. SCHIFF. I asked the gentleman if he would yield.

Mr. CANNON. Oh, certainly, Mr. Schiff.

Mr. SCHIFF. This is a, you know, rough replay of a scenario that took place in this Committee a couple years ago when I offered and amendment to this bill, to just do a study of whether those trying to get child support would be adversely impacted by the bill. It just called for a GAO study of the issue. The author of the bill at that time was Mr. Gekas. He made comments very similar to yours, along the lines of this may not be a bad idea, this may be a good idea, but we don't want anything added to the bill.

Mr. CANNON. Reclaiming my time, I think the point between the time that Mr. Gekas was here and now is there's been a lot of time to develop that idea, and if somebody wanted to do it, it could have been developed. I don't know that this issue has come up in the hearings that we've had or in the negotiations or discussions we've had anywhere. This has been an issue out there, but that hasn't had an advocate in the context of this bill.

Mr. SCHIFF. Will the gentleman yield again?

Mr. CANNON. Certainly.

Mr. SCHIFF. You know, I know the gentleman, with all due respect, is really reaching for a rationale to vote down the amendment, and, you know, I—Mr. Gekas, in the last scenario, offered to take up my amendment in the manager's amendment. It went up to the Rules Committee as part of this package. It came down from the Rules Committee, having been deleted from the package. And when I asked him why, he said, "You know, I thought I was the author of this bill, but it essentially is being controlled by the interest behind the bill," and he could not even succeed with an amendment he supported.

I hope we're not to that point. This is a very simple amendment that says——

Mr. CANNON. Reclaiming my time, I just—Mr. Gekas is not here to defend himself. That is an extraordinary statement. I knew Mr. Gekas very well. I've taken over the Subcommittee that he chaired earlier. I don't mean to challenge your credibility on the issue, but beyond Mr. Gekas we need to have a process, and we have not talked about this issue. I don't know if you've talked with other people that are engaged in the bill, but the issue has not, that is the issue of identity theft and how we fit it in the bill, has not been raised in a context where we could vet it and deal with it.

So part of the reason I'm stretching is because it's a new issue, and I don't know how it fits into—and I grant that I'm stretching. I don't know how it fits in. I don't know what it does to the bill. If it's going to be dealt with, it needs to be dealt with in the context to determine——

Mr. SCHIFF. Will the——

Mr. CANNON. Pardon me, just if I can finish. We need to deal with it in a context where we can consider the implications for the whole bill. And so I have a little bit of time left.

Mr. SCHIFF. I appreciate the gentleman yielding, and I'm not impugning at all Mr. Gekas' credibility, who fought for my amendment, and I'm appreciative to him. But I do challenge the process that's going on here where we have a markup. We spend hours here. And if the majority has made the decision that we will accept no amendments no matter how meritorious, then this really is a futile exercise, and we are all too busy to engage in a futile exercise.

Mr. CANNON. Reclaiming the last few moments that I have, it is a futile exercise if there's nothing new or if we can't make a clear and compelling case for something, which I don't think you can do with an issue like this at this time with the limited debate here. But we have a process.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The question is on the——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Senator Carper. The gentleman's recognized for 5 minutes.

Mr. WATT. And I really didn't intend to just get on this and stay on it, but we're getting to the point of just being ridiculous here, and you know, I think we all are beginning to have our sensibilities insulted. And to be honest with you and very blunt, the Republicans are beginning to do a disservice to themselves by looking like robots, and that's unfortunate.

This bill and the substance of this bill is too important to the American people to treat it like this, and I, I mean I think there's more integrity just to say, "Look, we're not going to amend this bill, you know, call the previous question," you know, which you all have done before. You try to do it when you can blame it on us. We're trying to be constructive here, offer really good amendments that a number of people have said are really good amendments, and—but there's no flexibility here, and I don't know what we are doing. This is a charade.

And I'm embarrassed because this is out of—I mean bankruptcy started out—I guess I'm taking the lead on this because bankruptcy is the subject matter of Commercial and Administrative Law, which I am the Ranking Member of, and I don't want to see my Chair, Mr. Cannon, continue to embarrass himself like this. There's no rational reason for what's being——

Mr. CANNON. Would the gentleman yield?

Mr. WATT. I'm happy to yield to him if he can tell me he's not embarrassing himself.

Mr. CANNON. You know, I actually find it embarrassing that we make an issue out of, out of the failure of an amendment that hasn't had any development. This is not a heavy-handed process that has culminated over 7 years to where we are today.

Mr. WATT. Reclaiming my time.

Mr. CANNON. This is a 7-year process.

Mr. WATT. Reclaiming my time, I am making an issue of the fact that you all are making a charade of the legislative process on an important public policy such as bankruptcy. I'm embarrassed by this, and I think you should be embarrassed by it. So I, you know, I'm—this is not the first time I've said this today. This is not about this particular amendment but the cumulative effect of what you are doing is embarrassing to yourself, and, you know, I'm going to keep offering these amendments as long as you all sit here and embarrass yourself, but at some point you're going to have to just say to the American people, "Regardless of how meritorious an amendment is on this bill, we are not going to amend the bill because our leadership has told us that. Mr. Delay or whoever is calling the shots has told us we are not going to amend this bill."

And I don't know why we fight for the jurisdiction of our Committee if our Committee can't do anything with the jurisdiction. What good is jurisdiction if you're not going to do anything?

Mr. BACHUS. Would the gentleman yield?

Mr. WATT. We are legislators.

Mr. BACHUS. Would the gentleman yield?

Mr. WATT. I'm happy to yield to the gentleman.

Mr. BACHUS. We've been amending this bill for 8 years, have we not? I mean this bill, we amended this bill this year and last year and the year before. So I mean it's not——

Mr. WATT. Keep embarrassing yourself.

Mr. BERMAN. Would the gentleman yield?

Mr. WATT. I'm happy to yield to the gentleman from California.

Mr. BERMAN. Would the gentleman—if the gentleman from North Carolina would yield to the gentleman from Alabama, could he explain to me why an amendment that says if 51 percent of your debts occurred because somebody stole your identity and that the ripple implications of accepting that amendment will so upset the delicate balance of this pristine bill that—in ways that we can never know. Just give us a coherent reason why an amendment as narrow and specific as this should be rejected on its face? I can understand accepting it and fine tuning it. I can understand—but you see the impression that we get over here?

Mr. BACHUS. I appreciate the gentleman——

Chairman SENSENBRENNER. The time of the gentleman from North Carolina has expired.

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. The Chair moves to strike the last word——

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER.—and recognizes himself.

First, there has been plenty of process on this bill over 8 years, and all of the paper that has been generated, hearings, markups, Committee reports and debates on the floor are on the clerk's desk. And if you're having trouble seeing the clerk over the pile of papers, it shows that there has been plenty of information that has been submitted.

Now, second, relative to the amendment that has been offered by the gentleman from California, Mr. Schiff, a person is not responsible for debts that he or she did not incur. So if the debt was run up by somebody else as a result of identity theft, the person in whose name the debt was run up is not responsible for it. And if there is identity theft, that is a factual issue that the bankruptcy judge can determine, and even without this amendment, the bankruptcy judge can disallow the claim that has been made against the bankrupt's estate. That is simple law.

Now, everybody knows what the process is here. The people who don't like this bill want to amend it to send it back to the other body because they know the other body will have to spend two more weeks jumping through the hoops to get a piece of legislation passed.

This bill has been hanging around here for 8 years. It is a bill that has gotten overwhelming support in both the Senate and the House of Representatives. There has been rollcall after rollcall, and I've added up the score in both the House and the Senate. Since the 105th Congress the aggregate total of votes on bankruptcy legislation has been 2,455 ayes to 871 nays.

We're getting close to the goal line on this. Most of these arguments have been ventilated repeatedly in the past. I think that this amendment is merely an attempt to try to kill the bill because everybody knows that a debtor is not responsible for the debts he didn't incur. The amendment should be voted down.

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.

Ms. WATERS. I move to strike the last word.

Chairman SENSENBRENNER. And the gentlewoman is recognized for 5 minutes.

Ms. WATERS. Mr. Chairman, if in fact this amendment does no harm, and if in fact it would be a restatement of existing law, then I don't see why it could not be considered for adoption.

However, I think there are a few things that you, Mr. Chairman, said that would help everyone here to understand that you have no intentions of accepting any amendments on this bill today. You talk about the number of votes that have been taken. You talk about how high the paper is stacked before the clerk, and you basically have said to us that we're here today convened simply to vote this bill out, and that you will do that because you have the numbers, you have the majority of this Committee. You're not going to accept any amendments. And why then are we going through allowing us to take our good time to offer these amendments when you have decided the fate of our amendments already?

I think it is worse than a charade, and I think it is, as Mr. Watt has said, embarrassing to us all, and I feel a little bit bad for the jockey of the bill over there from Idaho, who cannot defend—from Iowa—who cannot—where's he from? I'm sorry, Utah, somewhere out there. Who cannot defend his objections to the—cannot defend his objections to the amendment.

So, Mr. Chairman, is a motion in order to move that we close down the Committee and we just vote the bill out?

Chairman SENSENBRENNER. Does the gentlewoman move the previous question on the bill and the amendments?

Mr. DELAHUNT. Would the gentlelady—Mr. Chairman?

Chairman SENSENBRENNER. Does the gentlewoman make that motion?

Mr. DELAHUNT. Mr. Chairman?

Ms. WATERS. The gentlewoman is prepared to make the motion. I hear some objections from my colleagues on this side of the aisle.

Chairman SENSENBRENNER. Well, then should we vote on it and see what——

Ms. WATERS. Well, let me just—let me, let me just get a nod from—where's my leader on this? Where's Mr. Conyers? Is he here?

Mr. CONYERS. Yes, he is here.

Ms. WATERS. Mr. Conyers, what would you have me do?

Mr. CONYERS. Well, I'd ask you to yield to me first.

Ms. WATERS. I will yield to you on this before I offer this motion.

Mr. CONYERS. I'd like to point out about this large number of reports and other documents that have been put on the table, the witness table, that I've counted 1, 2, 3, 4, 5, 6 new Members on this Committee for the 109th session. I can't recall how many are new Members from the 108th session. But for the years that this bill has been going on, to now come up in the first part of the 109th session and say we've been working on this bill for 6 or 7 or 8 years, and so therefore, we've had enough discussion, let's get this on with, is perhaps not the best congressional or legislative procedure that we can engage in.

Mr. INGLIS. Would the gentleman yield?

Mr. CONYERS. No. I know you're a, you're a new old Member, and so we'll give you the credit you deserve.

But I think that that should be—I think that this should be taken into consideration. The amendment I offered earlier about veterans, I don't recall it being offered before. We haven't had any hearings in this session.

Ms. WATERS. Reclaiming my time. I think what I hear the Ranking Member advising me is not to offer the motion, so, Mr. Conyers, what I would like to do is make a suggestion to the Members on our side of the aisle, and that is, take up all your amendments, find some more, put your staffs to work so that they can create some more, and let's just stay here for a couple of days.

Chairman SENSENBRENNER. Does the gentlewoman yield back the balance of her time so that she can do that?

Ms. WATERS. If the gentlewoman had intended to do that, she would have let you know.

Chairman SENSENBRENNER. The time of the gentleman has—gentlewoman has expired. We're about 10 minutes away from four votes on the floor.

Mr. LUNGREN. Mr. Chairman?

Chairman SENSENBRENNER. Who seeks recognition? The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Mr. Chairman, I'm one of those old new or new old Members that the Ranking Member referred to, and I consider very importantly my obligation to act in the best interest of my constituents and the people of this Nation. I must remark that I'm surprised that the gentlelady from California is yielding to the iron clad rule of a Ranking Member. I thought we should independently make our decisions as to what is best.

But let me just say this. I have——

Ms. WATERS. They dare not take independence when they are doing what they are told.

Mr. LUNGREN. I understand, I understand. I might say that I have been absent from this chamber for 16 years, although interestingly enough, one of the elevator operators noted me on the elevator the other day, and asked where I'd been because she hadn't seen me around for a little while. So I told her it had been 16 years.

And I understand the frustration of the minority because I was there for 10 years, and I understand being on the losing side of votes. But, you know, it's not a charade when the votes are taken and you're on the losing side because there's more on the other side than there are on your side. That's sort of the result of what happened in November.

The frustration that you feel is probably a mirror image of the frustration that those of us feel on this side who have seen this work done on a major effort to reform a Bankruptcy Code that drastically needs to be reformed. There's a consensus in this country. And to see that happen year after year after year and be tangled up in disputes, I mean, let's be real. The reason we don't have a reform of the Bankruptcy Code over the last number of years was because of actions taken by some in the other body on the abortion issue, and there was an effort to make sure that that social issue was driven and driven and driven and driven and driven, despite all of the facts, despite all of the necessity for us to do something with the Bankruptcy Code.

And so that's why we're here now. We know that there's a need to have a Bankruptcy Code reform. We know that the best chance we have of doing that is to basically minimize any differences between ourselves and the Senate, particularly on a piece of work that has really the earmarks of Members of this body, Members of this Committee over the last number of years. As I understand it—and I stand to be corrected—this product has a number of amendments brought by both the majority and the minority over the last number of years that have been voted on either by recorded vote or voice vote.

So that's what we're talking about, and I understand what my friends on the other side are doing, trying to make sure that we're put in a position of voting against the aged and the poor and the young and kids and veterans and everybody else. And we understand that's being done, and you have every right to do it, and I wouldn't refer to it as a charade. But the fact of the matter is we are either going to have a major reform of the Bankruptcy Code or we are not, And if we repeat what's been done in this Congress over the last five or six congresses, we will not have it, and that ill serves the American people, it ill serves the people I represent.

So, yes, I am exercising some discipline not to offer amendments, and not to support certain amendments that I might otherwise wish to because I do not want to see my pursuit of the perfect ensure that we defeat the good. And we have made a good job of defeating the good in this Congress in the last number of years. And so I appreciate what my friends have said, but, frankly, it's not a charade when one makes a judgment that in order to actually have a bill on the President's desk that does a lot of good, rather than no bill once again, that we exercise discipline individually, and not support some things that we may otherwise wish to support.

Mr. CONYERS. Would my friend, Mr. Lungren yield?

Mr. LUNGREN. I would be happy.

Mr. CONYERS. And I thank you.

Mr. LUNGREN. And I want to say one thing. In the time that I was out of this chamber, whenever I visited, the Ranking Member was probably the most gracious in recognizing me when I was here, and I just wanted to say that for the record. I appreciate that.

Mr. CONYERS. I thank the gentleman. Would you review, at your leisure, sir, the organizations that are supporting the position that has been made clear by those of us on this side of the Committee room and the names of the organizations, lobbyists, banks and credit card organizations, commercial organizations that represent what you asserted was a majority of people. I think you'd find, my friend from California, that when the National Bankruptcy Conference, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, the National Association of Chapter 13 Trustees, the National Association of——

Mr. LUNGREN. Okay, reclaiming my time, I object to——

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the amendment offered by the gentleman——

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Yes. I'm going to yield in just 30 seconds to the gentleman from—Schiff, who's the author of this particular amendment. But in response to what—the observations by Mr. Lungren, I mean I would suggest that the amendments that have been offered today deal with obvious issues and egregious problems that

I would concluded that if there was not the exercise of discipline, there would be nearly unanimous agreement in terms of the adoption of these particular amendments.

You know, I'm listening to Mr. Cannon, whom I consider a friend and one of the better Members of this Committee, you know, speak about his children and the fact that Government is not a good protector. And yet today we're here rejecting the amendment put forth by Mr. Watt and myself relative to the discharge, the dischargeability of debts implicating interest over 50 percent. I mean we haven't protected the American citizen today from the predatory lender. And to speak about the marketplace in terms of the need for credit and suggesting that putting some boundaries, in imposing some accountability in terms of the lending community, I would suggest that's not doing what we ought to be doing. That's not protecting the people, all of the people of this country.

And that's not about the marketplace. As I said earlier, that is right up there with, you know, what the mafia did, we reject it. How—if we adopted that amendment, how could the other body, other body not agree to that particular amendment? And the reality is—and we have heard example after example over the course of the last three or 4 months, that that in fact is happening to people all over the country. With that, I'll yield to the gentleman from California.

Mr. SCHIFF. I thank the gentleman for yielding, and somehow my amendment seems to have provoked a disagreement between the Chair of the Subcommittee and the Chair of the full Committee. The Chair of the Subcommittee maintaining that my amendment, the problem with my amendment is that it may somehow do harm, the Chairman maintaining that the problem with my amendment is that it does nothing at all, that is the existing law. The Chairman of the Subcommittee maintaining that the problem is that this issue has never been explored, the problem as addressed by the Chairman is that this issue and every other has already been explored. It can't be both.

And the charade that my colleagues from California refers to—and charade is a stronger term than I would use—is not that you win a vote or we lose a vote. The illusion is that this is a markup, that this is a Committee that today is really deliberating the amendments and making decisions. That's the illusion. The reality is that the deal was made before we ever came into the Committee room.

And the reason I brought up the history, at least my little amendment some years ago in the 107th Congress, is that this has been the history as long as I've been here, on this bill. When I offered an amendment in the 107th Congress, two congresses ago, I was given much the same response, which is this issue has already been decided before the markup, so why are you offering something in the markup, good idea, bad idea, no idea at all? Where were you when we decided this in the back room before we got into the Committee?

And you know, for most of us in the minority we're not part of that discussion. The financial interests are part of the discussion, the majority is part of the discussion, the minority is not. My colleague from California referred to his years in the minority, and I can only say, as we found in 1994, majorities are fleeting. Ours was, yours may be as well, and it would be worthwhile to consider what it's like to stand in your colleague's shoes.

And I would only urge that if you feel the amendment has weight, support it. If you feel the amendment is somehow superfluous, vote against it, but let's have a real markup where the Committee can do real work, where those of us who are not invited to the back room can have input in the work product that goes out of the Committee.

Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The time of the gentleman from Massachusetts has expired.

The question is on the amendment offered by the gentleman from California, Mr. Schiff. Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. Chairman, I request a recorded vote.

Chairman SENSENBRENNER. A recorded vote will be ordered. Those in favor of the Schiff amendment will, as your names are called, answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. SCHIFF. Mr. Lungren said no.

The CLERK. Oh, I'm sorry. Mr. Lungren, no. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
[No response.]
The CLERK. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
Mr. SMITH OF WASHINGTON. Aye.
The CLERK. Mr. Smith, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? The gentleman from Texas, Mr. Smith.
Mr. SMITH OF TEXAS. Mr. Chairman, I vote no.
The CLERK. Mr. Smith, no.
Chairman SENSENBRENNER. Any further Members? Gentlewoman from California, Ms. Waters?

Ms. WATERS. Aye.

The CLERK. Ms. Waters, aye.

Chairman SENSENBRENNER. The clerk will report. Oh, the gentleman from Alabama, Mr. Bachus?

The CLERK. Mr. Chairman, Mr. Bachus is—Mr. Bachus votes no, has voted no.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Aye. I wanted to be recorded. I wasn't recorded. Is that all right?

Chairman SENSENBRENNER. Of course.

Mr. WATT. Thank you.

The CLERK. Mr. Watt, aye.

Chairman SENSENBRENNER. Anybody else who wishes to cast or change their vote? Going once, going twice, and the clerk will report.

The CLERK. Mr. Chairman, there are 13 ayes and 15 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

We have four votes on the floor. The Chair asks Members to return promptly after the last vote so that we can get going. There is a hearing that has been noticed for 2:00 p.m. in the Subcommittee on the Constitution. That will be postponed until after the markup is completed today, and the Committee stands recessed.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present. Pending at the time of the recess was a motion to report the bill, Senate 256 favorably. Are there further amendments?

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

Mr. DELAHUNT. Thank you, Mr. Chairman. I have an amendment at the desk. It's numbered Delahunt 003.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to S. 256 offered by Mr. Delahunt. Page 507, after line 6, insert the following (and make such technical and conforming changes as may be appropriate):

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from Massachusetts is recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Delahunt

Page 507, after line 6, insert the following (and make such technical and conforming changes as may be appropriate):

"(f)(1) The trustee may avoid a transfer of an interest in property of a debtor who is an individual, made by the debtor in the 10-year ending on the date of the filing of the petition to an asset protection trust if the amount of such transfer, or the aggregate amount of all transfers, to such trust or to similar trusts within such 10-year period exceeds $125,000.

"(2) An asset protection trust is a trust settled by the debtor, in which the debtor has a direct or indirect beneficial interest or under which the trustee may distribute property to or for the benefit of the debtor, and as to which a restriction on the voluntary or involuntary transfer of the debtor's beneficial interest in the trust is enforceable under applicable nonbankruptcy law. For purposes of this subsection, the following are not asset protection trusts:

"(A) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

"(B) Charitable trusts.

"(C) Qualified trusts under section 529 of the Internal Revenue Code of 1986, and other educational trusts, funds, or accounts.".

Mr. DELAHUNT. I thank the Chairman, and I think my final comment prior to the vote was that we haven't protected citizens today because we will be passing a bankruptcy bill that while there is a focus on personal responsibility, there is none on corporate responsibility. But I'm also concerned that we're establishing, for lack or failure to address a particularly egregious abuse that favors the affluent in this country, for failure to do that we're creating two bankruptcy systems, one for the more affluent and one for the rest of America.

So I would hope that all of my colleagues would support me in this change to eliminate what has been described euphemistically as a millionaire's loophole by addressing the issue of so-called asset protection trust. They are trusts that a person creates to shield assets for his or her own benefit. In other words, it's a financial planning to design for the more well to do who are concerned about potential bankruptcy. And currently there is no limit to the value of assets that can be shielded from bankruptcy by this particular device. The amendment is simple. It seeks to limit that value of assets up to $125,000. Now, let me emphasize that this amendment does not adversely affect retired Americans or take anything away from their retirement secretary such as IRAs, et cetera.

It also protects charitable, educational and other trusts set aside for legitimate purposes. As some experts have said, asset protection is just another term for making one self judgment proof. I would suggest that it is simply abuse of the existing system, or better yet, it's nothing more than gaming the current bankruptcy system.

This is a new development that has occurred in the last several years. The loophole is the result of laws that were adopted in five States exempting the so-called asset protection trusts from the Federal Bankruptcy Code. So for those that are interested, take note that in Alaska, Delaware, Nevada, Rhode Island and Utah, all have laws protecting stashed assets, and what's really amazing to me is you don't even have to live there to take advantage of them. Now, that's a good deal if you have a lot of money.

So if we're truly serious about abuse, bankruptcy law should not allow individuals to decide how much they want to keep away from creditors by setting up a self-created trust to do exactly that. That is doing financial planning and taking advantage of the current system to secure advantages.

This loophole is, in my judgment, evidence of how the current system provides two bankruptcy laws, one for the well connected and one for middle class families. Remember, more than half of middle class Americans who declare bankruptcy do so because of massive hospital bills or other catastrophic health care costs that they didn't expect or could not anticipate. Another third of all bankruptcies are the result of job losses. Nonetheless, the bill before this Committee today creates a special rule for millionaires. Whether the assets are villas or yachts or sport cars, investments or just suitcases full of cash, they're untouchable in the bankruptcy reorganizations of the well to do, who utilize these asset protection trusts, and neither creditors nor the courts can reach them.

The right way to address this bill is to put forth—this problem rather, is to put forward a bankruptcy protection bill with one standard, one standard for everyone that treats all Americans the same regardless of income and regardless of circumstances. You know, what message does it send when Congress submits middle class debtors to a means test irrespective of State law, while permitting the wealthy to continue to place huge sums out of reach of creditors. I don't believe we want to do that. And we can address it here today.

And I would hope that my colleagues on the other side of the aisle would listen, would reflect. I dare say if this particular amendment was passed and it was returned to the Senate, you would have your bill, and at the same time we would eliminate this mechanism for abuse from the system as it now is constituted and we could hold our heads high. I see my time has expired.

Chairman SENSENBRENNER. That it is.

The gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman. In fact, I appreciate your clarifying the State from which I come.

[Laughter.]

Mr. CANNON. This is an issue that has been debated in the Senate and soundly defeated. And let me just talk a little bit about background here. The Bankruptcy Code, section 541, generally defines what assets constitute property of the bankruptcy estate that can be made available to pay the claims of creditors. It also specifies what assets do not constitute property of the bankruptcy estate. For example, section 541(c)(2) provides that a trust is not property of the estate if the debtor's access to the trust is restricted. Thus, for example, a spendthrift trust, which is defined as a trust by the terms of the trust or by statute, a valid restraint on the voluntary and involuntary transfer of the interest that the beneficiary's imposed—pardon me for all the "legalese" but it gets to the point of where we're going I think—is established by the debtor before filing for bankruptcy relief, it would not constitute the property of the bankruptcy estate.

Under the Restatement of Trusts, a self-settled trust is a trust created by a person for his or her own benefit with a provision restraining the voluntary or involuntary transfer of person's interest, so the Restatement provides that such trust can be pierced by the person's creditors. Nevertheless, five States, Alaska, Delaware, Nevada, Rhode Island and Utah, have enacted laws that permit their citizens to establish self-settled trusts where they can place their assets outside the reach of their creditors including their homes as permitted under Delaware law. The State laws provide that property placed in such trust cannot be reached by creditors with exceptions that vary by State. Some except child, spousal support claimants and persons who suffered injury or death as a result of the settler's actions, for example.

It also appears that fraudulent transfers made by the settler to an asset protection trust may be avoided under applicable State laws as well as pursuant to Bankruptcy Code section 548. Alaska appears to allow such transfers to be set aside upon the showing of actual fraud. Delaware, on the other hand, appears to allow such transfers to be set aside based on either actual or constructive fraud, including a transfer of property for less than reasonably equivalent value which is similar to Bankruptcy Code section 548.

The bill as amended closes the self-settled trust loophole. An amendment by Senator Talent authorizing the bankruptcy trustee to avoid any transfer of property by a debtor to a self-settled trust made within 10 years preceding the filing—which is the same period that the amendment suggests, by the way—preceding the filing of the debtor's bankruptcy case if the debtor is a beneficiary of such trust, and the debtor made such transfer with actual intent to hinder, delay or defraud a creditor.

So what is an asset protection trust or self-settled trust? Neither the Internal Revenue Code nor the entire United States Code contain any reference to either of these terms. This is a matter of State law. To the extent that a—or an asset protection trust is a creature of State law, then this issue inherently involves States rights. The States should be able to determine for themselves what property their citizens can protect from the claims of creditors. This is not only implicit in the homestead exemption, but with regard to the status of all types of items of property including household goods and furnishings, livestock, family Bibles and church pews is determined under State law to be exempt property.

For example, according to CRS, Delaware only gives its citizens $5,000 homestead exemption, while Utahans only have a $10,000 homestead exemption. Why should these States be allowed—why shouldn't these States be allowed to have their citizens provide for their retirement nest egg by placing their assets in a trust fund, when in other States like Texas you have a huge homestead exemption?

States that have authorized asset protection trusts appear to be extremely supportive of them. Alaska's legislature announced that it had hoped to become the financial service center for the world as s result of authorizing such trusts. So why do we have such outrage? Senator Kennedy successfully had a provision included in the pending bankruptcy legislation, section 224, that protects up to $1 million in IRAs and other similar pension plans. An asset protection trust may be the only way for some individuals who live in a State with a nominal homestead exemption and no IRA exemption to protect assets from creditors. The issue should be studied and determined. We need to work on this. The fact is if we're going to move a bill out today, this is an issue that has been dealt with, has been debated, has been argued. It's been considered. The bill has been amended to include the basic provisions here, and I urge my colleagues to vote no on the amendment.

Thank you, Mr. Chairman. I yield back.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. WATT. Mr. Chairman and Members, all of what Mr. Cannon said would probably be a lot more rational if the underlying bill didn't set a national standard for homesteads too, and so we set a national standard for homestead exemptions at $125,000, yet what he's saying is that people ought to be able to be allowed to pour all of their non-homestead assets into these trusts and have them exempt because it's a matter of State law.

That is just absolutely inconsistent. I mean if you're going to have a national standard on homestead exemptions, it seems to me rational that you would have a national standard on non-homestead assets, and I think that's the only thing that Mr. Delahunt's trying to get at here. It is interesting that when some of us were trying to protect States' rights in many, many, many other contexts, it didn't mean a hill of beans to the people on this Committee. Yet when it's convenient to hide behind States' rights, all of a sudden we're out here talking about States' rights again, and you know, I thought we had this debate on the homestead. We resolved this debate on the homestead. So why would we have a different standard for non-homestead assets than we have for homestead assets?

I for the life of me can't understand that. So I would just encourage my colleagues to at least try to be consistent about this stuff, and encourage them to support this amendment. And I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Massachusetts, Mr. Delahunt. Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it. The amendment's not agreed to.

Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. A recorded vote is ordered. Those in favor of the Delahunt amendment will, as your name are called, answer aye. Those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Yes.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
[No response.]
The CLERK. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes? Gentleman from Florida, Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Chairman SENSENBRENNER. Gentleman from Tennessee, Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Chairman SENSENBRENNER. Gentleman from Florida, Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Chairman SENSENBRENNER. Gentleman from North Carolina, Mr. Watt?

Mr. WATT. I reported. I shouted out from the back and I wasn't clear whether she got it.

The CLERK. Mr. Chairman, I did not have Mr. Watt.

Mr. WATT. Aye.

The CLERK. Mr. Watt, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 10 ayes and 15 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Mr. Chairman, I have an amendment, Berman-Meehan amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to S. 256 offered by Mr. Berman and Mr. Meehan. Page 194, after line 2, insert the following (and make such technical and conforming changes as may be appropriate): section 322——

Mr. BERMAN. Mr. Chairman, I ask unanimous consent——

Chairman SENSENBRENNER. The clerk will continue to read until some of the Members get the amendment.

The CLERK. Exemption for medically distressed debtors. Section 522 of title XI, United States Code as amended by sections 224, 308 and 322, is amended by adding at the end the following: R(1), for a debtor who is a medically distressed debtor, if the debtor elects to exempt property——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from California will be recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Berman and Mr. Meehan

Page 194, after line 2, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. 322A. EXEMPTION FOR MEDICALLY DISTRESSED DEBTORS.

Section 522 of title 11, United States Code, as amended by sections 224, 308, and 322, is amended by adding at the end the following:

''(r)(1) For a debtor who is a medically distressed debtor, if the debtor elects to exempt property—

''(A) under subsection (b)(2), then in lieu of the exemption provided under subsection (d)(1), the debtor may elect to exempt the debtor's aggregate interest, not to exceed $150,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; or

''(B) under subsection (b)(3), then if the exemption provided under applicable law specifically for such property is for less than $150,000 in value, the debtor may elect in lieu of such exemption to exempt the debtor's aggregate interest, not to exceed $150,000 in value, in any such real or personal property, cooperative, or burial plot.

''(2) In this subsection, the term medically distressed debtor' means a debtor who, in any consecutive 12-month period during the 3 years before the date of the filing of the petition—

''(A) had medical expenses for the debtor, a dependent of the debtor, or a member of the debtor's household that were not paid by any third party payor and were in excess of 50 percent of the debtor's household income for such 12-month period;

''(B) was a member of a household in which 1 or more members (including the debtor) lost all or substantially all of the member's employment or business income for 4 or more weeks during such 12-month period due to a medical problem of a member of the household or a dependent of the debtor; or

''(C) was a member of a household in which 1 or more members (including the debtor) lost all or substantially all of the member's alimony or support income for 4 or more weeks during such 12-month period due to a medical problem of a person obligated to pay alimony or support.''.

Mr. BERMAN. Thank you, Mr. Chairman.

Basically this is about creating a uniform Federal floor for homestead exemptions of $150,000 or less, $150,000 basically for medically distressed debtors. The statistics clearly point out that there have been large increases in medical debt and bankruptcy cases, caused by medical debts, coupled with significant increases in real estate prices, and that has led to a new and rapidly-growing problem ignored by this bill.

This amendment would create a uniform Federal floor for homestead exemptions of $150,000, applicable only to debtors who have had very substantial medical debts or a very substantial loss of income due to medical problems, losses of over 50 percent of household income. This amendment would simply permit those homeowners who have suffered serious medical problems under the standards of this bill, with losses again over 50 percent of household income to file for bankruptcy without having to give us homes where they have $150,000 or less of equity.

The notion of forcing people out of their homes after illnesses or accidents is made more outrageous by the fact that this bill does nothing to deal with the handful of States where debtors of all kinds, famous sports figures, physicians who drop their medical malpractice insurance, real estate tycoons, can save millions of dollars in homestead. Americans, particularly those who face serious medical problems, are entitled to a more evenhanded justice. Families who face insurmountable debt problems following serious medical problems are confronted with the fact that they can obtain relief from their debts and bankruptcy only if they give up their homes. In nearly half of all States homestead exemptions are under $25,000. There are no escapes for families with high debts and home equity that exceeds that for instance very low homestead exemption. In a Chapter 7 bankruptcy case a family with equity greater than the State exemption limits, which in some States are under $10,000, must give up its home. In Chapter 13 the family must pay the creditors the amount equal to the greater equity which it can usually not afford. A family should not have to lose its home to obtain relief from debts caused by serious medical problems.

The amount of equity a homeowner can protect in bankruptcy has not kept up with the rise in home prices. While the value of even modest homes climbs in some areas, the protection of the law does not, leaving even people of modest means with a choice between a home or discharging medical debts. This falls particularly hard on elderly and disabled homeowners who often live solely on Social Security benefits. With incomes of 800 or $1,000 per month they could live in their current homes which may be paid off or have low monthly costs, but if they are forced out of these homes, they cannot afford to rent a decent place to live, and in fact, these homeowners would have no bankruptcy relief available to them.

The purpose of this amendment is to rectify it.

Mr. CONYERS. Would the gentleman yield?

Mr. BERMAN. I'd be happy to yield.

Mr. CONYERS. I want to commend the gentleman for this amendment because it specifically covers the problem of people with severe health care, and the recent study in bankruptcy revealed that one half of the people forced into bankruptcy is because of medical bills or immediate hospital costs, and I wanted the gentleman to know that the gentlelady from California, Zoe Lofgren, is entirely supportive of this amendment and will submit her own statement in support of it. She's unduly delayed and in——

Chairman SENSENBRENNER. Without objection, the statement of Ms. Lofgren will appear in the record at this time.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Many of us have loved ones who have battled a grave illness or serious injury. If you've ever had the misfortune of being in that situation, you know that it is an incredibly stressful experience, both on the mind and the pocketbook. But incredibly, this bill chooses to treat those families the same as spendthrifts.

A recent study conducted by professors at Harvard Medical and Law Schools demonstrated that about half of all personal bankruptcies today can be traced to severe medical illnesses or injuries. Among those, average unreimbursed medical costs totaled nearly $12,000. Nevertheless, the study found that these families did everything they could to pay their medical bills and avoid bankruptcy. One in five skipped meals. One-third had their electricity cut off. Almost half lost their phone service.

Incredibly, these families also cut back on needed medications. In fact, half went without needed prescriptions, and a full 60% went without a needed doctor appointment.

I cannot understand why the proponents of this bill want to treat these families the same as irresponsible spendthrifts. They are hard-working, middle class Americans who have had the misfortune of facing illness without adequate medical insurance. Yet this bill treats them the same as those who went on a spending spree. I think we should distinguish between a parent who has to pay for their child's cancer treatments and a 22-year-old who bought too many plasma screen televisions.

I had planned to offer an amendment today that would have exempted from the harsh means test those families facing bankruptcy due to a serious medical hardship. Unfortunately, I was not able to do so because of a conflicting commitment. However, I have no doubt that the Majority would have rejected that amendment just as they rejected Rep. Berman and Rep. Meehan's medical homestead amendment and every other reasonable amendment offered to this bill.

I am extremely disappointed that the Committee chose to abrogate its responsibilities and ignore families struggling to make ends meet in the face of a medical crisis. Unfortunately, once again, the power and influence of large corporations took precedence over average Americans in the Republican-controlled Congress.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. BERMAN. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. Gentleman from Utah. Gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Let me just begin by saying we are, everyone on this Committee is extraordinarily aware of the particular burden that medical problems cause and the resulting bankruptcies. But if I could clarify a couple of things, Mr. Berman, by asking a couple of questions.

As I read this, this overrides State law and creates a new Federal exemption for people that have medical emergencies that cause bankruptcy; is that right?

Mr. BERMAN. And I amends the Federal Bankruptcy Bill that will become Federal bankruptcy law, to provide a $150,000 equity exemptions so that people—for those people who have over 50 percent of their income lost because of medical bills or because of an injury that costs——

Mr. CANNON. Right. But that would preempt State laws in those cases that have a different homestead?

Mr. BERMAN. For purposes of bankruptcy, not for purposes of other issues, just for purposes of bankruptcy, which is a Federal issue.

Mr. CANNON. Certainly bankruptcy is, but bankruptcy has always recognized homestead as a State issue, and the effect of this, if I understand it—I'm just looking it over now—but the effect would be that a couple filing jointly for bankruptcy would have a $300,000 exemption as I read your language.

Mr. BERMAN. $150,000.

Mr. CANNON. But if you had a joint filing would that not double to 300,000?

Mr. BERMAN. No, no.

Mr. CANNON. Can you help me with where the language is that makes it the single, because you talk about the debtor's aggregate interest.

Mr. BERMAN. You have to get back to the base bill. Why don't we do it the other way around? Why don't you show me why it would?

Mr. CANNON. Okay. We'll——

Mr. BERMAN. You got a base bill——

Mr. CANNON. I actually don't think I have the burden. It seems to me—and I'll let just the Members of the Committee make the judgment—that, as I read it very quickly here——

Mr. BERMAN. It deals with household and the home equity. It's not, in other words it's about——

Mr. CANNON. Reclaiming my time, we disagree and we'll just have to have people exercise their judgment on that.

It also—you know, people sometimes get ill and then get healthy and they overcome their problems.

Mr. BERMAN. Yeah, that's a real problem.

Mr. CANNON. I don't see how we—well, it is a wonderful thing that happens I guess occasionally and maybe even often. We agree, I might say, that home prices have gone up, but the States have the responsibility under the homestead relationship with the Bankruptcy Act to deal with that.

And just I'd like to submit for the record, Mr. Chairman, a letter to the Honorable Charles E. Grassley, from the U.S. Department of Justice, signed by Mr. Will Moschella, that relates to the study that Mr. Conyers referred to, and if I could just read one paragraph of that——

Chairman SENSENBRENNER. Without objection. The letter will be included in the record.

[The material referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 10, 2005

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter, dated February 5, 2005, requesting information from the Executive Office for United States Trustees (EOUST) concerning medical debts of those who file for bankruptcy protection and the recently published study in the Health Affairs journal ("Market Watch: Illness and Injury As Contributors to Bankruptcy").

It is the practice of the U.S. Trustee Program (USTP) not to comment on data collected and analyses performed by outside researchers for reasons that include difficulties in verifying their data and research methodologies. It is noted in the cited study of 1,771 filers that very broad definitions of "medical bankruptcies" are used. The authors considered a "Major Medical Bankruptcy" to include cases in which debtor reported any of the following: illness or injury as a reason for filing bankruptcy; uncovered medical bills exceeding $1,000 in the past two years; loss of two weeks of work-related income due to illness or injury; or mortgage of home to pay medical bills. The authors considered "Any Medical Bankruptcy" to include cases containing any of the factors above or birth or death in the debtor's family or addiction or uncontrolled gambling.

Enclosed is a description of related USTP data and a summary of findings from analysis of a similar but larger sample of bankruptcy cases (5,203) utilizing data from official records during approximately the same time period as the study cited above. It should be noted that reported credit card debt also may reflect medical-related debts, but are not shown in these findings.

In general, the data describing medical-related expenses contained in official documents filed by chapter 7 debtors reveal that slightly more than 5 percent of their general unsecured debt is medical-related. The conclusion that almost 50 percent of consumer bankruptcies are "medical related" requires a broad definition and generally is not substantiated by the official documents filed by debtors.

The Honorable Charles E. Grassley
Page Two

We hope this information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

Summary of USTP Data and Findings on Medical Debt

USTP Data:

The USTP database contains 5,203 no asset chapter 7 cases that were closed between 2000 and 2002. The database includes cases filed in 48 states, Washington D.C. and Puerto Rico proportionate to chapter 7 filings in each location. The database contains no cases from North Carolina and Alabama, because those states are served by Bankruptcy Administrators. Nearly all of these cases had been filed about four months prior to closing.

On each petition we reviewed Schedule F of the petition to see if any medical debts were listed. This would include where the creditor was a doctor, hospital or other treatment facility, medical collection agency, or if the debt was in any way identifiable as being medical in origin.

This accounting would not have identified medical debts charged on credit cards, placed with certain collection agencies, or paid prior to the bankruptcy filings.

Findings:

<u>All Debtors (N = 5,203)</u>:

- 54% listed no medical debt.
- Medical debt accounted for 5.5% of the total general unsecured debt.
- 90.1% reported medical debts less than $5,000.
- 1% of cases accounted for 36.5% of the medical debt
- Less than 10% of all cases represent 80% of all reported medical debt.

<u>Cases Reporting Medical Debts (N = 2,391)</u>:

- Among the debtors reporting medical debt, the average medical debt was $4,978 per case.
- 78.4% reported medical debts below $5,000 (average of $ 1,212 for this group).
- 21.6% reported 80.9% of the total medical debt.
- Medical debts accounted for 13.0% of the total general unsecured debt for those reporting medical debt.

Mr. CANNON. "In general, the data describing medical-related expenses contained in official documents filed by chapter 7 debtors reveal that slightly more than 5 percent of their general unsecured debt is medical-related. The conclusion that almost 50 percent of consumer bankruptcies are 'medical related' requires a broad definition and generally is not substantiated by the official documents filed by debtors."

So I——

Mr. BERMAN. Will the gentleman yield?

Mr. CANNON. Yes.

Mr. BERMAN. Two points. One, although the gentleman is wrong on the larger issue, he, it turns out, is correct. If they are filing jointly, then each gets the $150,000 exemption, so I wanted to clarify that.

And who wrote that report? That's a very familiar name.

Mr. CANNON. Yes. I think everybody here would know Will Moschella——

Mr. BERMAN. Used to work on the majority side, right?

Mr. CANNON. He certainly, because we have a Republican President who has—who names people to political positions, but I think everyone here would also recognize that Mr. Moschella is a very thoughtful and reasonable person and he's gone down on record, so if you disagree with the conclusion you might want to check with him.

Mr. Smith, did you want——

Mr. SMITH OF TEXAS. If the gentleman will yield just for a minute.

Mr. Chairman, I just wanted to add a couple of other points. One is that this amendment was offered in the Senate last week and was defeated on a bipartisan vote of 58–39, so that's a good example of an amendment that received bipartisan opposition. Second of all, it does override States' rights. And third of all, as the Chairman has pointed out repeatedly today, this fractures the very closely crafted compromise that existed to try to get this bill through today.

Mr. BERMAN. Does the gentleman promise——

Mr. SMITH OF TEXAS. And for those reasons I'd oppose the amendment as well.

Mr. CANNON. Reclaiming my time I urge my colleagues to vote no on the——

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The time of the gentleman has expired. Gentleman from Massachusetts.

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I just can't allow that comment about this overrules States' rights. I think it was my friend from Texas that made that comment, when over the course of the past months, years, this Committee has preempted State law in terms of torts, securities litigation, they want to do it in terms of medical malpractice. They want to do it in terms of whatever—class actions. I mean with all due respect to my friend from Texas, give me a break. I mean that argument, that dog just simply doesn't hunt, as the Chairman of the Crime Subcommittee would understand.

Mr. WATT. Would the gentleman yield?

Mr. DELAHUNT. And I'll yield to my friend from North Carolina.

Mr. WATT. Isn't it true that this bill already sets a national standard for bankruptcy—for homesteads? It doesn't do that?

Mr. BERMAN. No. It allows——

Mr. WATT. It caps it, doesn't it?

Mr. BERMAN. No, it allow—well, it does in certain situations, but basically——

Mr. WATT. It caps it I mean.

Mr. BERMAN. In limited situations, but it allows States with enormous homestead exemptions that allow wealthy people to avoid paying off their debts and still keep huge mansions in those States like I think Texas, to continue to do so.

It's just another one of the deficiencies in a bill which I actually am happy is being pushed through in the fashion that it is, because it—in a perverse way it reminds me of why I'm a Democrat.

Mr. DELAHUNT. The time is still mine, and——

Ms. JACKSON LEE. Mr. Delahunt?

Mr. DELAHUNT. I could always count on the gentlelady from Texas, my friend, Sheila Jackson Lee. I yield to her what time I have left.

Ms. JACKSON LEE. You certainly can, Mr. Delahunt. Thank you and you were amazed at the comment regarding States' rights. I'm amazed at the comments that seem to suggest a particularly orchestrated process that we can't do anything to improve the legislation because there's some sort of external commitment to riding the backs of the Senate. And I've always had the understanding that these are two distinct bodies with two distinct lines of reasoning. And if this is all that we're doing in the Judiciary Committee, then shame on us again.

I think the gentleman's amendment is a very thoughtful amendment, and the reason is it is well documented that the middle class are most burdened in the instances of bankruptcies by catastrophic illnesses. It is clear.

Now, we can either concede today and ignore this amendment, and say that what we want to do is to put every family out in the streets, and continue then the pathway of destruction, or we can be reasoned and establish ourselves as an independent thinking body and support Mr. Berman's amendment. I think Mr. Meehan—I'm not sure—is that on that amendment.

Mr. MEEHAN. Yes.

Ms. JACKSON LEE. And make a very good point about what this bill should be standing for. It's helping people rebuild their lives, not helping people destroy their lives.

With that, I yield to the distinguished gentleman his time if he desires to have it. Mr. Delahunt, I yield back to you if you desire to have it.

Chairman SENSENBRENNER. The question is on the amendment.

Mr. MEEHAN. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. Who is moving?

Mr. MEEHAN. It's me.

Chairman SENSENBRENNER. Oh, the other gentleman from Massachusetts is recognized for 5 minutes.

Mr. MEEHAN. I am also a cosponsor of this amendment, and I was out at another hearing when the amendment was brought up.

I want to correct something that Mr. Smith said, and this is not the same amendment that was debated in the Senate. In the Senate it was a quarter, the standard was a quarter of the income on medical bills. This is one-half a person's income towards medical bills.

We're saying that medical costs are not spending sprees, not personal irresponsibility, but the single largest causes of bankruptcy. About half of the filers cite medical costs as a major factor of their bankruptcy. The average unreimbursed medical costs were $12,000. 45 million people in America go without health insurance every day. They are one accident or one illness away from financial ruin. But as this study found done by Harvard University, most people whose health care costs drove them to bankruptcy were uninsured but still had thousands of dollars in medical bills.

I believe that the Congress's failure to expand health care coverage in America and bring down health care costs are one of the reasons why medical bankruptcies have increased 2,200 percent since 1980. This amendment inserts a teeny bit of compassion and common sense to this bill. For debtors who are medically distressed, it provides a modest homestead exemption. Under this bill wealthy people can move to States with unlimited homestead exemptions, declare bankruptcy and shield their assets, even if they have mansions. But a family who has someone who falls ill can't afford the hospital bills, would lose their modest home, and that's entirely unfair. This amendment is narrowly tailored to apply only to—with majority medical expense.

To be defined here as medically distressed, you either have to be out of work for more than a month due to an illness in your family, or have medical bills that are more than 50 percent of your household income, which is different than the Senate bill. The amendment gives a reasonable household exemption of $150,000 for medically distressed debtors.

Nearly half of all States, the homestead exemption is less than 25,000, and several States don't have any homestead exemption. So this bill sets the floor at 150,000 in home equity, and despite what proponents of this bill would like to suggest, most people who file for bankruptcy because of medical expenses are not irresponsible. They're families who have had complications with the birth of a child. They're working men and women caring for a sick spouse or an elderly parent, or they're seniors who are living on a fixed Social Security check.

So I support this amendment, would urge my colleagues to support the amendment. And I yield back the balance of my time, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from California, Mr. Berman. Those in favor will say aye.

Opposed, no.

The noes appear to have it. rollcall is ordered. All those in favor of the Berman amendment will as your names are called answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?
[No response.]
The CLERK. Mr. Gallegly?
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
[No response.]
The CLERK. Mr. Lungren?
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no. Mr. Inglis?
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
[Pause.]
The CLERK. Oh. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?

Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
[No response.]
The CLERK. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote? Gentleman from Wisconsin, Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 13 ayes and 18 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments? The gentleman from New York, Mr. Nadler.
Mr. NADLER. Mr. Chairman, I have an amendment at the desk. We'll try again on the redrafted amendment No. 1 that hopefully will satisfy Mr.——
Chairman SENSENBRENNER. The clerk will report.
Mr. NADLER.—Cannon.
Chairman SENSENBRENNER. Second attempt.
The CLERK. Amendment to S. 256 offered by Mr. Nadler. Page 210, after line 13, insert the following (and make such technical and conforming——
Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from New York will be recognized for 5 minutes.
[The amendment follows:]

Amendment to S. 256

Offered by Mr. Nadler

Page 210 after line 13, ~~At an appropriate place~~, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. 333. NONDISCHARGEABILITY OF DEBTS INCURRED THROUGH VIOLATIONS OF CIVIL RIGHTS LAWS.

(a) DEBTS INCURRED THROUGH VIOLATIONS OF CIVIL RIGHTS LAWS.—Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

(1) in paragraph (18) by striking "or" at the end;

(2) in paragraph (19) by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(20) that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor (including any court-ordered damages, fine, penalty, or attorney fee or cost owed by the debtor), that arises from—

"(A) the violation by the debtor of any offense described in section 244 (relating to discrimination against a person wearing the uniform of the Armed Forces), section 245 (relating to federally protected rights), section 246 (relating to the deprivation of relief benefits), section 247 (relating to damage to religious property; obstruction of persons in the free exercise of religious beliefs), or section 248 (relating to the freedom of access to clinic entrances), of title 18, United States Code;

"(B) an offense under State law that consists of conduct that would be a civil rights crime described in subparagraph (A) of this paragraph;

"(C) a violation under section 1983 of title 42 of the United States Code, or

"(D) the intentional actions of the debtor that violate a valid court order enforcing a civil rights law described in subparagraphs (A) or (B) of this paragraph.".

(b) RESTITUTION.—Section 523(a)(13) of title 11, United States Code, is amended by inserting "or under the criminal law of a State" after "title 18".

Mr. NADLER. Thank you. Mr. Chairman, I'll be brief. I started describing this amendment earlier before the point of order.

This amendment would make debts arising from civil rights violations nondischargeable. It includes in the amendment the civil rights violations listed in the Federal Criminal Code, any civil judgment arising under civil rights violation including a 1983 violation action that is an action for violation of civil rights under color of law, or an intentional violation of a valid court order enforcing civil rights law described in the amendment.

It also includes offenses under State law that consists of conduct that would be a civil rights crime described in the Federal Criminal Code.

Finally, it repairs an omission in the current code that makes fines and restitution ordered under the Federal Criminal Code nondischargeable, but not under State law. My amendment would clarify that that includes fines and restitution ordered under State law.

So if you violate the right to vote, the right to work, the rights of a person wearing the uniform of the United States military, the right to the free exercise of religion, freedom of—access to clinic entrances or any other federally protected rights, you will not be able to abuse the Bankruptcy Code either to escape your debts or to force your victims to chase you across the country through bankruptcy courts trying to collect lawful judgments.

We know that that is now a common strategy, and even where it fails, the uncertainty in the law gives tort fees as the opportunity to inflict more damage and more expense on the victims through abuse of the Bankruptcy Code.

Mr. Chairman, this bill, the underlying bill greatly expands the kinds of debts that are deemed nondischargeable. It makes nondischargeable even small cash advances on credit cards prior to the filing of a case. It may not be enough money to keep your kids in Huggies, but it's enough to be nondischargeable. We're protecting the helpless credit card companies. If you use your credit card to pay your taxes online, something the IRS has been urging us to do for years, that would become a nondischargeable debt. We seem to have found ways to make all sorts of debts nondischargeable in this bill.

I would hope that with this amendment we could go on record and make the law crystal clear that if all these other things can become nondischargeable, then debts incurred as a result of the deliberate violations of Federal or State law to violate people's civil rights should also be nondischargeable so that you cannot violate people's civil rights and use the bankruptcy courts to evade your responsibilities under the law.

Thank you, Mr. Chairman.

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I won't use the 5 minutes. My colleague indicated that he wouldn't be real extensive in his arguments, so I won't be either. I'll keep mine brief.

I would rise in opposition to this amendment. This really, this amendment is just a revised version of the Schumer amendment, which has been responsible for scuttling the bankruptcy—passage of the entire bankruptcy bill for some time now. And it was defeated, this amendment was defeated in the Senate last week by a vote of 46 yeas and 53 noes.

The Bankruptcy Code already prevents the discharge of most types of debts resulting from violent or destructive activities. Current law already clearly applies to willful and malicious acts of violence committed by, for example, pro-life activists at an abortion clinic, that would result in injury either to a person or to property. In fact, there is no reported case specifying otherwise. CRS, for example, has stated that the specific intent requirement necessary to establish a violation of face would arise from behavior comparable to an intentional tort, and thus would be nondischargeable under 11 USC 532(a)(6). That provides that a debt for willful and malicious injury by a debtor to another entity or to the property of another entity is nondischargeable.

So in other words, willful or wanton acts, malicious acts, would already be nondischargeable under the Bankruptcy Code, so this amendment is unnecessary and really adds nothing. And as I indicated originally, this was the very amendment which scuttled the passage of this very important legislation before, so I would urge my colleagues to vote no.

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman yield back?

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Ohio yield back? Gentleman from Ohio, do you yield back?

Mr. CHABOT. I yield back, yes.

Mr. BERMAN. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from California.

Mr. BERMAN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. BERMAN. Yield to the gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, the remarks that we just heard from the distinguished Chairman of the Constitution Subcommittee really don't bear on this amendment. It is true the current code makes nondischargeable malicious and violent torts, but we're not talking necessarily about malicious and violent torts. We're talking about deliberate violations of civil rights of all kinds. And, yes, this would include within it some of what the Schumer amendment in the Senate—which I would remind the distinguished Chairman originated in this Committee a number of years ago as the Nadler amendment before they took it up in the Senate—would cover.

But this considerably broader and it is saying that if you deliberately the civil rights of someone else and there is a—and violates the law, the Federal or State law, and there's a judgment against you, you cannot abuse the bankruptcy courts to get rid of that judgment.

Now, the argument that this scuttles the bill, that's not an argument to the policy. The bill ought to say if credit cards debt incurred to pay your taxes on line is nondischargeable, then certainly you shouldn't be able to get rid of a court judgment against you for a deliberate offense against someone else's civil rights by use of the Bankruptcy Code.

The principle is sound, and we are to improve the bill, which is a bad enough bill, but make it a little better, by adopting this amendment.

I yield back. I thank the gentleman and I yield back to him.

Chairman SENSENBRENNER. The gentleman from California yield back? The time belongs to the gentleman from California.

The question is on the Berman—excuse me—the Nadler amendment. Now, this is the Nadler amendment, it's not the Schumer amendment. Those in favor will say aye.

Opposed, no?

The noes appear to have it. The noes—okay, a rollcall will be ordered. Those in favor of the Nadler amendment will as your names are called answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]

The CLERK. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
[No response.]
The CLERK. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
[No response.]
The CLERK. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
[No response.]
The CLERK. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. Gentleman from Arizona, Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Chairman SENSENBRENNER. Gentlewoman from California, Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? If not, the clerk will report. Gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Aye.

The CLERK. Mr. Scott, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The clerk will try again to report.

The CLERK. Mr. Chairman, there are 11 ayes and 17 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman. I have an amendment at the desk, No. 004.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to S. 256 offered by Mr. Scott of Virginia. Page 13, after line 23, insert the following (and make such technical and conforming changes as may be appropriate): E, subparagraphs (a) through (c) shall not apply——

Chairman SENSENBRENNER. Without objection the amendment is considered as read, the gentleman from Virginia will be recognized for 5 minutes.

[The amendment follows:]

F:\JH\S256ES\SCOTT.004

Amendment to S. 256

Offered by Mr. Scott of Virginia

Page 13, after line 23, insert the following (and make such technical and conforming changes as may be appropriate):

"(E) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing if ~~the~~ a substantial portion of the indebtedness was incurred as a result of illness of the debtor, a dependent of the debtor, or the debtor's spouse if not a dependent of the debtor.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, the rest of the reading would have said that the court may not dismiss or convert a case based on any form of means testing if the substantial portion of the indebtedness was incurred as a result of illness of the debtor, a dependent of the debtor or the debtor's spouse if not the dependent of the debtor.

Mr. Chairman, we're talking about bankruptcy abuse. Bankruptcy filings have increased lately in recent years, and some of the people who file for bankruptcy haven't been financially responsible, but the more likely explanation is that the consumer bankruptcy results were something beyond their control such as a divorce, major illness or job loss.

The truth is that many people are just one paycheck away or a job loss away or an uncovered medical catastrophe away from bankruptcy. We know at the present time there are about 1.5 million people who go into bankruptcy every year. Half of those people who go into bankruptcy go into bankruptcy because of medical bills. About three-fourths of those who go into bankruptcy because of medical bills even have insurance. But nonetheless the explosion of health care costs have added such a burden to these families that they've ended up in bankruptcy.

Mr. Chairman, if the purpose of the legislation is to deal with spendthrifts who are abusers of credit, we ought to distinguish them from the hard working Americans, basically middle class working families who have health insurance, or those on the right of the margin who wish they had health insurance, and those who are irresponsible in acquiring debt.

Mr. Chairman, if we don't adopt this amendment we'll be sending the message that if you get sick, you're abusing the system. Mr. Chairman, we need to make sure that individuals who are afforded the protection of Chapter 7 bankruptcy, if a substantial portion of their bills were incurred as a result of illness, and I would hope we would adopt the amendment.

Chairman SENSENBRENNER. Gentlemen from Utah.

Mr. CANNON. Thank you, Mr. Chairman. If I might ask, Mr. Scott, on line 3 it says "on any form of means testing if, the a substantial portion," but I take it the comma and the "the" should be stricken? I don't know that it makes sense otherwise.

Mr. SCOTT. Yes, Mr. Chairman. I think the after—"if" the comma should not be there.

Mr. CANNON. And the "the" should not be there either?

Mr. SCOTT. If the—right.

Mr. CANNON. So it means testing——

Chairman SENSENBRENNER. Without objection the amendment is modified.

Mr. SCOTT. To delete the comma and the "the" on line 3.

Chairman SENSENBRENNER. Gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Again we're dealing with issues that are similar to what we just dealt with prior to the last amendment, and I'm not going to belabor it except to encourage my—Members of the Committee to vote against this amendment. It prevents the—which prevents the case filed by a debtor from being dismissed under the means test. The special circumstances provision in section 102(a) addresses the concerns that are raised by this amendment I believe, and the amendment does not address circumstances where the debtor is currently healthy, and what happens if the debtor's a millionaire? That we're not dealing with—that's been raised significantly here.

This is on page 12 of the bill. The paragraph beginning with line 5 deals with those special medical—those circumstances such as a serious medical condition which I think deals with this issue appropriately.

Mr. SCOTT. Would the gentleman make that citation again, please?

Mr. CANNON. Yeah. On page 12 of the printed bill, it's a—line 5, capital B(i) or 1, and it's really line 7 that says "such as a serious medical condition" is one of those special circumstances. So I think that we've actually dealt with this issue in this bill. So I would encourage the Members of the Committee to vote against this amendment, and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the adoption of the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it and the amendment is not agreed to. Are there further amendments?

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. I have an amendment at the desk, 003.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. SCOTT. And, Mr. Chairman, under the—in light of the actions of the majority I'd want to take up 005 at the same time and take them en bloc.

Chairman SENSENBRENNER. The clerk will report amendments 003 and 005, and while the clerk is doing that, the staff will distribute both amendments. The clerk will read.

The CLERK. Amendment to S. 256 offered by Mr. Scott of Virginia. Page 13, after line 23, insert the following (and make such technical and conforming changes as may be appropriate:) E, subparagraphs (a) through (c) shall not apply and the court may not dismiss or——

Chairman SENSENBRENNER. Without objection the amendments will be considered en bloc and without objection the amendments will be considered as read, and the gentleman from Virginia is recognized for 5 minutes.

[The en bloc amendments follow:]

Amendment to S. 256

Offered by Mr. Scott of Virginia

Page 13, after line 23, insert the following (and make such technical and conforming changes as may be appropriate):

"(E) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if a substantial portion of the indebtedness is due to business losses incurred by a spouse who has died or deserted the debtor.

Amendment to S. 256

Offered by Mr. Scott of Virginia

Page 13, after line 23, insert the following (and make such technical and conforming changes as may be appropriate):

"(E) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the substantial portion of the indebtedness was a result of unforeseen loss of employment through no fault of the debtor.

Mr. SCOTT. Thank you, Mr. Chairman. 003 allows a spouse to file for bankruptcy if their—a person to file for bankruptcy if their spouse—if a substantial of the bills are due to business losses incurred by a spouse who has died or deserted. For example, if a wife co-signs some business loans on behalf of her husband, and the husband—the business fails because the husband died or disappears and deserts the wife, the wife is left holding the bag and bills she can never pay.

The bill would deny bankruptcy relief for the spouse if the person is making more than the median amount, say, $50,000. If they cosigned $500,000 worth of bills that spouse would be left holding the bag and unable to declare bankruptcy. If they can pay a couple hundred dollars a month, $10,000 over 5 years, they would not be able to file bankruptcy. That essentially means that everything over food and rent would be garnisheed from the person because they had the bad judgment to co-sign their spouse's business loans. It may be bad judgment but it's certainly not abusive.

The other amendment, Mr. Chairman, is if your bills are due, if you've gotten into financial difficulty because you lost your job through no fault of your own, you shouldn't be denied the opportunity to file for bankruptcy. After Enron and WorldCom we found that a lot of people lose their jobs through no fault of their own because their companies went bankrupt. Traditionally in the midst of—or if it's a downward economy, traditionally we deal with widespread job loss by protecting the employees by doing such things as extending unemployment benefits. Now we're punishing the employee by protecting the creditors and bills they can't pay. American families would be well served if Congress addressed the widespread economic insecurity that households face rather than close this door to an option of last resort.

Mr. Chairman, this job loss amendment would apply if the indebtedness was a result of unforeseen loss of employment through no fault of the debtor. So, Mr. Chairman, we should not deny bankruptcy relief if you lose your job through no fault of your own, or because you had the bad judgment to co-sign your spouse's business loan and you got deserted, or the spouse died and the business went under.

I would hope the we would adopt these two amendments.

Chairman SENSENBRENNER. The gentleman yield back?

Mr. SCOTT. I yield back. Thank you.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I'm working hard on understanding this. As the other side knows, I'm a slow reader and relatively dim-witted, and I'll acknowledge that but still try and help get an understanding of where we're going and why I don't think these amendments are necessary.

As I understand this, this would create an exemption to the needs based test as a grounds for dismissal so people would not be dismissed if this happened. I have a couple of problems with them in particular. In first place they are vague, so that what if the debtor is Mr. or Mrs. Trump or a widowed Mr. or Mrs. Trump? Why are we dealing with business losses in the first——

Mr. SCOTT. Will the gentleman yield on that point, on that point?

Mr. CANNON. Certainly.

Mr. SCOTT. If it's Mrs. Trump and she's co-signed the bills and he deserts here and she's left with billions of dollars or indebtedness, she would be unable to file for bankruptcy because she can pay $2,000 a year for the next 5 years.

Mr. CANNON. I think this amendment, as I understand it, Mr. Scott, is dealing with the same section and deals with a similar situation as the last amendment, and I believe that that would be taken care of by the special needs section that we just quoted a few moments ago, so that we already have the situation where the debtor can be discharged of the indebtedness under these circumstances as I read them.

Mr. SCOTT. So a spouse deserting you as part of a special circumstance is defined?

Mr. CANNON. If you're looking at that section B(i), and as you go down to line 9, to the extent that such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. So if a spouse dies, if there's a huge business debt, I believe that would be covered by the language that is currently in the bill, and specifically the job loss. So you have adjustments of current monthly income which is job loss, as I read——

Mr. SCOTT. Would the gentleman yield?

Mr. CANNON. Certainly.

Mr. SCOTT. Is it your statement that the legislative intent of the bill is to cover people in this—as a special circumstance who lose their job through no fault of their own?

Mr. CANNON. Well, I think yes. I'm comfortable with that given the language of the section on line 10 that justifies. So you have to prove it, but I think that's a relatively straightforward process and deals with the issues that you've—that you're suggesting here, and so I would ask my colleagues on the Committee to reject these amendments, and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendments en bloc offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye.

Opposed, no.

The noes appear to have it, the noes have it. The amendment's not agreed to.

Are there further amendments?

Mr. MEEHAN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. MEEHAN. Designated 001, Conyers 001.

The CLERK. Amendment to S. 256 offered by Mr. Meehan. Page 13, strike lines 14 through 23, and insert the following (and make such technical and conforming changes as may be appropriate:) D, subparagraphs (a) through (c) shall not——

Chairman SENSENBRENNER. Without objection the amendment will be considered as read, and the gentleman from Massachusetts is recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Meehan

Page 13, strike lines 14 through 23, and insert the following (and make such technical and conforming changes as may be appropriate):

"(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in section 3741(1) of title 38) and—

"(i) the indebtedness occurred primarily during a period during which he or she was—

"(I) on active duty (as defined in section 101(d)(1) of title 10); or

"(II) performing a homeland defense activity (as defined in section 901(1) of title 32); or

"(ii) the indebtedness occurred primarily as a result of an injury or disability resulting from—

"(I) active duty (as defined in section 101(d)(1) of title 10); or

"(II) performing a homeland defense activity (as defined in section 901(1) of title 32).

Mr. MEEHAN. Thank you, Mr. Chairman. This amendment is intended to protect injured or disabled veterans from the harsh and humiliating procedures established for debtors under the newly established means test.

This bankruptcy bill is based on the presumption that people who go into bankruptcy are just trying to abuse the system, and that's why it sets up an artificial means test to prevent people from trying to get a fresh start under Chapter 7. I believe that members of the military who swear to defend this country and risk their lives overseas, the presumption should be that they are responsible people. And so this amendment aims to exempt, all veterans returning home disabled, from the artificial means test.

According to the GAO in recent years about 16,000 active duty service members have filed for bankruptcy annually. But with our military extended from Iraq to Afghanistan and reservists separated from their families and jobs for long stretches of time, that number is sure to increase.

There were efforts in the Senate to protect all service members from the means test and the abusive practices by lenders, but many of them were turned back. Ultimately the Senate agreed on a more narrowly tailored protection for only disabled service members. The Senate amendment said that disabled veterans filing for bankruptcy, whose indebtedness occurred primarily while on active duty are exempt from means test. But the Senate amendment fails to exempt disabled service members who accumulated, amounted debt after their return home but because of the injury or the disability sustained while on active duty.

We all know that the members of the military who serve oftentimes have injuries that are diagnosed when they get back to the United States. There's been a lot of attention on PTSD, post traumatic stress syndrome. This amendment builds on the Senate compromise. It protects disabled veterans whose indebtedness occurred while on active duty as well as those whose indebtedness primarily as a result of their injuries or disabilities. More than a million service members have served in Iraq. More than 11,000 have been wounded. According to the New England Journal of Medicine, 16 percent of Iraq combat veterans are returning home with post traumatic stress disorder or other psychological conditions.

Now, I've gone to Walter Reed Hospital and visited kids who are missing arms and missing legs. They're struggling to recover. They might be unable to work for months or years, and they may have enormous personal costs associated with their ongoing medical treatments. This means test in this bill establish its completely arbitrary cost for expenses that have nothing to do with the kinds of new expenses that disabled service members might actually be facing. All this amendment does is protect the rights that disabled service members have when they file for bankruptcy. It gives judges the discretion to determine whether they should be eligible for Chapter 11, Chapter 7 or Chapter 13, and does not presume that they are trying to game the system.

I urge my colleagues to adapt—to adopt this amendment, and I urge them to look at the language that we're talking about, the indebted—what the Senate language says is the indebtedness occurred primarily during a period when he or she was in active duty. This language simply says that the indebtedness occurred primarily as a result of an injury or disability resulting from active duty. Clearly, a minimum we ought to be able to do for a man or a woman who's injured in Iraq, who comes home only to find out they have injuries that they weren't aware of, that we can excuse them from this means test, this arbitrary means test set up in this bill.

Now, surely, even a rush to get this bill out no matter what the amendments that are offered, surely we can consider this amendment.

Mr. CONYERS. Would the gentleman yield?

Mr. MEEHAN. I would yield to the ranking——

Mr. CONYERS. I only want to underscore the importance of us supporting those members of the armed services who are not just protecting us but putting their lives at risk in an effort to fight a very difficult kind of war, unlike any that we've been forced to deal with before. And I concur completely in the excellent way that he has put forward the logic in this amendment.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. MEEHAN. And again, it's overwhelming evidence that——

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. MEEHAN.—these members get PTSD and everything else.

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Thank you, Mr. Chairman. I apologize just for a moment here. We apparently got the wrong amendment initially here, so I've just been looking this over. And if I might ask Mr. Meehan just one question.

On line 12 of your amendment it says: result of an injury or disability resulting from (1) active duty and then performing homeland defense. Does "resulting from" mean that it happened while on either active or performing, or——

Mr. MEEHAN. No. The question——

Mr. CANNON. Does it have to be something involved—that, you know, if a guy is on active duty but he's out at a bar and he gets in a fistfight and gets disabled, do you have—what do you mean by that?

Mr. MEEHAN. No. The injury would be resulting from active duty. In other words, if somebody, as we all know from veterans coming back develop PTSD, and the question also is when the indebtedness occurred. But, no, this is anyone whose injured primarily as a result of, injury primarily the result of active duty. And oftentimes when a service member comes home and it's determined that they have PTSD, for example, then that is an injury that occurred as a result of active duty. Yet, if the indebtedness was not incurred while they were on active duty, then they don't get any relief under this amendment. That's a fundamental flaw in what the Senate adopted, and I think we ought to correct it here.

Mr. CANNON. May I just ask, so if someone who is on active duty is in a bar and gets in a fight, does that result from the active duty since it's—you know, he's in the theater, but it's, you know, a different circumstance than what we normally think of as post—PTSD. I don't—I'm just trying to understand where you're going with——

Mr. MEEHAN. Well, I can tell you that PTSD, the military has changed their policy. We now require, when soldiers come back, to have a full examination——

Mr. CANNON. Reclaiming my time, I'm not talking about PTSD so much as trying to understand, do you intend to cover everything that happens while a person is on active duty——

Mr. MEEHAN. Only if the injury is as a result of their service on active duty. In other words——

Mr. CANNON. So the fight in a bar in Iraq is not going to qualify—that is a fight with another American——

Mr. MEEHAN. Well, if it's in Iraq, it may well qualify, it may well qualify. But here's—you're missing the point. What this is about is when the indebtedness occurred, so even under the Senate amendment if the indebtedness occurred while this soldier was in Iraq, I believe he's covered by the Senate language.

However, if a soldier comes back to the United States, it's determined he has PTSD, and the indebtedness occurs after that disability has been diagnosed, and the indebtedness starts to build once a soldier comes back to the United States, they wouldn't get relief under the Senate language.

Mr. CANNON. Reclaiming my time, I think I understand where you're coming from on that. I'm unclear as to the scope, but let me just point out that the bill already has very substantial protections for the military in it. The bill's needs-based test includes numerous safe harbors and exceptions for special circumstances. As amended, the special circumstances exception specifically mentions a debtor who is subject to a call or order to active duty in the armed forces. And, as amended, the needs-based test has a special exception just for debtors who are disabled veterans if indebtedness occurred primarily during a period when the debtor was on active duty or performing a homeland defense activity.

As amended, the bill specifies that the absolute safe harbor from all types of dismissal motions, under section 707(b), applies to a veteran. As amended, the bill excuses a debtor if he or she is on active military duty in a military combat zone from the mandatory credit counseling and financial management training requirements.

I think we've done what we can do for our members of the military, and so I would encourage the Members of the Committee to vote no on this amendment.

Mr. MEEHAN. Would the gentleman yield?

Mr. CANNON. Certainly.

Mr. MEEHAN. But what I'm talking about here is people who have been injured or have a disability as a result of service, for example, in Iraq. If you want language, for example, to exempt anyone who gets in a bar fight in Iraq, I would be glad to do that, but what——

Mr. CANNON. No. I'm just trying to understand what you want to do but——

Mr. MEEHAN. What I'm talking about is if a soldier who serves in Iraq and comes home without a leg or another—without an arm, as they have at Walter Reed Hospital, literally thousands of them, and they have PTSD, as many of them do, and their indebtedness starts to grow when they get back from active duty, they ought to be covered by the same kind of exemption here.

Mr. CANNON. Are you suggesting that—you've talked about post traumatic stress syndrome——

Mr. MEEHAN. As one example.

Mr. CANNON. As an example, but is that because——

Chairman SENSENBRENNER. Time of the gentleman has expired.

Mr. CANNON. Thank you, yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Massachusetts, Mr. Meehan. Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Mr. MEEHAN. rollcall, Mr. Chairman.

Chairman SENSENBRENNER. rollcall will be ordered. The question is on the Meehan amendment. Those in favor will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes? Gentleman from Virginia, Mr. Boucher?
Mr. BOUCHER. Votes no.
The CLERK. Mr. Boucher, no.
Chairman SENSENBRENNER. Gentleman from California, Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Chairman SENSENBRENNER. Gentlewoman from Texas, Ms. Jackson Lee?
Ms. JACKSON LEE. Am I recorded?
The CLERK. Mr. Chairman, Ms. Jackson Lee is not recorded.

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.

Chairman SENSENBRENNER. Further Members in the—gentleman from Texas, Mr. Smith.

Mr. SMITH OF TEXAS. Mr. Chairman, I vote no.

The CLERK. Mr. Smith, no.

Chairman SENSENBRENNER. Gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.

Chairman SENSENBRENNER. Any other Members in the chamber who wish to cast or change their votes? If not, the clerk will report. The gentlewoman from California, Ms. Waters?

Ms. WATERS. Aye.

Chairman SENSENBRENNER. Is Ms. Waters recorded?

The CLERK. Mr. Chairman, Ms. Waters is recorded with aye.

Chairman SENSENBRENNER. The clerk will report.

The CLERK. Mr. Chairman, there are 12 ayes and 19 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?

Mr. SCHIFF. Mr. Chairman, I have an amendment.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff?

Mr. SCHIFF. Mr. Chairman, I have an amendment——

Ms. JACKSON LEE. Can I have a parliamentary inquiry, pleases? What is the order of selecting people to do amendments?

Chairman SENSENBRENNER. The order is at the discretion of the Chair. The gentleman from California, Mr. Schiff.

Ms. JACKSON LEE. That's what I notice, so let me say that I reject the discretion of the Chair. I've had my hand up forever and ever——

Chairman SENSENBRENNER. The gentlewoman from Texas is out of order.

Ms. JACKSON LEE. You need to be fair.

Chairman SENSENBRENNER. The gentleman from—the Chair has always been fair and——

Ms. JACKSON LEE. Not really.

Chairman SENSENBRENNER. Well, the clerk will report the amendment of the gentleman from California, Mr. Schiff.

Ms. JACKSON LEE. I'm planning on staying here all evening till you call on me.

Chairman SENSENBRENNER. The gentlewoman from Texas will be called on in due course. Which amendment does the——

Ms. JACKSON LEE. Well, it will be 12 tonight and I'll be right here waiting to be called on. You're rudely unfair.

Mr. SCHIFF. Mr. Chairman——

Ms. JACKSON LEE. Had my hand up forever.

Mr. SCHIFF. The amendment is numbered 002.

Chairman SENSENBRENNER. The clerk will report the amendment of the gentleman from California.

Mr. SCHIFF. Amendment to S. 256 offered by Mr. Schiff. Page 92, after line 5, insert the following (and make such technical and conforming changes as may be appropriate:).

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from California is recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Mr. Schiff

Page 92, after line 5, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. 220A. GAO STUDY RELATING TO CHILD SUPPORT PAYMENTS.

(a) STUDY.—The Comptroller General of the United States shall carry out a study to evaluate—

(1) the ability of individuals who are debtors under title 11, United States Code, to pay obligations for child support; and

(2) the ability of such debtors to obtain the payment of child support they are entitled to receive;

during the case under such title and after such case is closed.

(b) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the President pro tempore of the Senate and the Speaker of the House of Representatives a report on the results of the study conducted under subsection (a).

Mr. SCHIFF. Mr. Chairman, I will keep this very brief and it won't consume 5 minutes.

This amendment would authorize a study by the GAO to determine any effects the bill may have on the ability of a parent to pay child support or the ability of a parent to collect child support. Probably the most significant concern about the bill for me is the collateral consequence of the bill, where those trying to collect child support may be placed in indirect or direct competition with credit card companies or others who are in a much stronger position to collect on outstanding debts than those who are entitled to child support.

This amendment is identical to the one I offered 4 years ago that made it into the manager's amendment but was later removed from the manager's amendment. It would merely require that a study be conducted so that we can determine, after a suitable period of time elapses, if there has been an adverse impact in this area. Some have asserted that portions of the bill will actually help those attempting to collect child support, but I think it is still unclear what the impact will be on those who are entitled to child support and maybe unable to collect it. This amendment will provide for a good and objective analysis to help us determine whether subsequent legislation as a follow up would be prudent.

The bill only calls for a study. It does not impede the date of enactment of the bill or implementation of the bill.

With that, Mr. Chairman, I will yield the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

Let me respond by just submitting for the record a National Child Support Enforcement Association statement supporting the bill. This is from, I think this is from 2002, but I think the principles are the same.

Let me just point out that this study can be had just by a request from Congress. We could even do a bipartisan request of GAO, and I assure the gentleman from California that I would be happy to sign that request with him if he'd like to do that.

We do not need to amend the study—or amend the bill to get a study like this, and so I would encourage my colleagues to vote against this amendment, and I yield back the balance of my time.

[The material referred to follows:]

NCSEA

National Child Support Enforcement Association

Hall of the States • 444 North Capitol Street • Suite 414 •Washington, DC 20001-1512
Phone: 202-624-8180 • FAX: 202-624-8828 • E-mail: ncsea@sso.org • Website: www.ncsea.org

May 13, 2002

Re: Child Centered Reforms in H.R. 333

The National Child Support Enforcement Association is the membership organization representing the child support community – a workforce of over 60,000 child support professionals. For the past five years it has strongly supported the enactment of bankruptcy reform because the treatment of child support and alimony under present bankruptcy law so desperately needs reform. H.R. 333, the Bankruptcy Reform Bill, like the reform bills of the last three Congresses, includes provisions crucial to the collection of child support during bankruptcy.

With each day that passes under current law, countless numbers of children of bankruptcy debtors are subject to immediate interruption of their on-going support payments. In addition, during the lengthy three to five years duration of consumer bankruptcies as they happen every day under present law, debtors often succeed in significantly delaying or even avoiding repayment of child support and alimony arrearages altogether. Hardest hit by these effects of current bankruptcy law are former recipients of welfare who are owed support arrears but are stuck waiting until the bankruptcy is completed before such debts can be collected. Families who are dependent on obtaining their share of marital property for survival may now find under present bankruptcy law that such debts are discharged. And, worst of all, under present law significant collection tools used to require the payment of current child support needed by the custodial parent to feed and clothe children may be rendered ineffective after a bankruptcy petition is filed. Today, a bankruptcy filing may delay or halt the collection of support debts through the federally mandated earnings withholding and tax refund intercept programs, the license and passport revocation procedures, and the credit reporting mandates.

H.R. 333 would provide these children with first priority in the collection of support debts, allow the enforcement of medical support obligations, prevent any interruption in the otherwise efficient process of withholding earnings for payment of child support, and insure that during the course of a consumer bankruptcy all support owed to the family would be paid, and paid timely. It will allow state court actions involving custody and visitation, dissolution of marriage, and domestic violence to proceed without interference from bankruptcy court litigation

We, therefore, urge the members of the Conference Committee and the leadership of Congress to reach a compromise on this important piece of legislation and enact these long overdue bankruptcy reforms.

Sincerely,

Kay Farley

Kay Farley
President
National Child Support Enforcement Association

Mr. CONYERS. Could the gentleman from Utah yield, please?

Mr. CANNON. Mr. Conyers, I'd be happy to yield to you in just a moment, but may I suggest to the gentleman that he might want to withdraw the amendment. And I'd be happy to sign a letter asking for the study.

Mr. SCHIFF. If the gentleman will yield, I'd be happy to yield to the—I was going to say I'm—unless my colleague objects, I'd be happy to withdraw the amendment and join my colleague in——

Chairman SENSENBRENNER. Without objection, the amendment is withdrawn.

Mr. CONYERS. Thank you.

Chairman SENSENBRENNER. Are there further amendments? The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I wanted to just make—strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. After the distinguished gentlelady from Texas is recognized, and after the Ranking Member of Commercial and Administrative Law Subcommittee, Mr. Watt, makes an important presentation on his amendment, it is my inclination to call for the previous question. And I yield back my time.

Chairman SENSENBRENNER. Does the gentleman from Michigan yield back?

Mr. CONYERS. Yes, sir. I do.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. JACKSON LEE. It is 001, and I have five amendments.

Chairman SENSENBRENNER. Without objection, the amendments are considered en bloc.

Ms. JACKSON LEE. Mr. Chairman, I am not asking him for them to be considered en bloc.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. JACKSON LEE. 001, please.

The CLERK. Amendment to S. 256 offer by Ms. Jackson Lee of Texas. Page 10, line 22, strike "$1,500" and insert "$3,000."

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

[The amendment follows:]

Amendment to S. 256

Offered by Ms. Jackson-Lee of Texas

Page 10, line 22, strike "$1,500" and insert "$3,000".

Ms. JACKSON LEE. I thank the Chairman very much. I would like to have recorded—well, let me just make a statement. I was unavoidably detained for the Schiff amendment dealing with identity theft. I'd like to be recorded as voting aye if I had been present. And I was detained for the Nadler amendment. I'd like to be recorded as having voted yes.

With that in mind, to my colleagues, I think that this amendment is a very straightforward and simple amendment, and would generate, I would hope, bipartisan support. My amendment simply increases the amount of relief that is given to those parents who have children in private and parochial schools, raising the amount that is protected from $1,500 to $3,000.

Let me share with my colleagues what has been recently noted as private school dollars. In looking at a list of schools from Texas, you will find that most private schools, that is, primary schools, are anywhere from $3,500 to $5,000. The $1,500 would simply throw children out of school and eliminate—or burden children who are not responsible for the difficulties of their parents. The mean test mechanism, the principal mechanism aimed at the bankruptcy filing rate is the means test under section 11, which denies access to Chapter 7 bankruptcy to those debtors who are deemed able to repay their debts. The test has been described by proponents as a flexible test to assess an individual's ability to repay his debts and as a remedy to irresponsible consumerism and lax bankruptcy law.

The Jackson Lee amendment seeks to remove one aspect of its inflexibility and outdatedness. The means test limits private or parochial school tuition expenses up to $1,500 per year. According to a study by the National Center for Educational Statistics, even in 1993, $1,500 would not have covered the average tuition for virtually any category of parochial school—of any parochial school or private school. Today it would not come close for any particular school. In order to yield a few dollars for credit card issuers, this bill would force many struggling families to take their children from private or parochial school, often in violation of deeply held religious beliefs, for 3 to 5 years in order to conform or confirm a Chapter 13 plan.

My amendment, as I indicated, would simply increase this tuition payment ceiling to $3,000 to account for inflation as well as the current cost of parochial tuition. The average cost to educate one elementary school student is $3,100, which is double what it was 10 years ago.

As I look at the crisis of education in America, it would certainly be shameful if we stood in this room to deny individuals the opportunity to be educated.

Let me share as well some food for thought for my colleagues in their understanding or in their deliberation on the final resolution of this particular legislation. We realize that if you are with a bad credit score and you do accept a credit card, which they are given to anyone that literally breathes in America, you are usually paying usurious rates, 29 percent, 24 percent. Those interest rates are in essence an insurance against those who may get themselves into trouble. That means this is the insurance that is given to the credit card company when there are those who default. And what is strange about this is that the credit card companies collect this risk premium year in and year out, but when the risk actually happens and the borrower cannot pay, the lenders want the Federal Government to intervene to force the debtor to pay. That is the ludicrous—the ridiculousness of this legislation. Credit card companies go off scot free, and those who are victimized have to pay.

I would like to—and that is by Elizabeth Warren, at least the comment that I read. I don't want to put the other comments—the comment that I read about the risk actually happens is a notation by Elizabeth Warren.

I would like to put into the record what was written by David Broder, and I'd ask unanimous consent to put his entire article into the record.

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

washingtonpost.com

A Bankrupt 'Reform'

By David S. Broder

Sunday, March 13, 2005; Page B07

When it comes to blatant hypocrisy, nothing beats the Senate record on the just-passed bankruptcy bill.

This "reform," which parades as an effort to stop folks from spending lavishly and then stiffing creditors by filing for bankruptcy protection, is a perfect illustration of how the political money system tilts the law against average Americans.

The simple fact that for eight straight years it has gained a place on a crowded congressional calendar is testimony to the impact of the millions of dollars that banks and credit card companies have spent on lobbyists and campaign contributions.

What happened -- and didn't happen -- during two weeks of Senate debate demonstrates just how the powerful exert their influence. It's all too typical of what takes place now in Washington with most issues.

Few policy battles, Social Security being a current example, draw enough public and press interest for the legislators to feel real scrutiny. Most are in a netherworld where media coverage is cursory and interest groups' pressure determines the outcome. That's how bankruptcy reform made it through the Senate and why it will soon pass the House and be signed into law by President Bush.

The recent decade's rise in the number of bankruptcy cases has been dramatic, and it is not difficult to find cases of abuse. But most bankruptcy petitions are filed by people with real financial problems, often the result of family illness, divorce or loss of jobs. This bill will make it harder for everyone -- chiselers and innocent victims alike -- to get a clean start without the overhang of mounting interest payments on unpaid credit cards and other debt.

For two weeks the Senate sponsors shot down virtually every attempt to separate the sheep from the goats and carve out protections for the average family trapped by circumstances. The dry language of the Congressional Record recites a series of one-sided votes rejecting amendments "to protect service members and veterans . . . to exempt debtors whose financial problems were caused by serious medical problems . . . to preserve existing bankruptcy protections for individuals experiencing economic distress as caregivers to ill or disabled family members . . . to exempt debtors if their problems were caused by identity theft." Nothing would be allowed to stand in the way of the creditors' pursuit of those folks.

On the other hand, when an amendment was offered to restrict so-called "asset protection trusts," used by wealthy individuals to shelter their portfolios from creditors, it was rejected. Five states -- Alaska, Delaware, Nevada, Rhode Island and Utah -- have changed their laws to let people who live anywhere in the country establish trusts of unlimited size that cannot be reached by federal bankruptcy proceedings. The amendment would have limited this "millionaires' loophole" to $125,000. But Sen. Charles Grassley of Iowa, the bill's chief sponsor, intent on blocking any amendment that might prove indigestible in the House, said, "This is an issue that just needs more time for us to determine whether there is an abuse that needs to be corrected." With no more debate, it was rejected.

These amendments came from the liberal camp -- senators such as Edward Kennedy, Russ Feingold, Richard Durbin and Charles Schumer -- and were easily dismissed by the Republican majority. Even more instructive was what happened when a staunch conservative, Republican Sen. John Cornyn of Texas, tried to put a little balance into the bill.

When he was attorney general of Texas, Cornyn said, the notorious Enron bankruptcy case "opened my eyes to a very real abuse in the current bankruptcy system," the loophole that allows corporations to go "judge-shopping" for jurisdictions with permissive standards. Enron, which had 7,500 employees in Houston, filed for bankruptcy in New York, where it had 57 workers, because New York, along with Delaware, is known for being lenient on big business.

Congress recently passed a law restricting plaintiffs in class-action lawsuits from judge-shopping in the state courts, and Cornyn argued that it should also require corporations' bankruptcy cases to be filed in their principal place of business. Citing cases of Polaroid, Kmart, WorldCom and Enron, he said the judge-shopping loophole "serves to unfairly enable corporate debtors to evade their financial commitments, [and] it badly disables consumers, creditors, workers, pensioners, shareholders and small businesses from pursuing and receiving reasonable compensation from bankruptcy proceedings."

No one rose to dispute Cornyn. So what happened? He withdrew the amendment, without a vote, "out of respect to the managers of this bill who say that amendments to this bill would endanger its ultimate passage."

A Cornyn spokesman told me that the bill sponsors said his amendment would cost them the support of the two Democratic senators from Delaware -- that favorite haven for big business. And, except for the lobbyists, no one even noticed.

davidbroder@washpost.com

Ms. JACKSON LEE. One of the paragraphs reads, "For 2 weeks the Senate sponsors shot down virtually every attempt to separate the sheep from the goats and carve out protections for the average family trapped by circumstances. The dry language of the Congressional Record recites a series of one-sided votes rejecting amendments 'to protect service members and veterans . . . to exempt debtors whose financial problems were caused by serious medical problems . . . to preserve existing bankruptcy protections for individuals experiencing"——

Chairman SENSENBRENNER. The gentlewoman's time has——

Ms. JACKSON LEE. I don't want to follow the——

Chairman SENSENBRENNER.—expired.

Ms. JACKSON LEE.—Senate. I'd ask you to support my amendment.

Chairman SENSENBRENNER. The gentlewoman's time has expired. The question is on the Jackson Lee amendment. Those in favor will say aye?

Those opposed, no?

The noes appear to have it. The noes——

Ms. JACKSON LEE. rollcall vote.

Chairman SENSENBRENNER. Those in favor of the Jackson Lee amendment will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote? The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? The gentleman from California, Mr. Issa.

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 12 ayes and 21 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas. The clerk will report the amendment.

Ms. JACKSON LEE. It is 003.

The CLERK. Amendment to S. 256, offered by Ms. Jackson Lee of Texas. Page 20, line 24, insert "assistance funds received by the debtor as a victim of a natural disaster"——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

Amendment to S. 256

Offered by Ms. Jackson-Lee of Texas

Page 20, line 24, insert ''assistance funds received by the debtor as a victim of a natural disaster, damages awarded to the debtor as a person injured by a tort,'' after ''Act,''.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the Chairman, and I thank the Ranking Member.

Mr. CONYERS. Would the gentlelady yield to the Ranking Member momentarily?

Ms. JACKSON LEE. I'd be happy to yield. I'd be happy to yield to the gentleman.

Mr. CONYERS. I'd ask all of my colleagues to either put all of their amendments en bloc or strike the last word, put the amendment and the argument in so that it will be there, because we have two other very important pieces of legislation after we finish this bill. If you could consider that, I'd be grateful.

Ms. JACKSON LEE. Mr. Chairman, I'd be delighted, if I could do this one, and I'll put the other en bloc and be finished. Would that meet—how can I accommodate——

Mr. CONYERS. That would delight me no end.

Ms. JACKSON LEE. All right. I will do this very quickly, and then I have three others and I will put them en bloc.

Mr. CONYERS. Thank you.

Ms. JACKSON LEE. I thank the gentleman very much for his kindness.

Mr. CONYERS. Thank you very much.

Ms. JACKSON LEE. My friends, this is a circumstance that will confront all of our States, whether it is a flood, a hurricane, certainly any natural disaster that we can imagine has confronted individual States. We know recently that—we know recently that Florida suffered a historic three hurricanes or more in 2004. Families that are affected by natural disasters such as a hurricane in Florida or the mudslides in California should not have to apply their scarce relief effort monies to bankruptcy debt. The intent in providing Federal and State monies to families who are victims of such natural disasters is to relieve the burden that the disaster has caused, not to increase their net worth.

Bankruptcy reform should address many specific issues, such as the negligent mismanagement of money, but hurt those who are already suffering from flooding or collapsed roof or house that has gone out to sea is absolutely ridiculous.

I'd ask my colleagues to support this, which exempts the benefits that you've received if you have suffered a natural disaster. Again, I started out my concern about this legislation in that it is class warfare. I simply ask my colleagues to find some sense of balance to be able to balance this legislation with those middle-class and working families who are simply trying to make ends meet. We have already denied veterans and those returning from Iraq. We've denied those with catastrophic injuries. I can't imagine that there's not one of us that has not been in a community that has suffered a natural disaster.

I ask my colleagues to support this amendment.

Chairman SENSENBRENNER. Does the gentlewoman yield back?

Ms. JACKSON LEE. I yield back.

Chairman SENSENBRENNER. The question is on the amendment. Those in favor will say aye? Opposed, no? The noes appear to have it. The noes have it. The amendment is not agreed to.

The gentlewoman from Texas.

Ms. JACKSON LEE. I have three amendments at the desk, 002, 004, and 006.

Chairman SENSENBRENNER. Without objection, the——

Ms. JACKSON LEE. Excuse me——

Chairman SENSENBRENNER.—amendments will be considered en bloc. Hearing none, so ordered. The clerk will report the amendments.

The CLERK. Amendments to S. 256 offered by Ms. Jackson Lee of Texas. At an appropriate place, insert the following "(and make such technical and conforming changes as may be appropriate):"

"Section. Debts incurred as a result of sex offenses against minors."

"Section 523(a) of title 11, United States Code, as amended by section"——

Chairman SENSENBRENNER. Without objection, the amendments are considered as read en bloc.

[The en bloc amendments follow:]

Amendment to S. 256

Offered by Ms. Jackson-Lee of Texas

At an appropriate place, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. ___. DEBTS INCURRED AS A RESULT OF SEX OFFENSES AGAINST MINORS.

Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

(1) in paragraph (18) by striking or'' at the end;

(2) in paragraph (19) by striking the period at the end and inserting ; or''; and

(3) by adding at the end the following:

''(20) for a debt arising from a sex offense, in which the victim was an individual who had not attained the age of 17 years, that consists of conduct that would be a Federal sex offense under:

''(A) section 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2243(a)(relating to sexual abuse of a minor), 2244(a)(1) or(2) (relating to abusive sexual contact), 2245(relating to sexual abuse resulting in death), or 2251A (relating to selling or buying of children) of title 18, United States Code;

"(B) section 2423(a) (relating to transportation of minors) of title 18 United States Code, involving prostitution or sexual activity constituting a State sex offense; or

"(C) an offense under State law that consists of conduct that would be a Federal sex offense described in subparagraph (A) or (B) of this paragraph.".

Amendment to S. 256

Offered by Ms. Jackson-Lee of Texas

At an appropriate place, insert the following (and make such technical and conforming changes as may be appropriate):

SEC. ___. DEBTS INCURRED AS A RESULT OF TOBACCO-RELATED CAUSES OF ACTION.

Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

(1) in paragraph (18) by striking or'' at the end;

(2) in paragraph (19) by striking the period at the end and inserting ; or''; and

(3) by adding at the end the following:

''(20) arising from a judicial, administrative, or other action related to the consumption or consumer purchase of a tobacco product that is based in whole or in part on false pretenses, a false representation, or actual fraud.''.

Amendment to S. 256

Offered by Ms. Jackson-Lee of Texas

Page 271, after line 8, insert the following (and make such technical and conforming changes as may be appropriate):

"(B) of a kind specified in section 523(a)(9); or

Chairman SENSENBRENNER. And the gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Although we may have an opportunity to address this on the floor of the House, I think my amendments are self-explanatory. Might I make note for the audience that I have a great deal of respect for the Chairman of the Subcommittee, but I think it is beneath the process of this body when you offer an amendment and there is not even the courtesy and the respect to have a response by the opposition.

But this is the low level of which we have reached in this body, and I always believed that when you reach to go over the edge, when you abuse your power, I can assure you that it's going to come back to you. We're here debating the lives of people, the lives of people who are simply going to be crushed by this oppressive, destructive, and special interest legislation. And if there are any credit card companies in the audience, it's not personal. But for you to spend this amount of money to generate this kind of ugly, one-sided legislative initiative is an absolute disgrace.

Let me cite the testimony from Elizabeth Warren, who spoke before the Committee on the Judiciary on February 10, 2005, an outstanding scholar at Harvard University Law School: "The overreaching problem with this bill is that time and the American economy has passed it by. We don't need this legislation. It is a complete misnomer. It is nothing but a payoff to credit card companies who have spent $4 million and more for this legislation."

In the 8 years since this bill was introduced, new cases have burst on the scene. The names are burned into our collective memories: Enron, WorldCom, Adelphia, United Airlines, US Airways, TWA, LTV Steel, Kmart, Polaroid, Global Crossing. While the number of consumer bankruptcy cases have declined slightly in the past year, many of the largest corporate bankruptcy cases in American history have occurred since the Senate has last re-evaluated the bankruptcy laws, and some of those cases are already legend for the corporate scandals that accompany them.

My friends on the other side of the aisle, my amendments are simple. Do not eliminate the debt of someone or allow someone to stand behind bankruptcy when they have a liability because of a sexual assault. Do not allow those who receive dollars because they're injured in cases relating to tobacco to have to use those dollars in getting rid of their credit debt or their other debt. And if someone is impacted by—though we wish they would not, by some nuclear accident, under the Price-Anderson Act, the PAA, let us not have those dollars subjected to the bankruptcy laws, meaning that they would have to utilize them to pay off their debt.

In this instance, I would simply say that Elizabeth Warren is right. She was right 8 years ago, and she is right now. We have seen a decrease in consumer bankruptcies. We already have an insurance plan as it relates to the credit card companies by their charging of usurious rates. You get any credit card invitation, and what you get in the mail is a complete, if you will, scandalous request for you to join their family. It is in blind need that you sign up for it, 30 percent, 29 percent.

And so we have this 512-page document that gives little relief to anyone other than those who simply want to break the backs of the middle class. Let me tell you, my friends, that this company runs—

excuse me, this country, this Nation runs on the backs of the middle class. They are the working people. They're the ones that generate the economy. And, yes, they are the consumers. I already said that the credit card companies create a house of cards. That's what they do. You can't buy or sell without a credit card. This country is going to find itself overridden by not debt but by the system that doesn't allow you to use your simple dollars to buy and sell.

This bill makes it happen for sure, and all I would say is that I'd ask for the thoughtfulness in this process. This is not about whether the Chairman likes you or doesn't like you, likes your philosophy or doesn't like your philosophy, likes your style or doesn't like your style. This is the legislative process, and I'm representing people who cannot speak for themselves.

Mr. CONYERS. Would the gentlelady——

Ms. JACKSON LEE. And I will not be silenced on that basis. I'd be happy to yield.

Mr. CONYERS. I'd like to say that you've presented three very important amendments that have not been considered in any way, and I don't want anyone to confuse the fact that you have introduced them en bloc with the fact that they are any less important than any of the other amendments that you have put forward today. And I thank the lady for cooperating with the parliamentary process, and I support the amendments without exception.

Ms. JACKSON LEE. I thank you for your leadership. I ask my colleagues to support the three amendments and speak on behalf of the American people.

Chairman SENSENBRENNER. The gentlewoman's time has expired. The question is on agreeing to the Jackson Lee amendments en bloc. Those in favor will say aye? Opposed, no? The noes——

Ms. JACKSON LEE. rollcall.

Chairman SENSENBRENNER.—appear to have it—rollcall will be ordered. The question is on agreeing to the three Jackson Lee amendments en bloc. Those in favor will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
[No response.]
The CLERK. Ms. Sánchez?
[No response.]
The CLERK. Mr. Smith?
[No response.]

The CLERK. Mr. Van Hollen?

Mr. VAN HOLLEN. Aye.

The CLERK. Mr. Van Hollen, aye. Mr. Chairman?

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Chairman SENSENBRENNER. Other Members in the chamber who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, Ms. Jackson Lee—Mr. Chairman, Ms. Jackson Lee is recorded as aye.

Chairman SENSENBRENNER. The clerk will report.

The CLERK. Mr. Chairman, there are 9 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendments en bloc are not agreed to.

For what purpose does the gentlewoman from California, Ms. Waters, seek recognition?

Ms. WATERS. Mr. Chairman, I have three amendments that I will offer en bloc.

Chairman SENSENBRENNER. The clerk——

Ms. WATERS. They're at the desk, and if I may identify them as stay of eviction for victims of domestic abuse, homestead exemption for seniors, and under-age credit card amendment.

Chairman SENSENBRENNER. Without objection, the——

Mr. BACHUS. Mr. Chairman, as to the last amendment, I'd like to reserve a point of order.

Chairman SENSENBRENNER. A point of order is—well, without objection, the first two amendments are considered en bloc, and the clerk will report them.

The CLERK. Amendments to S. 256 offered by Ms. Waters. Page 159, line 13, insert the following before the semicolon: "unless the debtor certifies under penalty of perjury that the debtor is a victim of domestic violence and that the physical well-being of the debtor or of a child of the debtor would be threatened if"——

Chairman SENSENBRENNER. Without objection, the two amendments considered en bloc are considered as read. Without objection, the third amendment will be considered en bloc, and a point of order is reserved against the third amendment.

[The en bloc amendments follow:]

Amendment to S. 256

Offered by Ms. Waters

Page 159, line 13, insert the following before the semicolon:

unless the debtor certifies under penalty of perjury that the debtor is a victim of domestic violence and that the physical well-being of the debtor or of a child of the debtor would be threatened if relief from the stay is granted

AMENDMENT TO S. 256
OFFERED BY MS. WATERS OF CALIFORNIA

On page 191, between lines 5 and 6, insert the following:

SEC. 322A. EXEMPTION FOR THE ELDERLY.

Section 522 of title 11, United States Code, as amended by sections 224, 308, and 322, is amended by adding at the end the following:

``(r) For a debtor whose age is 62 or older on the date of the filing of the petition, if the debtor elects to exempt property--

``(1) under subsection (b)(2), then in lieu of the exemption provided under subsection (d)(1), the debtor may elect to exempt the debtor's aggregate interest, not to exceed $30,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; or

``(2) under subsection (b)(3), then if the exemption provided under applicable law that may be applied to such property is for less than $30,000 in value, the debtor may elect in lieu of such exemption to exempt the debtor's aggregate interest, not to exceed $30,000 in value, in any such real or personal property, cooperative, or burial plot.''.

AMENDMENT TO S. 256

OFFERED BY MS. WATERS OF CALIFORNIA

Page 504, after line 15, insert the following new section (and conform the table of contents accordingly):

SECTION 1310. ISSUANCE OF CREDIT CARDS TO UNDERAGE CONSUMERS.

Section 127(c) (15 U.S.C. 1637(c)) is amended by inserting after paragraph (7) (as added by section 1304(a) of this title) the following new paragraph:

"(8) APPLICATIONS FROM UNDERAGE CONSUMERS.—

"(A) PROHIBITION ON ISSUANCE.—No credit card may be issued to, or open end credit plan established on behalf of, any consumer who has not attained the age of 21, except in response to a written request or application to the card issuer that meets the requirements of subparagraph (B).

"(B) APPLICATION REQUIREMENTS.—An application to open a credit card account by a consumer who has not reached the age of 21 as of the date of submission of the application shall require—

''(i) the signature of the parent or guardian of the consumer indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has reached the age of 21; or

''(ii) submission by the consumer of financial information indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account.''.

Chairman SENSENBRENNER. And the gentlewoman from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much. Mr. Chairman and Members, the homestead exemption for seniors is pretty self-explanatory. My amendment would set a mandatory $30,000 Federal minimum homestead exemption for debtors who are 62 or older and would allow such debtors in bankruptcy to protect some or all of the value of their homes from credentials.

It seems to me that we're forever talking about protecting seniors. If we cannot protect seniors and keep them in their homes, then we have done nothing. So without going any further, that's what that amendment is all about. I would ask for an aye vote en bloc on that amendment also.

The second amendment is a stay of eviction for victims of domestic abuse. My amendment would modify the Bankruptcy Code to secure better protection for domestic abuse victims by granting them relief from summary eviction from their housing. This relief would only be available if a domestic violence debtor certifies under penalty of perjury that the debtor is, in fact, a victim of domestic abuse and that their physical well-being or the physical well-being of the debtor's child would be threatened if this debtor were evicted. This amendment would provide a safe harbor for those victims who face the threat of more violence and extreme danger if their homes were taken.

I would ask for an aye vote for these two amendments en bloc.

Mr. CONYERS. Would the gentlelady yield to me?

Ms. WATERS. Yes, I yield.

Mr. CONYERS. I want to make a point here, that these three amendments are original and are not duplicative of any of the amendments that have occurred before: homestead exemption for seniors, abuse, domestic violence, victims of abuse, which is a large area, not understood by all, and that they are valid, each of them in their own right, and I urge the careful consideration of the Committee in support of these amendments. And thank the gentlelady.

Chairman SENSENBRENNER. Does the gentlelady yield back her time?

Ms. WATERS. The gentlelady yields back the time.

Chairman SENSENBRENNER. Does the gentleman from Alabama insist on his point of order against the third amendment being considered en bloc?

Mr. BACHUS. Yes, I do, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman will make his point of order, quickly.

Mr. BACHUS. Mr. Chairman, the amendment—the credit card amendment violates house rule XVI(7) and is not germane. The fundamental purpose of the amendment is not germane to the fundamental purpose of the bill. The amendment, in fact, amends the Truth in Lending statute, and jurisdiction for that statute is outside the jurisdiction of this Committee. And as such, the amendment is not germane.

Chairman SENSENBRENNER. Does the gentlewoman from California wish to speak on the point of order?

Ms. WATERS. Well, Mr. Chairman, I do wish to speak on the point of order, and I really don't know why I'm going through this charade because it really doesn't make any difference. We're not allowed any amendments here today anyway. They're going to be voted down. So I guess it doesn't make any difference whether it's done on a point of order or whether you call the roll for the vote. But——

Chairman SENSENBRENNER. Okay. The——

Ms. WATERS. But I think—I have not finished, Mr. Chairman. I think it is important to note that I think the gentleman from Alabama is opposing it because he knows that when this Committee hears about these under-age students who are being solicited by these credit card companies, running up this debt, and basically setting up all kind of obstacles to their being able to be successful when they graduate from college, then he knows he's embarrassed by that. So he may have a point of order that you probably will rule in his favor. So be it. It doesn't matter how it dies. It's going to die one way or the other.

Chairman SENSENBRENNER. The Chair—the Chair is prepared to rule. One of the tests of germaneness of an amendment is whether the amendment, if introduced as free-standing legislation, would be referred by the parliamentarians and the Speaker to the Committee that is considering the bill for amendment. The amendment—the third amendment that is proposed by the gentlewoman from California, Ms. Waters, is an amendment to the Fair Credit Reporting Act, I believe, which is not in the jurisdiction of the Judiciary Committee, but is in the jurisdiction of the Financial Services Committee. Therefore, the amendment is not germane, and the Chair sustains the point of order by the gentleman from Alabama relative to the third amendment being considered en bloc. The question is on agreeing to the other two amendments——

Mr. BACHUS. Mr. Chairman, it's the Truth in Lending Act.

Chairman SENSENBRENNER. The Chair stands corrected on that. The question is on agreeing to the other two amendments offered en bloc by the gentlewoman from California, Ms. Waters. Those in favor will say aye? Opposed, no? The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments? The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I call up amendments—Watt amendments 04, 06, and 06 and request their consideration en bloc.

Chairman SENSENBRENNER. Without objection, the amendments will be considered en bloc, and the clerk will report the amendments.

The CLERK. Mr. Chairman, I have 03 and 04.

Chairman SENSENBRENNER. The gentleman from North Carolina?

Mr. WATT. I'm looking at 04, 05, and 06.

Chairman SENSENBRENNER. Would the gentleman from North Carolina briefly describe the subject matter? That might help the clerk.

Does the clerk have them now? No.

Mr. WATT. 04 is the one that says "04" in the corner. 05 is the one that says——

The CLERK. Mr. Chairman, I have 03, 04, and 06.

Mr. WATT.—"05" in the corner. 06 is the one that says "06" in the corner.

Chairman SENSENBRENNER. I believe the clerk's got what the gentleman from North Carolina wishes to offer, and the clerk will report the amendments considered en bloc.

The CLERK. Amendments to S. 256

Mr. WATT. I ask unanimous consent the amendments be considered as read.

Chairman SENSENBRENNER. Without objection.

[The en bloc amendments follow:]

04

Amendment to S. 256

Offered by Mr. Watt (N.C.)

On page 14, strike line 2 and all that follows through line 14 and insert the following: "tion of a party in interest, may order the".

On page 14, line 17, insert "and reasonable trustee fees based upon the trustee's time in prosecuting the motion," after "fees,".

Beginning on page 14, strike line 20 and all that follows through page 16, line 2, and insert the following:

"(ii) the court grants such motion.

"(B) Any costs and fees awarded under subparagraph (A) shall have the administrative priority described in section 507(a)(2) of this title, and such costs and fees shall be excepted from the discharge described in section 727 of this title in the current or any successor cases filed under this title.

On page 16, strike line 17 and all that follows through line 19 and insert the following: "the".

On page 28, between lines 21 and 22, insert the following:

(1)ADDITIONAL GROUND OF NONDISCHARGEABILITY. – Section 523(a) of title 11, United States Code, is amended by inserting after paragraph (18) the following:

"(18A) for costs or fees imposed by a bankruptcy court under section 707(b)(4) of this title, whether imposed in the current case or a prior case filed under this title;".

On page 28, line 22, strike "(k)" and insert "(m)".

On page 60, strike lines 12 and 13 and insert the following:

"(5) The declaration shall consist of the following certification:

On page 60, strike line 24 and all that follows through line 5 on page 61.

On page 184, line21, strike **"EXPANSION"** and insert **"ENFORCEMENT"**.

On page 184, line 24, insert "fraud and abuse exist in the bankruptcy system and that in order to curb this fraud and abuse, Federal bankruptcy courts should vigorously enforce" after "that".

On page 184, line 25, strike "App.)" and insert "App.)."

On page 185, strike line 1 and all that follows through line 11.

On page 464, lines 11 and 12, strike ", even if such amount has been discharged in a prior case under this title".

05

Amendment to S. 256

Offered by Mr. Watt (N.C.)

On page 113, line 13, insert ", other than an attorney or an employee of an attorney" after "any person".

On page 121, lines 6 and 7, strike "AN ATTORNEY OR" and insert "A".

On page 121, line 13, strike "AN ATTORNEY OR" and insert "A".

On page 121, lines 15 and 16, strike "ATTORNEY OR".

Amendment to S. 256

Offered by Mr. Watt

Page 128, line 10, insert "during the 1-year period ending" after "effect".

Chairman SENSENBRENNER. And the gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Amendment 04, which is supported by the American Bar Association and a whole host of other people, accomplishes two things. It eliminates provisions in the bill that would require the debtor's attorney to certify the accuracy of the debtor's schedules under penalty of harsh court sanctions, and it modifies provisions that would require attorneys to certify a debtor's ability to make future payments under a reaffirmation agreement.

Section 102 unnecessarily imposes a harsher standard on debtor attorneys to certify pleadings filed on behalf of the debtor. No similar heightened standard is imposed on credential attorneys, nor for attorneys outside the bankruptcy context. By holding the debtor's attorney personally liable for the accuracy of their clients' schedules, these provisions would force the attorney to hire private investigators and appraisers to verify information, adding thousands of dollars to the cost of representing a debtor in bankruptcy. Without this amendment, I believe that the bankruptcy representation—that bankruptcy representation would become unaffordable for most debtors.

Also, the impact on the pro bono bar providing bankruptcy services would dwindle with the likely result that thousands of pro se debtors would clog up the court system or debtors will not seek the relief they need at all.

Amendment 05 corrects the provisions that would require bankruptcy attorneys to identify and advertise themselves as debt relief agencies and comply with intrusive new regulations that would interfere with the confidential attorney-client relationship. Sections 227 and two twenty—through 229 of the bill would seriously interfere with the attorney-client relationship by prohibiting debtor's bankruptcy attorneys and many non-bankruptcy attorneys from giving their clients certain proper bankruptcy planning advice. These provisions would also have a chilling effect on debtor's lawyers and their firms by requiring all of their newsletters, seminars, advertising materials to include awkward and misleading statements identifying themselves as debt relief agencies.

Amendment 06 would make a—is a technical amendment that seeks to close an unintended, I suppose, loophole in the current bill that would allow sensitive personal consumer information to be sold on the eve of a corporate bankruptcy. The sale of consumer lists is not a new method to increase the capital available to failing companies, and as we have seen with the recent debacle with ChoicePoint, such lists are highly sensitive and the distribution of personal information included can be disastrous to consumers. Lists of consumer information can be worth millions of dollars, a tempting asset to liquidate when a company is on the way into bankruptcy.

It is for these reasons that the privacy policy enforcement in the Bankruptcy Act of 2000 sought to exclude personally identifiable information from the assets of the debtor——

Mr. CANNON. Would the gentleman yield——

Mr. WATT. The bill prohibited—let me just finish and I'll be through, and then you'll have 5 minutes.

The bill prohibits the sale or disclosure—the amendment—I'm sorry. The bill prohibited the sale or disclosure of personally identifiable information if doing so violates a privacy policy of the debtor in effect at the time at which such information was collected. The Consumer Privacy Act also protected consumer information in the same manner. However, this bill doesn't do that, and I'm happy to yield to the gentleman——

Mr. CANNON. Thank you. I might suggest, you know, I have concerns about some of these issues. I don't want to see the bill amended at this point in time. If the gentleman——

Mr. WATT. That is quite obvious at the end of the day.

Mr. CANNON. If the gentleman would consider withdrawing the amendments, I can assure him that I'd be willing to work with him in the Subcommittee without making any commitments for the full Committee on the issue to take a look at some of these things.

Mr. WATT. Well, I would hope that the gentleman will just do as he has all throughout the day and just vote these things down and still if it's a problem take them up in the Subcommittee. I hope the gentleman is not saying he's going to punish me for offering an amendment by not——

Mr. CANNON. Absolutely no.

Mr. WATT.—taking up something that he thinks is important.

Mr. CANNON. Let me just suggest these are—there are issues here that we need to consider. We'll look at those in the order——

Mr. WATT. Well, I'm not going to ask for a recorded vote. You all are going to vote them down and—you know.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the amendments en bloc offered by the gentleman from North Carolina, Mr. Watt. Those in favor will say aye? Opposed, no? The noes appear to have it. The——

Mr. WATT. See, I told you.

[Laughter.]

Chairman SENSENBRENNER. The noes do have it, and the amendments en bloc are not agreed to.

Are there further amendments? If there are no further amendments, the question——

Ms. JACKSON LEE. Mr. Chairman? I don't have an amendment. I'd like to put something in the record. I ask to strike the last word for submission——

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. I wanted to add into the record, Mr. Chairman, the complete testimony of Professor Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School, February 10, 19—excuse me, February 10, 2005. And I wanted to——

Chairman SENSENBRENNER. Where—well, if the gentlewoman will yield, where was this testimony presented?

Ms. JACKSON LEE. In the United States Senate.

Chairman SENSENBRENNER. Because the rules prohibit us including in the record proceedings in the other body, I would ask the gentlewoman to withdraw her unanimous consent request. The Senate has published that hearing, and it is a part of the record of the Senate consideration of this legislation.

Ms. JACKSON LEE. I will at this time withdraw that request, Mr. Chairman, and I've made mention of it. I want to make sure that

I did have included, however, a bankrupt reform article. I believe I did, but I want to double check, and that's by David S. Broder, and that's Sunday, March 13, 2005.

Chairman SENSENBRENNER. The gentlewoman has already asked unanimous consent to include that in the record and has received it from the Committee.

Ms. JACKSON LEE. Thank you.

Chairman SENSENBRENNER. Are there further——

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.

Ms. WATERS. I, too, would seek unanimous consent to submit for the record my statements on the bills that I introduced. I did not give the complete statements in the interest of time, and I——

Chairman SENSENBRENNER. Without objection, the statements of the gentlewoman from California will be included in the record.

[The prepared statements of Ms. Waters follow:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I have an amendment at the desk.

Mr. Chairman, I ask unanimous consent that the reading be dispensed with so that I may explain my amendment.

Mr. Chairman, the very modest amendment I am now offering will help protect seniors who have to file for bankruptcy from losing their homes. My amendment sets a mandatory $30,000 federal minimum "homestead exemption" for debtors who are 62 or older, and would allow such debtors in bankruptcy to protect some or all of the value of their homes from creditors. It also would substantially decrease the likelihood that many of these seniors must sell their homes.

Mr. Chairman, many of our seniors have been driven into bankruptcy because of huge medical expenses that they could not pay, job losses, and other events beyond their control.

When these seniors face the misfortune of bankruptcy because of medical expenses, they should not also have to lose virtually all of the equity in their home, equity that many of them have saved and struggled throughout their lifetime to build.

Nor should they be forced to sell their home if they file for a bankruptcy, a result that frequently is the case in states with low homestead exemptions. In many cases, a home may be an older person's only significant asset, representing an entire life savings.

My amendment sets a $30,000 nationwide floor on the homestead exemption for seniors, debtors who are 62 years old or older. States, like California, that have a more generous homestead exemption would not be affected by my amendment, but my amendment would protect more of the equity of older debtors who live in states like Ohio, with low homestead exemptions.

Mr. Chairman, some states have very low homestead exemptions. Ohio has an exemption of $5,000, and North Carolina has an exemption of $10,000. Currently, only two states have a higher exemption for the elderly. California's regular exemption is $50,000, but it is $150,000 for seniors. Maine's exemption is $35,000, but $70,000 for the elderly. Wisconsin's homestead exemption is $40,000 across the board. Florida and Texas have an unlimited dollar value homestead exemption while many states, like Ohio, have exemptions as low as $5,000.

Mr. Chairman, I believe that Federal law should provide additional protection to seniors in states where the homestead exemption is very low. A senior debtor should be entitled to a decent degree of basic protection for his home equity, wherever that senior happens to live.

Many of our seniors have scrimped and saved for a lifetime to buy their homes. We should do all that we can to help protect them from having to sell their home because illness or job loss required them to file for bankruptcy.

Mr. Chairman, the pain and burden for our seniors of dealing with huge, unexpected medical expenses or job loss is enormous. Let's not add insult to injury by making them suffer the loss of their homes as well. Please join me in preserving the dignity of our seniors by supporting my homestead exemption for seniors' amendment.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I have an amendment at the desk.

Mr. Chairman, I ask unanimous consent that the reading be dispensed with so that I may explain my amendment.

Mr. Chairman, this is an unbalanced, unfair anti-consumer bill that is tilted way too far in favor of the credit card companies. My amendment makes a modest attempt at restoring some balance by holding credit card companies responsible for their reckless extensions of credit to young people without regard to their capacity to handle such credit card debt.

My amendment would that an application for a credit card by someone under 21 have the signature of the young person's parent or guardian, that is, that there be a co-signer, or the submission of financial information by the under 21 year old consumer that demonstrates that this young applicant has the financial capacity to repay the credit sought. Under my amendment, no credit card could be issued to anyone under twenty one whose application did not meet this requirement.

Mr. Chairman, I am very concerned that because of the reckless practices of the credit card companies, many young people with little financial education or sophistication end up with huge debts that they simply cannot handle. The credit card companies, with their relentless marketing campaigns and endless television ads, seduce our young people with promises of the good life, without taking any responsibility for those who cannot responsibly handle the credit that they extend.

In recent years, there has been a huge effort by the credit card companies to market their cards to college students, and many students just starting out are being saddled with huge credit card debts that they cannot repay, debts that drive some of them into bankruptcy.

All of us know about the t-shirt giveaways, the low "teaser" rates that are used to entice young people, and the large number of marketing representatives who appear on college campuses at sporting events and other venues to push credit cards.

Mr. Chairman, for all too many of our young people, these cards are not so-called "convenience" cards that are paid in full every month. They often result in the creation of long term debt that these students lack the means to repay. My amendment would provide a means to significantly decrease the chance that a young borrower would get into financial trouble.

Let's do something meaningful to protect our young people from being victimized by the credit card companies. I urge all of my colleagues to support this common sense amendment.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I have an amendment at the desk.

Mr. Chairman, I ask unanimous consent that the reading be dispensed with so that I may explain my amendment.

Mr. Chairman, my amendment would provide a safe harbor for the many victims of domestic abuse whose physical well-being or their children's well-being would be greatly threatened by summary eviction procedures authorized under this bill.

Mr. Chairman, women and children who are victims of domestic violence join the ranks of the homeless every day. For women are so desperate to flee domestic abuse that they too often find themselves without funds with which to support themselves and their children. Victims often have a difficult time finding room at domestic violence shelters. Furthermore, domestic violence victims have a difficult time finding affordable long term housing because of the severe shortage of long-term affordable housing.

Mr. Chairman, domestic violence victims also find it extremely difficult to find and keep jobs. Their batterers often harass them at their places of work, which frequently results in the loss of their jobs. This directly affects their economic stability and often results in the inability to pay for life's basic necessities—such as housing.

Mr. Chairman, my amendment would provide protection for the overwhelming number of women and children who are trying to escape and survive domestic abuse and would greatly aid in allowing these victims to start a new life for themselves and their children. It would keep more of them in a safe and secure home.

Mr. Chairman, my amendment would modify the bankruptcy code to secure better protection for domestic abuse victims by granting them relief from summary eviction from their housing. Please note, this relief would only be available if a domestic violence debtor certifies, under penalty of perjury, that the debtor is, in fact, a victim of domestic abuse and that their physical well-being or the physical well-being of the debtor's child would be threatened if this debtor were evicted. This amendment would provide a safe harbor for those victims who face the threat of more violence and extreme danger if their homes were taken.

Mr. Chairman, we must recognize that these victims face the threat of losing their lives due to abuse and violence. They should not be forced from their homes dues to financial difficulties that are often out of their hands. Domestic abuse victims need the chance to start a new life free from violence, in a safe and secure home. Please support my amendment to carve out an exemption for domestic violence victims from summary eviction procedures authorized by this bill.

I yield back the balance of my time.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I ask unanimous consent to submit for the record a letter from the American Bar Association dated March 11, 2005, to Chairman Sensenbrenner and to John Conyers related to one of the three amendments.

Chairman SENSENBRENNER. Without objection, that letter will be included in the record.

[The material referred to follows:]

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

March 11, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Bankruptcy Attorney Liability Provisions in S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"

Dear Chairman Sensenbrenner and Ranking Member Conyers:

As your committee begins its consideration of S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," the American Bar Association (ABA) respectfully urges you to support amendments to delete several provisions from the bill that we believe unfairly increase the liability and administrative burdens of bankruptcy attorneys under the Bankruptcy Code.

Although the ABA has not taken a position on S. 256 in its entirety, the ABA and many state and local bars throughout the country strongly oppose those provisions in the bill that would require debtor bankruptcy attorneys to: (1) certify the accuracy of the debtor's bankruptcy schedules, under penalty of harsh court sanctions [*see* Section 102]; (2) certify the ability of the debtor to make future payments under a reaffirmation agreement [*see* Section 203(a)]; and (3) identify and advertise themselves as "debt relief agencies" subject to a host of new intrusive regulations that would interfere with the confidential attorney-client relationship [*see* Sections 227-229]. The ABA has prepared some proposed amendments that would eliminate these provisions and replace them with alternative language that would be more effective in reducing bankruptcy fraud and abuse. The text of the ABA's proposed amendments are available online at http://www.abanet.org/poladv/bankruptcyreform.html. It is our understanding that these and other possible amendments may be discussed and considered during your committee's markup scheduled for March 16, 2005.

The ABA believes that the attorney liability provisions in S. 256, discussed in greater detail below, would be a disaster for the nation's bankruptcy system. The provisions holding the debtors' attorneys *personally liable* for the accuracy of their clients' schedules would force the attorney to hire private investigators and appraisers to verify this information, adding thousands of dollars to the cost of representing a debtor in bankruptcy. Any attorney who fails to take these costly steps—including *pro bono* attorneys—would be subject to harsh sanctions and civil penalties that malpractice policies are unlikely to cover. Unless these and other related provisions are removed, bankruptcy representation will become unaffordable for most debtors and essential *pro bono* bankruptcy services will be greatly diminished, resulting in thousands of *pro se* debtors clogging up the courts.

Certification of Bankruptcy Schedules and Related Attorney Sanctions

The ABA strongly opposes the provisions in S. 256 that would require the debtor's attorney to certify the accuracy of all factual allegations in the debtor's schedules and would subject the attorney to harsh court sanctions if any factual inaccuracies resulted in the dismissal of the debtor's Chapter 7 bankruptcy petition or in its conversion to a Chapter 13. During House-Senate conference committee negotiations in 2002 on the predecessor to S. 256, H.R. 333, the provision requiring the court to impose sanctions against attorneys for inaccurate bankruptcy schedules was replaced with a discretionary standard. Although that change was a significant improvement, the current language contained in S. 256 will still have severe negative effects on the bankruptcy system.

Under current law, the debtors themselves are legally responsible for the accuracy of the schedules they file with the bankruptcy court, and debtors are required to sign and certify these schedules under penalty of perjury. If the debtor files false schedules, the debtor is subject to strict sanctions and criminal penalties, including stiff fines and up to five years in prison. In addition, existing Bankruptcy Rule 9011 requires both debtor and creditor bankruptcy attorneys, like all other attorneys appearing in federal courts, to certify that pleadings and other items that they prepare are supported by the facts before they are filed with the court. This rule, which is identical in form and substance to Federal Rule of Civil Procedure 11, applies to all pleadings and motions filed with the bankruptcy court. By its own terms, however, Rule 9011 does not apply to the bankruptcy schedules listing the debtor's financial information. Because those schedules are prepared almost entirely with information supplied directly by the debtor, Rule 9011 allows bankruptcy attorneys to rely in good faith upon the accuracy of this information provided by the client. Therefore, the debtor alone has been held responsible for the truthfulness and accuracy of the schedules.

Section 102 of S. 256 would change existing law by creating a new and higher standard for debtor bankruptcy attorneys that goes well beyond the standards imposed upon other attorneys. By creating new subsections 4(A) – (D) to 11 U.S.C. § 707(b), Section 102 of the bill would hold the debtor's attorney—instead of the debtor—financially responsible for any factual errors contained in the debtor's bankruptcy schedules. Therefore, if even innocent errors in the schedules result in the dismissal of the petition or in its conversion to a Chapter 13 proceeding, the debtor's attorney could be held financially responsible unless it is proven that the attorney conducted a time-consuming and costly investigation of these factual allegations before the filing.

In addition, while current Rule 9011 holds all bankruptcy attorneys to the same standards, Section 102 of S. 256 unfairly discriminates between debtor and creditor attorneys. Section 102 provides that if the debtor's schedules are found to violate Rule 9011 and the debtor is denied a discharge

March 11, 2005

under the means test outlined in S. 256, the debtor's attorney would be subject to harsh court sanctions and could be held personally liable for the attorneys' fees of the trustee or bankruptcy administrator who contested the discharge, as well as civil penalties. Because most malpractice carriers are expected to exclude this new liability from coverage under their policies, the debtor attorney's exposure will be even greater. In contrast, attorneys representing creditors would not be required to certify the accuracy of their clients' factual information and would not be made subject to any comparable new sanctions under the bill.

The new standards outlined in Section 102 of the bill also would fundamentally alter the attorney-client relationship in bankruptcy cases. It would transform the attorney from an advocate to a detective and informer. The legislation would create an unwaivable conflict of interest because the attorney would be unable to accept information provided by the client at face value without risking liability if the information later proved to be inaccurate. Further, the debtor's attorney would be required to independently verify all of the client's factual representations. Indeed, the attorney would be forced to hire private investigators and appraisers to confirm the existence and value of all of the assets listed on the client's schedules.

Requiring the debtor's attorney to verify all of the client's representations would significantly raise the cost to the debtor of filing for bankruptcy. As a result of the new obligations and liability imposed on attorneys by Section 102, many bankruptcy lawyers will no longer agree to accept debtors' cases because they will not be willing to become their client's insurer. In addition, those bankruptcy lawyers who continue to represent debtors will be forced to charge substantially higher fees (which most debtors will be unable to afford). Therefore, the practical effect of these provisions will be to deny many debtors timely, effective, and affordable representation just when they need it most. For all of these reasons, the ABA believes that new subsections 4(A) – (D) contained in Section 102 are counterproductive and should be removed from the bill.

Certification of Reaffirmation Agreements

The ABA also opposes those provisions in Section 203(a) of the bill that would require attorneys to certify the debtor's ability to make payments under a reaffirmation agreement.

Under current law, a debtor is not required to accept the discharge of all outstanding debt. Instead, the debtor may choose to reaffirm certain debts—thus retaining liability for these debts—provided that the decision is voluntary and will not create undue hardship for the debtor. Before such reaffirmation agreements can proceed under current law, however, the debtor's attorney must certify that the reaffirmation is voluntary and will not impose an undue hardship on the debtor or the debtor's dependents.

Section 203(a) would change these procedures by again imposing new burdens on the debtor's attorney. Unlike the current law, which simply requires the debtor's attorney to certify in writing that the reaffirmation agreement is voluntary and would not cause the debtor undue hardship, the new provisions require the attorney to certify that "the debtor is able to make the [reaffirmation] payment," in cases where there is a presumption of undue hardship under the debtor's budget (i.e., if the debtor's monthly income is less than monthly expenses, including the reaffirmation payments).

Bankruptcy attorneys are not accountants and are neither trained nor equipped to conduct extensive audits of their clients' finances, nor do they make financial or household budgeting decisions for their clients. Indeed, this is not the attorney's proper role, and any attempt to force the attorney to assume these duties will substantially increase the cost of representing a debtor in bankruptcy. Therefore, this certification requirement, like the certification requirement in Section 102, will discourage many attorneys from representing debtors, while forcing the remaining debtors' attorneys to charge higher fees to cover the substantial additional costs and risk.

The new certification requirement contained in Section 203(a) also will create strong conflicts of interest between the debtor and the attorney in those instances when the debtor wants to reaffirm a debt and instructs the attorney to certify the debtor's ability to make payments. If the attorney follows the client's directive, the attorney may become subject to sanctions under Rule 9011—or to a lawsuit by the creditor—if the debtor later proves unable to pay the reaffirmed debt. This new mandate is particularly unfair because creditor's attorneys are not subject to sanctions under Rule 9011 for their clients' false disclosures or illegal collection practices even if they acted in bad faith for vexatious purposes. For all of these reasons, the ABA believes that the provisions in Section 203(a) requiring debtors' attorneys to certify their clients' ability to make reaffirmation payments are inappropriate and should be deleted from the bill.

"Debt Relief Agency" Provisions

The ABA also strongly opposes those provisions in Sections 227-229 of the bill that would require bankruptcy attorneys to identify and advertise themselves as "debt relief agencies" and then comply with a host of new intrusive and burdensome regulations. These provisions would confuse the public, seriously interfere with the attorney-client relationship, and impose unfair additional burdens and liability on debtors' attorneys that constitute an unjustified government invasion of the relationship between private attorneys and their clients.

Under these provisions, any "person"—including both bankruptcy attorneys and non-attorney "bankruptcy petition preparers"—who assists individual debtors with their bankruptcies in return for compensation is deemed to be a "debt relief agency." Unfortunately, the provisions fail to take into account any of the important differences between attorneys and non-attorneys providing bankruptcy services. Under current law, only attorneys are permitted to give legal advice, file pleadings, or represent debtors in bankruptcy hearings. In addition, unlike non-attorney bankruptcy petition preparers, only attorneys are licensed by the state in which they practice, bound by canons of ethics, and subject to discipline by the courts in which they practice. More importantly, only those communications between the debtor and his or her attorney are protected by the attorney-client privilege. Requiring both attorneys and non-attorney bankruptcy petition preparers to advertise themselves as "debt relief agencies" would obscure these important distinctions while creating substantial confusion among the public.

The "debt relief agency" provisions in the bill would also interfere with the attorney-client relationship in a variety of ways. Because the definition is worded so broadly, it may be construed to apply not just to bankruptcy attorneys, but also to family attorneys, tax attorneys, criminal and civil defense attorneys, and general practitioners who, in the course of representing their clients, are compelled to advise them to consider filing bankruptcy to protect their rights. This will jeopardize the attorney's ability to properly advise his or her client regarding their legal rights.

Any attorney who assists a client with bankruptcy will be subject to a long list of new regulations under the bill. In particular, attorneys will be required to provide lengthy written disclosure statements to potential and existing bankruptcy clients that explain the bankruptcy system and that provide general, government-approved legal advice. In addition, attorneys will also be required to advise the debtor in writing that the debtor need not be represented by a lawyer in the bankruptcy or in related litigation, which in many cases is bad advice.

By requiring that the debtor's attorney provide the debtor with preprinted, government-approved legal advice on bankruptcy law, and by forcing the attorney to state in writing that the debtor need not even retain a lawyer, the bill would usurp the attorney's role as the proper legal representative of the debtor. Perhaps even more troubling, the bill would also prohibit the attorney from giving certain proper pre-bankruptcy planning advice to the client, including advice to pay certain lawful obligations or to incur certain debts. In fact, these provisions of the bill are worded so broadly that the attorney could be subject to liability merely for making an unsuccessful attempt to help the client restructure the debt to avoid bankruptcy. These provisions, which dictate the types and content of legal advice that an attorney can and cannot render to his client, are particularly destructive of the attorney-client relationship.

Sections 227-229 also require attorneys to provide the debtor with a written contract, and if the contract fails to comply with each of the detailed requirements outlined in the bill, it would be void and unenforceable. Furthermore, if the debtor's attorney failed to follow any of the many technical requirements of the legislation, the attorney would forfeit the entire fee and could be sued in state or federal court by the debtor, the trustee, or state law enforcement officials for actual damages, civil penalties, attorneys' fees, and costs. Although existing law and ethical rules require all attorneys to provide quality legal representation to their clients, Sections 227-229 go well beyond existing law and would subject just one type of attorney—debtors' bankruptcy attorneys—to a far stricter standard than attorneys in any other field of practice.

In addition, Section 229 also seeks to micromanage the bankruptcy attorney's advertising by requiring the attorney to include a conspicuous—and awkward—statement in all its advertising stating that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." No such requirements will apply to creditors' attorneys under the bill. These advertising regulations could conflict with the well-established advertising rules that have already been established by many state supreme courts and state bars and will confuse the public. In addition, requiring attorneys to label themselves as "debt relief agencies" will discourage general practitioners and bankruptcy professionals who have a consumer and business, debtor and creditor practice, from advertising the availability of bankruptcy services, thus limiting consumer bankruptcy representation to attorneys with narrower practices. For all of these reasons, the ABA believes that attorneys should be exempted from the coverage of the "debt relief agency" provisions contained in Sections 227-229.

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These three attorney liability provisions outlined above, taken together, would be a disaster for the nation's bankruptcy system. These provisions would discourage many attorneys from agreeing to represent debtors at all and would make bankruptcy representation unaffordable for countless numbers of Americans. In addition, these provisions would strongly discourage attorneys from providing essential *pro bono* bankruptcy services to the poor. With fewer attorneys available to represent debtors, many more debtors will be forced to file their bankruptcies *pro se*, without first obtaining adequate advice regarding the necessity or advisability of filing for bankruptcy. Therefore, these attorney liability provisions ultimately will have an adverse effect on debtors, creditors, and the bankruptcy system as a whole.

To avoid these problems, the ABA has crafted proposed amendments that would replace the current attorney liability provisions in S. 256 with tough new *non-dischargeable* sanctions against debtors who lie on their bankruptcy schedules and new language urging the bankruptcy courts to more vigorously enforce existing Rule 9011 of the Federal Bankruptcy Rules when misconduct by any party is shown. The proposed amendments would also amend the definition of "debt relief agency" to exclude attorneys (who are already licensed and heavily regulated by their state supreme courts and state bars) while leaving these new regulations in the bill in place for the non-attorney bankruptcy petition preparers (who are now largely unregulated). If adopted, these reforms would reduce bankruptcy fraud and abuse without unfairly harming honest debtors or the overall bankruptcy system. Therefore, we urge you to add these amendments to S. 256.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's positions on these issues, your staff may contact our legislative counsel for bankruptcy law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: All members of the House Judiciary Committee

Chairman SENSENBRENNER. Are there further amendments? If there are no further amendments, a reporting quorum is present. The question is on reporting the bill Senate 256 favorably to the full House. Those in favor will say aye? Opposed, no?

Mr. CONYERS. Mr. Chairman, I ask for a recorded vote?

Chairman SENSENBRENNER. The ayes appear to have it, and a recorded vote will be ordered. Those in favor of reporting the bill favorably to the full House will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH OF TEXAS. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye. Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Feeney?

Mr. FEENEY. Aye.

The CLERK. Mr. Feeney, aye. Mr. Franks?

Mr. FRANKS. Aye.

The CLERK. Mr. Franks, aye. Mr. Gohmert?

Mr. GOHMERT. Aye.

The CLERK. Mr. Gohmert, aye. Mr. Conyers?

Mr. CONYERS. No.

The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Are there Members who wish to cast or change their vote? The gentleman from Arizona, Mr. Flake.
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Chairman SENSENBRENNER. Further Members who wish—the gentlewoman from Texas, Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? If not, the clerk will report. And while the clerk is adding up, I would remind the Members that we have one more bill that needs to be considered that will go very briefly. It's a resolution of—is the gentleman from California, Mr. Issa, recorded?
Mr. ISSA. On final passage?
Chairman SENSENBRENNER. Yes.
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye.
Chairman SENSENBRENNER. Okay. The clerk will report—the gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?
[No response.]
Chairman SENSENBRENNER. The clerk will report.
The CLERK. Mr. Chairman, there are 22 ayes and 13 noes.
Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by the House rules, in which to submit additional dissenting, supplemental, or minority views.
[Intervening business.]
The business scheduled before the Committee having been completed, the Committee stands adjourned.
[Whereupon, at 5:42 p.m., the Committee was adjourned.]

DISSENTING VIEWS

Reform of the bankruptcy system, and the principle that every debtor should repay as much of her debt as she can reasonably afford, is a sound and uncontroversial idea. Were the legislation reported by the Judiciary Committee to bear any remote relationship to that laudable goal, this legislation would be wholly uncontroversial. Instead, by pressing legislation that is unbalanced and tilted toward specific special interest groups, the proponents of S. 256 have created a bill that would: impose monumental costs on the parties in the bankruptcy system, including the government; subject the "honest but unfortunate debtor" to coercion and loss of their legal rights; force businesses into unnecessary liquidation; and favor certain creditors over others.[1]

It is a stark fact that the bankruptcy filing rate has almost doubled during the last decade. Nonetheless, debtors filed just under 1.6 million bankruptcy cases last year,[2] a decline in total bankruptcy filings nationally from 2003 of 3.8%.[3] The bill's sponsors view the long-term increase as evidence of widespread abuse of the bankruptcy system by people who otherwise would be in a position to pay their debts. Bankruptcy, the bill's sponsor says, has become a system "where deadbeats can get out of paying their debt scott-free while honest Americans who play by the rules have to foot the bill."[4]

The bankruptcy filing rate is a symptom. It is not the cause. While some people abuse the bankruptcy system, more than 90 percent of debtors file for bankruptcy due to unemployment or underemployment, an illness or accident, or divorce. The bulk of the remainder suffered from other legitimate difficulties, including activation for military service, being a victim of crime or natural disasters, or a death in the family .... an independent study on the subject found that less than four percent of debtors who filed under Chapter 7 (where unsecured debt is discharged) could possibly repay *any* of their unsecured debt under Chapter 13.[5]

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[1] Local Loan v. Hunt, 292 U.S. 234, 244 (1934). "One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' The purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Id.* (Citations omitted).

[2] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY STATISTICS FOR CALENDAR YEAR ENDING ON DECEMBER 31, 2004.

[3] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY STATISTICS FOR CALENDAR YEAR ENDING ON DECEMBER 31, 2003 *available at* http://www.uscourts.gov/bnkrpctystats/statistics.htm#calendar.

[4] Press Release, Office of Senator Charles Grassley, Grassley Renews Effort to Reform Bankruptcy Code (February 2, 2005).

[5] Letter from Martin Eakes, CEO, Self-Help Credit Union; Jim Blaine, State Employees' Credit Union, North Carolina; Terry D. Simonette, President & CEO, NCB Development Corporation; Calvin Holmes, Executive Director, Chicago Communit6y Loan Fund; Elsie Meeks, Executive Direct, First Nations Oweesta Corporation; Ceyl Prinster, Executive Director, Colorado Enterprise Fund; Bill Edwards, Executive Director, Association of Enterprise Organizations; Mark Pinsky, National Community Capital Association; John Herrera, Board Chair, Latino Community Credit Union; Fran Grossman, Executive Vice President, ShoreBank Corporation; Kerwin Tesdell,

Our concerns regarding this legislation are procedural as well as substantive. The House Judiciary Committee has held no hearings on this legislation in this Congress.[6] The Subcommittee on Commercial and Administrative Law has not considered the bill. Additionally, Chairman Sensenbrenner made it abundantly clear that, although regular order would be followed, in Full Committee, it would be regular order in name only. The votes, and the result, were preordained. No amendments were permitted, and none would receive consideration regardless of their merit.[7]

The single Senate Judiciary Committee hearing on S. 256 shed light on the major factor now driving people into bankruptcy: increasingly high medical expenses. A joint study of bankruptcy filings by researchers at Harvard Medical School and Harvard Law School revealed that roughly half of all bankruptcies filed in 2001 were caused, at least in part, by illness or medical debts.[8] Remarkably, 75 percent of bankruptcy filers with medical expenses had health insurance at the onset of their bankrupting illness. However, a significant number experienced gaps in coverage and high out-of-pocket costs, particularly for prescription drugs.

In the eight years since the credit industry first came to Congress seeking relief from the rising rate of personal bankruptcy filings, the extension of credit has not been curtailed nor have the industry's profits been diminished due to bankruptcy filings. Instead, credit card solicitations have doubled to five billion a year.[9] The bill still ignores the problem of the abuse of consumers by credit card companies.

While bankruptcy filings have increased 17 percent in the last eight years, credit card profits have increased 163 percent – from $11.5 billion to $30.2 billion.[10] The cost of late and other penalty fees assessed by credit card companies have doubled in the last decade and now are more quickly levied (payments arriving after a certain hour on the due date are now considered late). Even more damaging have been the accompanying penalty rates. These rates jump from usually zero percent to a range of 22-29 percent, are retroactive to the entire balance, and, thanks to "universal default" policies, now create a domino effect on the consumer's financial

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CEO, Community Development Venture Capital Associationto Hon. Dennis Hatert, Speaker and Hon. Nancy Pelosi, Minority Leader, U.S. House of Representatives (Mar. 14, 2005)(citations omitted)(on file with minority staff).

[6] The most recent hearing was held on March 4, 2003.

[7] In his opening statement during the March 16, 2005, markup, the Chairman stated "[i]t's no secret that I will strongly encourage Members of this Committee to vigorously oppose all amendments to S. 256 as passed by the Senate based on this extensive record . . . . I will, accordingly, urge my colleagues to report this bill without amendment."

[8] David U. Himmelstein et al., *Marketwatch: Illness and Injury as Contributors to Bankruptcy*, W5 HEALTH AFF. 63, 63 (2005) *at* www.healthaffairs.org.

[9] Kate Fitzgerald, *Mail Mania*, CREDIT CARD MGMT., Dec. 2004, at 20. (expecting that credit card issuers will mail a record $5.4 billion solicitations in 2004).

[10] *Bankruptcy Reform: Hearing on S. 256 Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 10, 2005) (statement of Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School) (citing CardWEb.com, Inc./RAM Research Group Frederick, MD *available at* www.cardweb.com).

situation.[11] Additionally, the average late fee in 2003 for a late payment on a credit card was $29.

Proponents of the legislation say that the bill will put pressure only on the families that have the ability to repay. In fact, the weight of the evidence demonstrates that the legislation will increase the cost of bankruptcy for every family, and it will decrease the protection of bankruptcy for every family, regardless of income or the cause of financial crisis. There are provisions that will: force many honest debtors unnecessarily out of chapter 7, make Chapter 13 impossible for many of the debtors who file today, protect significant loopholes for wealthy and well-advised debtors, raise the cost of the system for all parties, turn the government into a private collection agency for large creditors, and force women trying to collect child support or alimony to compete with credit card companies that will have more of their debts declared non-dischargeable.

The simple reality is that time and changes in the American economy have passed by the substance of this bill. Even if it was a flawless bill when it first was introduced eight years ago (and it was not), the events of the past eight years have dramatically changed the landscape in which we now consider it. The ability to file for bankruptcy and to receive a fresh start provides crucial aid to families overwhelmed by financial problems. This bill would seriously compromise the bankruptcy protections these families need.

This legislation is opposed by organizations and individuals most concerned with the bankruptcy system, the rights of consumers, the needs of single parents and children, the elderly, working families, and civil rights.

Among the organizations that have opposed, or have expressed serious concerns with S. 256 and its predecessors since the 105th Congress are:

(1) groups concerned with the rights of workers including: AFL-CIO, Air Line Pilots Association, American Federation of Labor and Congress of Industrial Organizations, American Federation of State, County and Municipal Employees (AFSCME), Transport Workers Union, Service Employees International Union, Union of Needletrade Industrial and Textile Employees (UNITE), United Food and Commercial Workers International Union, United Mine Workers of America, United Steelworkers of America, Communication Workers of America, International Association of Machinist and Aerospace Workers, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers, International Brotherhood of Electrical Workers, International Brotherhood of Police Officers, International Brotherhood of Teamsters, International Union UAW, Laborers International Union of North America, National Association of Government Employees, PACE International Union, and UNITEHERE;[12]

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[11] *See* TAMARA DRAUT & JAVIER SILVA, DEMOS: A NETWORK FOR IDEAS AND ACTION, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE 90S 13 (2003) *available at* www.demos-usa.org.

[12] Letter from Charles Loveless, Director of Legislation, American Federation of State, County, and Municipal Employees, to Members of Congress (Feb. 25, 2005); Letter from William Klinefelter, Legislative and Political

(2) groups of non-partisan bankruptcy lawyers, judges, academics, physicians and banks including: American Association of University Women, American Bar Association, American Federation of Teachers, Association of Enterprise Organizations, Community Development Venture Capital Association, Klee, Tuchin & Bogdanoff LLP, Latino Community Credit Union, National Bankruptcy Conference, National Community Capital Association, National Conference of Bankruptcy Judges, National Association of Chapter 13 Trustees, National Association of Bankruptcy Trustees, Commercial Law League of America, the American College of Bankruptcy, and National Association of Consumer Bankruptcy Attorneys, a group of 110 professors of bankruptcy and commercial law, and a group of 1,700 physicians from around the country wrote to Congress in opposition to S. 256 because it would remove protections available to patients ruined financially by medical expenses;[13]

(3) groups concerned with the rights of women, children, seniors, and victims of crimes and torts including: Alliance for Retired Americans, Business and Professional Women/USA, Children's Foundation, Church Women United, National Council of Jewish Women, National Council of Women's Organizations, National Organization for Women, National Women's Law Center, and OWL – The Voice of Midlife and Older Women;[14]

(4) groups concerned with consumer protection, civil rights, and social justice including: American Friends Service Committee, Association of Community Organization for Reform Now (ACORN), Center for Community Change, Commission on Social Action of Reform Judaism, Consumer Federation of America, Consumers Union, Leadership Conference on Civil Rights,

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Director, United Steelworkers of America, to Members of Congress (Feb. 28, 2005); Letter from Ala n Reuther, Legislative Director, UAW, to Members of Congress (Feb. 28, 2005); Letter from American Federation of Labor and Congress of Industrial Organizations, AFSCME, American Federation of Teachers, Communications Workers of America, International Association of Machinist and Aerospace Workers, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, and Forgers, International Brotherhood of Electrical Workers, International Brotherhood of Police Officers, International Brotherhood of Teamsters, UAW, Laborers International Union of North America, National Association of Government Employees, Air Line Pilots Association, PACE International Union, Service Employees International Union, United Food and Commercial Workers International Union, United Mine Workers of America, United Steelworkers of America, and UNITEHERE, to Members of Congress (Feb. 28, 2005); Letter from Patricia Campos, Legislative Director, UNITEHERE, to Members of Congress (Mar. 1, 2005).

[13] Letter from Bill Edwards, Executive Director, Association of Enterprise Organizations, Mark Pinsky, National Community Capital Association, John Herrera, Board Chair, Latino Community Credit Union, and Kerwin Tesdell, CEO, Community Development Venture Capital Association, to Members of Congress (Mar. 14, 2005); Letter from Robert Evans, Director, American Bar Association, to Honorable Arlen Specter, Chairman, Senate Judiciary Comm. (Feb. 8, 2005); Letter from David Himmelstein & 1,700 Doctors, to Members of Congress (Feb. 14, 2005); Letter from Richard Aaron & 109 professors, to Honorable Chairman James Sensenbrenner & Ranking Member John Conyers (Mar. 11, 2005); Letter from Ken Klee, Partner, Klee, Tuchin, Bogdanoff & Stern LLP, to Members of Congress (Mar. 10, 2005).

[14] Letter from Nancy Duff Campbell et al., Co-President, National Women's Law Center, to Honorable John Conyers, Ranking Member, House Judiciary Comm. (Mar. 14, 2005); Letter from Edward Coyle, Executive Director, Alliance for Retired Americans, to Members of Congress (Feb. 28, 2005); Letter from Lisalyn Jacobs, Vice President for Government Relations, National Organization of Women (NOW), to Members of Congress (Feb. 28, 2005).

Lutheran Office for Governmental Affairs ELCA, NAACP, National Advocacy Center of the Sisters of the Good Shepard, National Community Reinvestment Coalition, National Consumer Law Center, Neighborhood Assistance Corporation of America, Network – a National Catholic Social Justice Lobby, Public Justice Center, and U.S. Public Research Group.[15]

Many of these concerns have been expressed since the introduction of the precursor bills beginning with the 105th Congress.[16] The reported bill is virtually identical to the conference report on H.R. 333 in the 107th Congress with the exception of an important provision that would have prevented the discharge, or the abuse of the bankruptcy system to hinder, delay and defraud creditors, of debts arising from violations of the Freedom of Access to Clinic Entrances Act.[17] There is no reason for the deletion of this amendment that reflects a compromise among Sen. Charles Schumer, Sen. Orrin Hatch and Rep. Henry Hyde, other than the conclusion of the bill's sponsors that protecting women's constitutional rights would interfere with the passage of this special-interest legislation.

For all the foregoing reasons, and the reasons discussed below, we dissent from this legislation.

Section I describes concerns about the lack of empirical justification for this bill. Section II describes the consumer provisions, including, most notably, the means test. Section III discusses flaws in the small business and single-asset real estate provisions, Section IV turns to

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[15] Letter from Travis Plunkett, Legislative Director, Consumer Federation of America, to the Honorable Chairman James Sensenbrenner and Ranking Member John Conyers (Mar. 15, 2005); Letter from Susanna Montezemolo, Policy Analyst, Consumers Union, to Members of Congress (Mar. 1, 2005); Letter from Wade Henderson et al., Executive Director, Leadership Conference on Civil Rights, to Members of Congress (Mar. 14, 2005).

[16] A number of editorials and articles have been written in opposition this bill. Riva Atlas & Eric Dash, *Bracing for Bankruptcy Rush*, N.Y. TIMES, Mar. 11, 2005, at C1; *Bankruptcy Reform Hurts Struggling Families*, BALT. SUN, Mar. 4, 2005, at A15; David Broder, *A Bankrupt 'Reform,'* WASH. POST, Mar. 13, 2005, at B7; *Bum of a Bankruptcy Bill: The Legislation Would Add Unfairly to the Misfortune of Many*, AKRON BEACON-JOURNAL, Mar. 6, 2005, at B3; Jonathan Chait, *When Democrats Join the Dark Side; Their Kowtowing to Home-state Industries Props up the Republicans*, L.A. TIMES, Mar. 4, 2005, at B13; E.J. Dionne, *A Morally Bankrupt Bill Democrats Should rally Against A Bankruptcy Bill That Hurts the Most Vulnerable*, PITTSBURGH POST-GAZETTE, Mar. 1, 2005, at A15; Annette Dunlap, *Right Ignores Bible's Words about Debt Scripture, Calls for Protecting People from Enslavement to Creditors*, CHARLOTTE OBSERVER, Mar. 21, 2005, at A13; *For Banks a Triumph of Greed*, N. N.J. RECORD, Mar. 17, 2005, at L11; *How a Bad Bill Becomes Law*, S. F. CHRON., Mar. 13, 2005, at C4; Walter Kirn, Broke, N.Y. TIMES, Mar. 27, 2005, at F7; Stephen Labaton, *A New Mood in Congress to Forgo Corporate Scrutiny*, N.Y. TIMES, Mar. 9, 2005, at C3; *Morally Bankrupt*, THE NEW REPUBLIC, Mar. 2005; Shanon Murray, *The Bankruptcy Game Looms*, The Deal Dot Com, Mar. 11, 2005, *at* www.thedeal.com; Norman Pressman, *Bankruptcy Changes Will Enslave BusinessPeople*, ST. LOUIS POST-DISPATCH, Mar. 27, 2005; *Reshape Bankruptcy with More Fairness*, KANSAS CITY STAR, Mar. 29, 2005; Michelle Singletary, *Bankruptcy Bill Lingers in the Ring*, WASH. POST, Mar. 3, 2005, at E3; *The Flawed Bankruptcy Bill Legislation Would Harm People Forced into Insolvency by Life's Vagaries*, BUFF. NEWS, Mar. 9, 2005, at A6; Cynthia Tucker, *Bush Cheats Those He Owes*, ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2005, at F8; Elizabeth Warren, *Sick and Broke*, WASH. POST, Feb. 9, 2005, at A23; *Working Class Forsaken in Favor of Special Interests*, BUCKS COUNTY COURIER TIMES, Mar. 24, 2005, at A10.

[17] 18 U.S.C. § 248 (2004).

the tax sections of S. 256, and Section V looks at corruption in the bankruptcy system. The following is a table of contents summarizing this analysis:

Table of Contents

I. LACK OF EMPIRICAL JUSTIFICATION

One of the major reasons accounting for the differing views regarding S. 256 relates to differing understandings of the quantitative evidence of the causes, costs, and effects of bankruptcy. S. 256's proponents point to (1) the fact that the United States has experienced a dramatic growth in the number of personal bankruptcy filings in the last decade[18] and (2) credit industry-funded studies by Professor Michael Staten of Georgetown University's Credit Research Center,[19] Ernst & Young,[20] and the WEFA[21] group that purport to demonstrate that the bankruptcy laws allow many relatively high income individuals to avoid debts they could otherwise pay and that this avoidance imposes substantial costs on the economy. Proponents of S. 256 point to the "opportunistic personal filings" for bankruptcy and the declining stigma associated with doing so to explain the increase in filings.[22]

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[18] According to the Administrative Office of the United States Courts, total bankruptcies filed for calendar year 2004, declined by 3.8% compared with calendar year 2004. This represents a total of 1,597,462 for 2004, compared with 1,660, 245. Non-business filings, which comprise the largest portion of total bankruptcy filings declined 3.8% (from 1,625, 208 to 1,563,145). The number of business fillings fell 2.1% (from 35,037 to 34,317). By chapter: Ch. 7 filings declined 3.3% (from 1,176,905 to 1,137,958); ch. 13 filings declined by 5.1% (from 473,137 to 449,129); ch. 11 filings were the only ones to increase. They rose by 7.7% (from 9,404 to 10,132); chapter 12 filings dropped to 108 from 712 filings. Press Release, Administrative Office of the U.S. Courts, Bankruptcy Flings Drop in Calendar Year 2004 (March 1, 2005) (on file with author).

[19] Professor Michael E. Staten of Georgetown University's Credit Research Center ("CRC"), which has many credit industry officials on its board, conducted what is perhaps the most-discussed study. JOHN M. BARRON & MICHAEL E. STATEN, PURDUE UNIVERSITY CREDIT RESEARCH CENTER, PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY TO PAY (Oct. 1997). Staten concluded that 5% of chapter 7 debtors could repay all of their non-priority, non-housing debt over 5 years, 10% could repay at least 78% of such debt, and 25% could repay 30% of their debt. *Id.* at 26. *See also Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the House Comm. on the Judiciary*, 106th Cong. 520 (March 17, 1999) (statement of Michael E. Staten, Professor and Director, Credit Research Center, Georgetown University).

[20] An Ernst & Young study, funded by VISA USA and MasterCard International, purports to corroborate the CRC findings. POLICY ECONOMICS AND QUANTITATIVE ANALYSIS GROUP, ERNST & YOUNG LLP, 1997 BANKRUPTCY PETITION STUDY: EXPERIENCE APPLYING A TOTAL QUALITY DESIGN PARADIGM 1 (1998) *available at* http://www.amstat.org/sections/srms/Proceedings/papers/1998_019.pdf.

[21] Wharton Econometric Forecasting Associates ("WEFA") examined the financial cost of personal bankruptcy cases filed in 1997, which it defined as "the amount of credit dollars (outstanding loans) lost due to bankruptcy filings . . . [and] the costs of the U.S. court system . . . and other creditor's expenses relating to bankruptcy." WEFA GROUP RESOURCE PLANNING SERVICE, THE FINANCIAL COSTS OF PERSONAL BANKRUPTCY 4 (Feb. 1998). The WEFA study calculated that "financial losses due to 1997 personal bankruptcies totaled more than $44 billion . . . . Unsecured nonpriority losses totaled almost $35 billion in 1997 . . . [and] passing such financial losses on to consumers in terms of higher prices would cost the average household over $400 annually." *Id.* at 1. The WEFA study also concluded that the needs based proposal in H.R. 3150 "should decrease financial costs due to bankruptcy . . . from 8% to 17% annually." *Id.* at 2.

[22] *Hearing on H.R. 833, the Bankruptcy Reform Act of 1999, Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. (March 17, 1999) (written statement of Michael E. Staten); *Joint Hearing Before the House Subcomm. on Commercial and Admin. Law and the Senate Subcomm. on Admin. Oversight and the Courts*, 106th Cong. (March 11, 1999) (written statements of (1) Bruce L. Hammonds, Senior Vice Chairman of MBNA Corporation; (2) Judge Edith H. Jones, U.S. Court of Appeals for the Fifth Circuit; (3) Professor Todd J. Zywicki, George Mason University School of Law; and (4) Dean Sheaffer, National Retail Federation).

Despite the earlier trend in higher numbers of bankruptcy filings, the vast weight of studies have contradicted the proponents' rationales and have shown that the filing rate is a symptom of financial difficulties. Analysts with the Congressional Budget Office,[23] the General Accounting Office,[24] and the Federal Deposit Insurance Corporation all have called into question the conclusions of those studies. These critiques focus on a number of grounds, including numerous flaws in the analysis and the assumptions underlying the studies. Moreover, other analyses indicate that the rise in bankruptcies is more properly attributable to a number of changes unrelated to the bankruptcy laws, such as unexpected medical costs, family crises like divorce, loss of high-paying full-time jobs, and most notably, the deregulation of credit card interest rates and the dramatic increase in credit card solicitations and overall consumer debt.[25] Even a credit

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[23] Kim Kowalewski of the Congressional Budget Office ("CBO"), at the request of the National Bankruptcy Review Commission, conducted a review of three economic analyses of this question. Kowalewski concluded that a 1996 VISA study did not support such a conclusion and, in fact, "because the social trends variable is flat during 1995 and early 1996, VISA believes that their social factors played no role behind the increase in personal bankruptcies in that period." KIM J. KOWALEWSKI, EVALUATIONS OF THREE STUDIES SUBMITTED TO THE NATIONAL BANKRUPTCY REVIEW COMMISSION 4 (Oct.6, 1997). At the request of Subcommittee Democrats, Mr. Kowalewski reviewed the economic issues affecting the rate and nature of bankruptcy in the United States. The Democratic Members made their original request on January 14, 1998; the response from CBO, in draft form only, was delivered April 16, 1999, over one year later. Mr. Kowalewski has still not been made available to testify before the Committee.

[24] At the request of Senators Charles Grassley and Richard Durbin, the General Accounting Office ("GAO") examined the CRC study and found five areas of concern: (1) data supplied by the debtors regarding their income expenses, debts, and the stability of their income and expenses over a 5-year period were not validated, (2) the report did not define the universe of debts for which it estimated debtors' ability to pay, (3) payments on non-housing debts that debtors stated they intended to reaffirm were not included in debtor expenses in determining the net income debtors had, (4) the CRC did not account for the considerable variation among the 13 locations used in the analysis, and (5) a scientific random sampling methodology was not used to select the 13 bankruptcy locations or the bankruptcy petitions used in the analysis. GENERAL ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER REPORT ON DEBTORS' ABILITY TO PAY 2–3 (1998) *available at* http://www.gao.gov/archive/1998/gg98047.pdf. The GAO also was concerned with Ernst & Young's bankruptcy study because the study: did not validate the data reported on the debtor's schedules; assumed that the unvalidated data would be stable and consistent throughout the five-year repayment period; assumed that 100 percent of the debtor's net income was expected to go to debt repayment; and assumed that the debtor would satisfactorily complete the repayment plan. GENERAL ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER AND ERNST & YOUNG'S REPORTS ON DEBTORS' ABILITY TO PAY 9 (1998) *available at* http://www.gao.gov/archive/1998/gg98076t.pdf. The GAO also had concerns with WEFA's report because it did not contain sufficient information regarding the reasonableness of the assumptions and methodology that they used. GENERAL ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE WEFA REPORT ON THE FINANCIAL COSTS OF BANKRUPTCY 15 (1998) *available at* http://161.203.16.4/paprpdf2/160330.pdf.

[25] The Federal Deposit Insurance Corporation ("FDIC") contested many of assertions made in the above-noted studies. BANK TRENDS (FDIC, Washington, D.C.) March, 1998 *available at* http://www.fdic.gov/bank/analytical/bank/bt_9805.html. The FDIC observed a strong correlation between credit card default rates and personal bankruptcies, both of which increased in the 1990's. *Id.* The FDIC found that, because of and following interest rate deregulation in 1978, credit card companies became more profitable and credit card lenders were able to extend more unsecured credit to less creditworthy borrowers. *Id. See also* Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 254 (1997) (stating that the rise in bankruptcies has strongly correlated with the rise in credit card debt delinquencies that consumers have incurred); David U. Himmelstein et al., *Marketwatch: Illness and Injury as Contributors to Bankruptcy*, W5 HEALTH AFF. 63, 66 (2005) (finding that almost half of all debtors filing for bankruptcy did so because of a "major medical bankruptcy") *at* www.healthaffairs.org.

card industry official found that "[t]he majority of bankruptcies in [its] file are on customers who have been on the books for more than three years and have had some significant change in their financial condition."[26] It also has been shown that the average income of persons filing for bankruptcy has declined from the 1980's, further contradicting assertions of widespread abuse by high-income individuals.[27]

One of the most telling studies was performed by the non-partisan American Bankruptcy Institute, which commissioned Professors Marianne B. Culhane and Michaela M. White of the Creighton University School of Law to conduct a study independent of the credit industry.[28] Professors Culhane and White used for their study a database of chapter 7 cases; the National Conference of Bankruptcy Judges funded the compilation of the database.[29] The study estimated that 3.6% of the debtors in their sample had sufficient income, after deducting allowable living expenses, to pay all of their non-housing secured debts, all of their unsecured priority debts, and at least 20% of their unsecured nonpriority debts.[30] Moreover, in making their calculations, Professors Culhane and White assumed that 100% of the debtors in chapter 13 would complete a five-year repayment plan even though more than 60% of voluntary chapter 13 plans currently do not complete.[31]

The American Bankruptcy Institute study also showed that, while the credit industry estimates it may be eligible recover $4 billion under the rigid standards of the means test, creditors

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[26] *Joint Hearing Before the House Subcomm. on Commercial and Admin. Law and the Senate Subcomm. on Admin. Oversight and the Courts*, 106th Cong. 81(March 11, 1999) (written statements of Bruce L. Hammonds, Senior Vice Chairman of MBNA Corporation).

[27] While bankruptcy rates have been on the rise as a result of the current recession both the American Bankruptcy Institute and Professor Ausubel pointed out, that the earlier rise in personal bankruptcy rates, which were used to manufacture fear of a so-called bankruptcy crisis, in fact ended in 1998. American Bankruptcy Institute, *ABI Testifies on Bankruptcy Reform Bill*, 18 ABI Journal 1 (Apr. 1999) *at* http://www.abiworld.org/Template.cfm?Section=199921&CONTENTID=8602&TEMPLATE=/ContentManagement/ContentDisplay.cfm; LAWRENCE M. AUSUBEL, UNIVERSITY COLLEGE LONDON, A SELF-CORRECTING "CRISIS": THE STATUS OF PERSONAL BANKRUPTCY IN 1999 1 (Mar. 10, 1999). In fact, the ABI found that "consumer bankruptcy filings have dropped dramatically nationwide in January and February [1999], after three consecutive years of record filings." AMERICAN BANKRUPTCY INSTITUTE, *supra*, at 1. Specifically, "[t]he personal bankruptcy filing rate per thousand population grew at an annual rate of only 1.5% in the last year, and at a (seasonally-adjusted) annual rate of only 1.0% in the last quarter." LAWRENCE M. AUSUBEL, *supra*, at 1. The crisis corrected itself because lenders, as they normally would, tightened their lending practices when defaults became more common and infringed upon profits, thereby limiting the number of people going into debt and filing for bankruptcy. *See id.* at 3. The decline in bankruptcy filings for the last calendar year bears this out. Administrative Office of the U.S. Courts, *supra* note 11.

[28] *Hearing on H.R. 833, the Bankruptcy Reform Act of 1999, Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. 526 (March 17, 1999) (statement of Marianne B. Culhane); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 30 (1999).

[29] Culhane & White, *supra* note 28, at 30.

[30] *Id.* at 32–34.

[31] *Id.* at 59–60.

would receive at best $450 million in actual collections.[32] These figures are significantly lower than those of the Credit Research Center and VISA – two studies funded by the credit industry – and show that the credit industry may have overstated the "problem" by as much as 500%.[33] The Executive Office of United States Trustees in the Justice Department conducted a study that reached similar results, estimating that passage of the legislation probably would have netted creditors no more than 3% of the $400 per household they claim to be losing.

Professor Staten, whose work for the credit industry provided much of the empirical fodder for this legislation, has observed that this legislation would only move about 5% of all chapter 7 cases into chapter 13, and that the legislation would have no effect on the number of bankruptcies.[34]

Similarly, according to James Blaine, CEO of the NC State Employees Credit Union, "Charge-offs, too, are well under control at .46% of total loans (less than 1%). In other words, 99.5% of credit union loans are repaid as promised. According to NCUA 41.1% of credit union charge-offs related to bankruptcy. Or said another way, just .19% (less than 2/10th of 1%!) of total credit union loans result in a bankruptcy loss. So taking a the high estimate of 15% rate of abuse, he calculates that total losses on loan portfolios are .0385% or less than 3/100ths of 1% (.19% x 15% = .0285% (less than 3/100ths of 1%)."[35]

Moreover, there is nothing in this bill to guarantee that any savings realized from this bill will be passed on to consumers. The bill does not require it and, quite frankly, although real interest rates continue to hover at record lows, very little of the benefit of these low rates have been passed on to credit card borrowers. Not surprisingly, there is no evidence that the credit card industry would pass on any of the "savings" from bankruptcy law changes to individual borrowers.[36] Instead the evidence shows that credit card companies, tend to maintain high interest

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[32] *Id.* at 29–31.

[33] *Id.*

[34] FDIC Roundtable On Consumer Debt (Statement of Michael Staten) (Feb. 28, 2003).

[35] James Blaine, *Only Thing Bankrupt Is Logic Behind 'Reform,'* CREDIT UNION J., Feb. 2003, at 23.

[36] In a recent interview with the Financial Times,

> James Sensenbrenner, chairman of the House Judiciary Committee, said the bill would help the financial services industry by encouraging consumers to borrow more sensibly. The legislation also carried an implicit responsibility for the industry, according to Mr Sensenbrenner, who will manage it in the House.
>
> "The responsible thing for credit-card issuers to do would be to reduce interest rates because there is less risk," he said. "If they don't, they will play into the hands of the opponents of the bill - it would reduce their credibility."

Andrew Balls et al., *Bankruptcy Bill Set for Passage After Eight Years,* FIN. TIMES, Mar. 2005, at 10.

rates, even when their own cost of credit declines.[37] In at least some cases, these patters appear to have been caused by unlawful behavior on the part of the credit card industry.[38]

An important study from Harvard University recently found that over fifty percent of all individuals who filed for bankruptcy did so as a result of some sort of medical emergency or situation in the family.[39] This study also found that many of the debtors had gone without some sort of privation in the preceding two years before the debtor filed for bankruptcy. Such privations included debtors going without: telephone service (40.3%), food (19.4%), doctor or dental visits (53.6%), and filling prescriptions(43%). This study provides further evidence that certain societal problems are causing people to have to file for bankruptcy.[40]

Recently, Demos: A Network for Ideas and Action, released a study contradicting the assumptions of this bill's proponents. The Demos study showed how the amount of credit card debt per person has risen in the last 10 years.[41] The study also showed how the increase in senior citizens filing for bankruptcy has been the greatest of any age group over the years.[42] Credit card debt among young Americans has increased dramatically in the 1990s.[43] The average young adult had over $4,000 in credit card debt in 2001. The average American family experienced a 53 percent increase in the amount of credit card debt that they owed.[44] The main reason that most Americans have been incurring much more credit card debt is not because of reckless consumption but because of the "growing gap household earnings and the costs of essential goods and services."[45] The Demos study also found that one of the reasons for the rising credit card debt

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[37] In 1996, Professor James Medoff, the Meyer Kestnbaum Professor of Labor and Industry at Harvard University, pointed out that, between 1980 and 1992, when the federal funds rate (the interest that banks charge for overnight loans) fell from 13.4% to 3.5%, a drop of nearly 10 percentage points, the average credit card interest rate rose from 17.3% to 17.8%. Professor Medoff suggests that during the 1980s, when interest rates were high, lenders learned a valuable lesson; consumer debtors in general pay very little attention to interest rates. *Hearing on H.R. 833, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. 221 (March 16, 1999) (written statement of the Honorable Joe Lee) (citations omitted).

[38] The Second Circuit Court of Appeals recently found that Visa and Mastercard's exclusivity rules that did not allow banks that issued their credit cards to issue credit cards of their competitors such as American Express were in violation of the Sherman Anti-Trust Act. The United States Supreme Court denied certiorari to the case. Visa v. United States, 125 S. Ct. 45 (2004).

[39] David U. Himmelstein et al., *Marketwatch: Illness and Injury as Contributors to Bankruptcy*, 24 HEALTH AFF. 63, 66 (2005) (stating that half of the surveyed debtors met at least one of the criteria for "major medical bankruptcy").

[40] *Id.* at 68.

[41] Press Release, Demos: A Network for Ideas and Action, Misguided Bankruptcy Bill Ignores the Financial Insecurity Forcing Families into Debt and Bankruptcy; Economic Consequences Would Be Severe (Feb. 24, 2005) (on file with author).

[42] HEATHER MCGAHEE & TAMARA DRAUT, DEMOS: A NETWORK FOR IDEAS AND ACTION, RETIRING IN THE RED: THE GROWTH OF DEBT AMONG OLDER AMERICANS 1 (2005).

[43] TAMARA DRAUT & JAVIER SILVA, DEMOS: A NETWORK FOR IDEAS AND ACTION, GENERATION BROKE: THE GROWTH OF DEBT AMONG YOUNG AMERICANS 1 (2005).

[44] TAMARA DRAUT & JAVIER SILVA, DEMOS: A NETWORK FOR IDEAS AND ACTION, BORROWING TO MAKE END'S MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S 1 (2005).

[45] *Id.*

was due to the effective deregulation of the credit card industry and deceptive credit card industry practices such as excessive late fees and aggressive marketing in terms of solicitations.[46] Late fees were the largest jump in revenue for credit card companies increasing from $1.7 billion in 1996 to $7.3 billion in 2002.[47]

II. CONSUMER PROVISIONS

A. Current Law and Proposed Changes

Under current law, individuals facing financial difficulty may seek a variety of forms of relief under the bankruptcy laws, with chapter 7 (liquidation) being by far the most common form of relief sought. Under this chapter, debtors are required to forfeit all of their property other than their "exempt" assets (*i.e.*, assets deemed necessary for the debtor's maintenance, as determined under federal or state law, at the state's option) in exchange for receiving a discharge of their unsecured debts. Creditors are entitled to receive any net proceeds from the sale of the debtor's nonexempt property, subject to the statutory priority schedule.[48] The Bankruptcy Code does not permit the discharge of certain debts whose payments are considered to be important to society. Some of this debt is of the same nature as priority debt (*e.g.*, family support obligations and taxes), but the law also exempts from discharge debts incurred through the debtor's misconduct, such as debts arising from fraud and intentional injuries.[49]

While the decision to seek relief under chapter 7 or chapter 13 is voluntary at the discretion of the debtor, section 707(b) of the Bankruptcy Code grants the court the discretion to deny relief where the filing is found to be a "substantial abuse."[50] Under section 707(b), however, there is a presumption *in favor of* granting relief to the debtor. This stems in part from the costs and potential hardships associated with developing excessive barriers to chapter 7 eligibility, the belief that the "honest but unfortunate debtor" should be entitled to a "fresh start," the importance of encouraging risk-taking and entrepreneurship, and avoiding situations where it is impossible for individuals to escape aggressive creditor collection tactics.[51] Section 707(b) is not the only provision in the Bankruptcy Code that prevents individuals from misusing chapter 7. For example, creditors may request that certain debts be held nondischargeable under section 523(a), or that the debtor be denied a discharge altogether under section 727.

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[46] *Id.* at 5.

[47] *Id.*

[48] 11 U.S.C. § 507(a) (2004).

[49] 11 U.S.C. § 523(a) (2004).

[50] The Code does not define the term "substantial abuse," which is used in § 707(b), although, some courts have found that the ability to pay an appreciable proportion of one's debts over three years, using future income, could constitute "substantial abuse." *See, e.g.*, Fonder v. United States, 974 F.2d 996 (8th Cir. 1992) (finding that the debtor could pay 89% of unsecured debts in three years); In re Krohn, 886 F.2d 123 (6th Cir. 1989) (stating that there was an ability to pay portion of debts from "ample income" in excess of $80,000 per year); In re Walton, 866 F.2d 981 (8th Cir. 1989) (explaining that the debtor had the ability to pay two thirds of debts in three years).

[51] There are a number of disincentives to filing for bankruptcy, such as the fact that a chapter 7 bankruptcy will be disclosed on a debtor's credit report, and the law's prohibitions on repeat chapter 7 filings for six years.

A creditor may also seek dismissal of a debtor's petition for relief under chapter 7 under section 707(a), or seek to examine the debtor under Bankruptcy Rule 2004, which allows the creditor to examine an entity (including the debtor) as to acts, conduct, or property or to the liabilities and financial conditions of the debtor, or to any matter which may affect the administration of a debtor's estate, or to or to the debtor's right to a discharge." The creditors' lobby has asserted that it is the job of the government to expend funds to investigate a debtor, collect debts, and assert a creditor's rights under the Code notwithstanding the legal right of a creditor to assert those rights and powers under current law. In effect, it is the position of the proponents of this legislation that the government should assume the role of their debt collector *gratis*.[52]

A separate bankruptcy alternative available to individual debtors is chapter 13, which was formerly known as a wage earner's plan.[53] Under chapter 13, a debtor is permitted to retain his or her property, but is required to pay to creditors over a 3–5 year period out of future income at least as much as the creditors would have received under a chapter 7 liquidation, and is also required to pay all priority debts in full. To accomplish this, the debtor must propose a plan, administered by a trustee, that pays creditors in full or that devotes the debtor's "disposable income" after accounting for necessary support of the debtor, his or her family, or a business. In order to encourage the use of chapter 13 plans, which are currently voluntary, Congress determined that persons who meet their chapter 13 obligations are entitled to a broader discharge of their unpaid debts than is available under chapter 7. In addition, debtors are permitted to retain property whether or not the property is encumbered by liens and the debtor committed a prepetition default, so long as the chapter 13 plan cures any arrearages. In this manner, debtors can use chapter 13 to save their homes from foreclosure. In addition, in chapter 13 a debtor is permitted to bifurcate a loan on personal property, such as an automobile, into secured and unsecured portions based on its present value, and treat only the secured portion as a secured claim that must be paid in full with

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[52] Mr. **NADLER.** Sir, I understand. But are you aware that a creditor has the right under section 343 of the Code, in rule 2004 to conduct an extensive examination under penalty of perjury of the debtor's financial circumstances, including the production of documents?

Mr. **WALLACE.** Yes, I have done these things and they do take a fair amount of time and I bill my clients for them. They are expensive.

Mr. **NADLER.** So why should the Government obtain—why should the Government have to spend public money to do the job that the creditors should be doing?

Mr. **WALLACE.** Because it is a governmental program, sir. Because it is not the job of the creditor. It is the job of the Government. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform Hearing before the House Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary* 108th Cong. (March 4, 2003) (Testimony of George Wallace, Esq., of Counsel, Eckert Seamans Cherin & Mellot, LLC, Washington, DC, on behalf of the Coalition for Responsible Bankruptcy Laws)

[53] The eligibility requirements for chapter 13 may be found in 11 U.S.C. § 109(e). To be eligible for chapter 13, an individual must have regular income and noncontingent, liquidated, unsecured debts of less than $307,675 and secured debts of less than $922,975. Individuals with debts in excess of the chapter 13 limits must reorganize under chapter 11.

interest.[54] Chapter 13 plans must provide for the payment of in full of all priority debts, such as taxes and family support obligations. A debtor also has the ability to cure defaults as part of her plan.[55]

S. 256 would institute a number of major changes to consumer bankruptcy, in general, and to chapter 7 and 13, in particular, that some have argued may reduce the number of bankruptcy filings (but will not reduce the number of cases of financial hardship), and that will undoubtedly serve as procedural and legal impediments to bankruptcy relief. These changes are purportedly designed to increase pay-outs to non-priority unsecured creditors, particularly credit card companies, as well as to certain secured lenders, especially those extending credit for automobile loans.

1. Means Testing

The most far-reaching change, set forth in section 102 of the bill, would institute a so-called "means testing" approach to consumer bankruptcy.[56] This new standard could create a presumption of abuse of the bankruptcy system and deny chapter 7 relief to debtors who fail a "means test."

The means test purportedly calculates the debtor's ability to repay her non-priority unsecured debts (such as credit card debts) over a five year period. If the debtor is found, using the means test formula, to be able to pay non-priority creditors as little as $100 per month for five years, the bill would create a presumption that the debtor is abusing chapter 7. In essence, the sole purpose of the means test is to advance the position of creditors who have made the riskiest debts, those that, as a matter of public policy, have been placed in line behind secured and priority creditors, such as single parents holding claims for child support.

Instead of using the debtor's actual or projected income to calculate the debtor's ability to repay, the bill uses a fictitious "current monthly income," which, with certain exclusions, is the average of the debtor's income for the six months preceding the filing of the case. Even if, as is frequently the case, the debtor's bankruptcy was triggered by the loss of a job, or other precipitous loss in income due to serious illness or mobilization for war, the means test would attribute to the debtor the lost income for the purposes of determining whether a debtor is abusing chapter 7.

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[54] This is known as a "stripdown." Specifically, except for certain home mortgages, a debtor in chapter 13 may be able to bifurcate a debt to a secured creditor, treating only the *current value* of the collateral as secured, even if it is less than the full amount of the loan, and treating the remaining debt as a non-priority unsecured debt.
[55] 11 U.S.C. § 1322(a)(2) (2004).
[56] Subsection (a) of section 102 amends section 707(b) of the Bankruptcy Code to permit a court, on its own motion, or on motion of the United States trustee, private trustee, bankruptcy administrator, or party in interest, to dismiss a chapter 7 case for abuse if it was filed by an individual debtor whose debts are primarily consumer debts.

Similarly, instead of using the debtor's actual expenses to determine the ability to repay non-priority unsecured debts, the bill relies on guidelines developed by the Internal Revenue Service to aid in the collection of tax debts.[57]

Moreover, where the IRS has specific local expense standards, those standards do not always provide adequately for normal expenses. Ironically, Congress itself has recognized the inadequacy of such collection standards. The Internal Revenue Service Restructuring and Reform Act of 1998 directs the IRS to "determine, on the basis of the facts and circumstances of each taxpayer, whether the use of the schedules . . . is appropriate" and to ensure that they not be used "to result in the taxpayer not having adequate means to provide for basic living expenses."[58] However, neither that law, nor S. 256, grants this safeguard in the bankruptcy context.

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[57] Then-Chairman Hyde attempted to remove the inflexible means test when the bill was considered in the 106th Congress:

> Mr. Chairman, my colleagues are making a virtue out of what is a vice, and that is the inflexibility of the IRS standards. The cost of food in Omaha, Nebraska or Boise, Idaho, is different than in downtown Manhattan. So what is realistic about an inflexible standard? Why not give some wiggle room so that humanity can play out?
>
> This could be a good bill. It is a great bill for the creditors, I can say. I have 75 enhancements here for the creditors. Why not throw a little small bone to the debtor? Do not talk about ``reasonably necessary" as too vague. Are my colleagues aware, those who have said that, that there is 15 years of litigation and decisional authority interpreting that? Of course. "Reasonable" is a word used in negligence law, in the exercise of reasonable care and caution. To hear some of my colleagues talk, I would think this was from outer space. That is nonsense.
>
> We have to allow for regional differences, for family differences. A reasonably necessary standard is ascertainable.
>
> I am as capitalist as anybody, I am as conservative as anybody, but it does not seem to me when there is a bill that is truly tilted towards the creditors, that giving a little flexibility for living standards for people who are bankrupt is a violation of one's credentials as a conservative. The median income that the gentleman from Pennsylvania (Mr. GEKAS) mentioned of $51,000 sounds like a lot of money, but that is for a family of four, a family of four. That may be a lot of money in Boise, Idaho. It may be very little in New York.
>
> Give some flexibility. The current law is what ought to obtain. My colleagues are trying to change it by putting the IRS standards in. It is the first time, and I dare say the last time, so much kind approbation will be showered on the IRS by this side of the aisle. I certainly do not join in that showering.
>
> So this litigation, there will be litigation on the IRS standards, there will be as much litigation as anyone wants.
>
> This could be a good bill. I support this bill, but for goodness sake give some humanity in the establishment of living standards while paying out Chapter 13.
>
> Lastly, let me pay my respects to the creditor lobby. They are awesome.

145 CONG. REC. H2724 (1999) (Statement of Rep. Hyde).

[58] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3462 (1998).

Although the means test is only applicable above median income,[59] the contention that debtors with income below the median would not be affected by the means test is false.

The inflexible and fictitious calculations in the means test are justified by proponents who point to a provision that allows a debtor to alter the income or expense assumptions of the means test by allowing adjustments for "special circumstances that require additional expenses or adjustments of current monthly total income, for which there is no reasonable alternative." Under the revised 707(b), a debtor would have to provide extensive documentation to the court, not to establish the debtor's actual financial condition, but to rebut the presumption of abuse, which may be challenged by the trustee or any creditor.[60]

The bill also makes substantial changes to chapter 13 by substituting the IRS expense standards to calculate disposable income for debtors earning over the median income, rather than the existing standard that uses the debtor's actual expenses "reasonably necessary for the maintenance and support of the debtor or a dependant of the debtor.[61] Although the bill does allow certain specified adjustments to the IRS standards, the formula remains inflexible and divorced from the debtor's actual circumstances.

The means test is also used to calculate a debtor's income and expenses for the purposes of confirming a chapter 13 plan. Unlike the means test in chapter 7, however, there is no provision for a debtor to seek adjustments to current monthly income for "special circumstances," making the application of the means test in chapter 13 even more inflexible and divorced from reality. Unlike the means test in chapter 7, the means test in chapter 13 applies to all debtors, with no exceptions for those below the median income.

The bill also requires debtors to calculate the means test using expenses over 5 years rather than 3 years, and makes other changes to the way plans must be presented. These changes will guarantee that, if the means test pushes a debtor into chapter 13, the repayment capacity assumptions, and new mandates, would make it even less likely that a debtor would be able to complete a repayment plan in chapter 13 – the ostensible purpose of the means test in the first place. In view of the fact that approximately two thirds of all voluntary chapter 13 plans under current law are not completed, it is likely that even more debtors would be unable to confirm or

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[59] Two forms of "safe harbors" are recognized under section 102(a). One provides that only a judge, United States trustee, bankruptcy administrator, or private trustee may bring a motion under section 707(b) of the Bankruptcy Code if the chapter 7 debtor's income (or in a joint case, the income of debtor and the debtor's spouse) does not exceed the state median family income for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household. The second safe harbor provides that no motion under section 707(b)(2) may be filed by a judge, United States trustee, bankruptcy administrator, private trustee, or other party in interest if the debtor and the debtor's spouse combined have income that does not exceed the highest median family income in the debtor's state for a family of equal or lesser size (adjusted for larger sized families), or the state median family income for one earner in the case of a one-person household. Certain disabled veterans are exempted from dismissal on the basis of the means test.

[60] *Id.* at § 102 (proposed amendment to 11 U.S.C. § 707).

[61] 11 U.S.C. § 1325(b) (2004).

complete the now-mandatory chapter13. This legislation also greatly curtails the broader discharge currently available to debtors who have successfully completed a chapter 13 plan, eliminating a significant inducement for voluntary debtor participation in chapter 13.[62]

2. Exceptions to Discharge & Loan Bifurcations

S. 256 would make significant additions to the types of debts that a debtor may not discharge under chapters 7 or 13, and greatly curtail a debtor's ability to bifurcate a loan into secured and unsecured portions based upon the value of the collateral.

Section 310 would create a presumption of non-dischargeability for credit card debts of $500 or more in the aggregate (as opposed to $1,225 under current law) or more owed to a single creditor for "luxury goods or services" incurred within 90 days prior to the bankruptcy filing (as opposed to 60 days under current law).[63] Additionally, section 310 also makes presumptively nondischargeable cash advances aggregating at least $750 incurred within 70 days before the order for relief, to one or more creditors in an open-ended credit plan. This means that, if a debtor uses several cards to purchase basic household needs (there is no requirement that these cash advances be used for luxury goods) over a 70 day period, even if the debt to each creditor is a fraction of the $750 threshold, all the debts would be presumed fraudulently incurred. Current law makes cash advances aggregating more than $1,250 nondischargeable if they are incurred within 90 days before the order for relief.[64] Section 314 adds another exception to discharge when the "debtor incurred the debt to pay a tax to a governmental unit that would be nondischargeable."[65] Therefore, regardless of the debtor's intent, any debts incurred to pay a nondischargeable tax debt would be nondischargeable.[66] This particular change will have a devastating impact on taxpayers who, at the urging of taxing authorities, pay their taxes electronically using a credit card.

The legislation would also largely eliminate the possibility of loan bifurcations in chapter 13 cases. Under current law a debtor is permitted to bifurcate a loan between the secured and unsecured portions. The debt is treated as a secured debt up to the allowed value of the property securing the debt. The remainder of the debt is treated as a non-priority unsecured debt. Section 306 of the legislation prevents such bifurcations (including with regard to interest and penalty provisions) with respect to any loan for the purchase of a vehicle in the 910 days before bankruptcy, as well as all loans secured by other property incurred within one year before bankruptcy.

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[62] *Id.* at § 314(b) (proposed amendment to 11 U.S.C. § 1328(a)).
[63] *Id.* at § 310 (proposed amendment to 11 U.S.C. § 523(a)(2)(C)).
[64] 11 U.S.C. 523(a)(2)(C).
[65] S. 256, § 314 (proposed amendment to 11 U.S.C. § 523(a)).
[66] *Id.* at § 315.

3. Domestic Support

Sections 211–219 of the bill make a number of changes to current law that are purportedly intended to enhance the status of child support and alimony payments in bankruptcy. These changes are presumably being made in an effort to offset the considerable criticism the legislation has received from children and family advocates.

Section 211 creates a new definition of "domestic support obligation."[67] In addition to applying to debts owed on account of child support and alimony, which are already nondischargeable under current law,[68] the new definition includes alimony and child support debts owed or recoverable to a governmental unit.[69] This definition is in turn relevant to new sections of the Bankruptcy Code that give certain enhanced rights to the holders of domestic support obligations in terms of priorities, payments, automatic stay, preferences, and foreclosure placing the rights of children and custodial parents in conflict with the claims of governmental entities.[70]

Section 212 grants alimony and child care creditors a first priority in bankruptcy (they are currently seventh, although most of the higher priority debts are seen rarely in consumer bankruptcy cases).[71] Section 213 prevents the confirmation of a reorganization plan unless the debtor has paid all domestic support obligations.[72] Section 214 provides that the automatic stay does not prevent legal actions enforcing wage orders for domestic support obligations and similar actions.[73] Section 215 makes nondischargeable all domestic support obligations, including obligations owed to government support agencies. Section 216 permits nondischargeable domestic support obligations to be collected from property – notwithstanding state laws making that property exempt from collection or attachment – after bankruptcy.[74] Section 217 makes clear that a transfer that was a bona fide payment for a domestic support obligation will not be considered a fraudulent or preferential prepetition transfer.[75] Section 218 specifies that alimony and child support payments are not included in the definition of disposable income in chapter 12 cases. Finally, section 219 of the bill requires trustees to send written notice to recipients of alimony and child support payments, and to the local and state child support agencies, notifying them that a debtor of such payments has filed for bankruptcy.[76]

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[67] S. 256, § 211 (proposed amendment to 11 U.S.C. § 101).
[68] 11 U.S.C. § 523(a)(6).
[69] *Id.*
[70] *See* S. 256, § 211 *et seq.*
[71] *Id.* at § 212 (proposed amendment to 11 U.S.C. § 507(a)). In the current enumeration of priorities, for example, the unsecured claims of a fishermen against the debtor have fifth priority. 11 U.S.C. § 507(a)(5).
[72] *Id.* at § 213.
[73] *Id.* at § 214 (proposed amendment to 11 U.S.C. § 362(b)). This includes the interception of tax refunds, the enforcement of medical obligations, or actions to withhold, suspend, or restrict licenses of the debtor for delinquency in support obligations.
[74] *Id.* at § 216 (proposed amendment to 11 U.S.C. § 522).
[75] *Id.* at § 217 (proposed amendment to 11 U.S.C. § 547(c)(7)).
[76] Notices to domestic support recipients must also state that they can use the services of a government support enforcement agency to collect the support.

4. Other Anti-Debtor Provisions

The legislation makes a host of additional changes to the consumer provisions of the bankruptcy laws. The majority of the provisions are designed to increase creditor pay outs and would greatly harm low- and middle-class debtors. As Harvard Law Professor Elizabeth Warren testified, the bill "has 217 sections that run for 239 pages" and "virtually every consumer provision aims in the same direction. The bill increases the cost of bankruptcy protection for every family, regardless of income or the cause of financial crisis, and it decreases the protection of bankruptcy for every family, regardless of income or the cause of financial crisis." [77] In 1999, then-Chairman Hyde himself noted that the bill contained at least 75 provisions detrimental to debtors and favorable to creditors. Among other things, the bill extends the period permitted between ch. 7 filings from the 6 years under current law to 8 years;[78] expands the ability of residential landlords to evict tenants without seeking permission from the court;[79] and significantly narrows the definition of household goods exempt from repossession in bankruptcy.[80]

B. Principal Problems with Proposed Changes

1. S. 256's Means Testing is Arbitrary and Unworkable in Practice

The National Bankruptcy Review Commission's majority specifically rejected the so-called "means testing" approach,[81] observing:

> The credit industry has sought means testing consistently for at least 30 years, but Congress has consistently refused to change the basic structure of the consumer bankruptcy laws. . . . . Access to chapter 7 and to chapter 13, the central feature of the consumer bankruptcy system for nearly 60 years, should be preserved.[82]

The 1973 Commission on Bankruptcy Laws similarly considered and rejected industry calls for mandatory chapter 13's, noting that Congress had itself rejected similar proposals in 1967, and observed:

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[77] *Bankruptcy Reform: Hearing on S. 256 Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 10, 2005) (statement of Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School).

[78] S. 256, §312, *cf.* Duet. 15:1 - 2 – "Every seventh year you shall grant a remission of debts. And this is the manner of the remission: every creditor shall remit the claim that is held against a neighbor, not exacting it of a neighbor who is a member of the community because the Lord's remission has been proclaimed."

[79] S.256§311.

[80] S.256 §313.

[81] Only two members of the National Bankruptcy Review Commission signed onto a dissenting statement supporting the consideration of various means testing options. NATIONAL BANKRUPTCY REVIEW COMMISSION, FINAL REPORT: BANKRUPTCY - THE NEXT TWENTY YEARS 1131 (1997) (Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law Submitted by the Honorable Edith H. Jones and Commissioner James I. Shepard).

[82] *Id.* at 90–91.

> [B]usiness debtors are not subject to any limitation on the availability of straight bankruptcy relief, including discharge from debts, and it was pointed out that, quite apart from bankruptcy, business debtors are able to incorporate and to limit their liability to their investments in corporate assets. To force unwilling wage earners to devote their future earnings to payment of past debts smacked to some of debt peonage, particularly when business debtors could not be subjected to the same kind of regimen under the Bankruptcy Act. . . . The Commission concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system.[83]

The principal problem with the means test is that the rigid one-size-fits-all test used in determining eligibility for chapter 7 and the operation of chapter 13 will often operate in an arbitrary fashion. Many of these flaws were highlighted in 1999 by then-House Judiciary Committee Chairman Henry Hyde when he unsuccessfully sought to delete the use of the rigid IRS standards and instead substitute a more fact-specific test based on the court's assessment of the debtor's actual reasonable and necessary expenses.[84]

Rather than relying on the debtor's actual costs of living, the bill relies upon IRS collection standards, which lay out no comprehensive or specific standards for the deduction of living expenses. Part of the problem arises from the fact that the IRS standards referenced by the bill are not automatic in many cases. Although the IRS does set forth national standards for some expenses, such as food and clothing,[85] and local standards for expenses such as housing and transportation,[86] it leaves the determination of "other necessary expenses" to the discretion of the relevant IRS employee.[87]

The seemingly arbitrary allowances for such expenses points to another problem with the means test under S. 256 – its bias against debtors without secured debts. The bill allows all secured debt payments to be deducted from monthly income, but limits rental and lease payments to the amount permitted by the IRS standards. This means that persons renting apartments and leasing cars may not be able to deduct the full amount of their housing and transportation costs in bankruptcy, while persons with mortgages and automobile debt will be able to do so.[88] There is

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[83] *Report of the Commission on Bankruptcy Laws*, H.R. Doc. No. 137, Part I, 93rd Cong. 158–59 (1973) (citation omitted).

[84] In 1999, the Committee had initially approved an amendment offered by Chairman Hyde eliminating the IRS collection standards from the means test. Subsequently, however, Rep. Graham (R-SC) offered an amendment reintroducing the IRS collection into the means test; effectively reversing the Chairman's earlier amendment. The Committee accepted this amendment by a vote of 17 - 14, largely on party lines, with Chairman Hyde and Rep Baccus (R-AL) crossing party lines to join with most Democrats in opposing the reinsertion of the IRS standards.

[85] IRS Manual § 5323.432.

[86] IRS Manual § 5323.433.

[87] IRS Manual § 5323.12.

[88] Higher income debtors can also easily plan around the means test by, for example, purchasing a new expensive car shortly before bankruptcy, or deferring tax and child support payments, thereby increasing priority claims.

no legitimate policy rationale for this discrepancy, which appears to punish people who rent and lease and nonetheless must resort to bankruptcy.

Also, it is important to note that the IRS collection standards can change the manner in which the bankruptcy laws are applied. The collection standards serve as internal guidelines for the IRS; they are not regulations that are subject to the Administrative Procedures Act. As such, the IRS does not need to provide notice, or seek public comment, when introducing new standards or when changing the existing ones. If the bankruptcy law was amended to incorporate the collection standards, as S. 256 proposes, and the IRS were to change the collection standards in the future, the alteration in the standards would completely change how the Bankruptcy Code is applied. In effect, S. 256 would delegate authority to the IRS to amend the Bankruptcy Code without notice.

It is no answer to assert, as the legislation's proponents have done, that the "glitches" in the collection standards can be resolved through the bill's allowance that "the presumption of abuse may only be rebutted by demonstrating special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."[89] This is a new standard with no clear definition. It is unclear how the courts will apply it. Establishing "special circumstances" will be costly and burdensome.[90] It is the debtor's burden to show special circumstances. The debtor must present detailed documentation for expenses for adjustments to income and a detailed explanation of the special circumstances that make such expenses or adjustment to income the only reasonable alternative for the debtor. These requirements make it very difficult for debtors to claim special circumstances, since many expenses are paid in cash and cannot be documented. This risk provides a tremendous disincentive for debtors to claim special circumstances, let alone incur the legal costs the debtor himself is required to pay to defend against a creditor's motion.

Penalties available against creditors who file abusive motions under section 707(b) appear to provide the authority for the court to impose only attorney's fees and costs, not the civil penalties available against debtors' counsel. No penalties or fees could be imposed under the revised 707(b) for motions brought by "small businesses" with small claims, even if the court finds that Bankruptcy Rule 9011 had been violated.[91]

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[89] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. § 102 (2005) (proposed amendment to 11 U.S.C. 707(b)(2)(B)(I)). The final wording was formulated by staff in the 106th Congress using nothing more than a paperback thesaurus.

[90] *Id.* at § 102 (proposed amendment to 11 U.S.C. § 707(b)(2)(B)).

[91] Bankruptcy Rule 9011(b) provides, in part, "By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation."

Under the bill, should a court grant a section 707(b) motion made by a trustee and find that the action of debtor's counsel in filing the chapter 7 case violated Federal Rules of Bankruptcy Procedure 9011, section 102(a) mandates that the court order the attorney to reimburse the trustee for all reasonable costs in prosecuting the motion, "Small business" is a deceptive term as used in this section. For the purposes of sparing a creditor sanctions under this section, a small business is a unincorporated business, partnership, corporation, association or organization that has fewer than 25 full-time employees (including wholly owned subsidiaries) and is engaged in commercial or business activity. A firm engaged whose sole business involves purchasing debts and attempting to collect on them in a in bankruptcy cases would qualify under this definition of a "small business," and would not be subject even to the lesser penalties imposed on creditors even if they violated BR 9011. Conversely, debtors' counsel are subject to both costs and civil penalties, and must certify that the client's statement about her financial circumstances are true.

There are also several serious interpretive problems caused by the drafting of the means test, which combines debt payment amounts with IRS allowances. For example, it the language of the bill needs to make clear that a debtor who has two payments remaining on a secured car loan is allowed the IRS car ownership allowance for the remaining 58 months. If not, the debtor may have no funds to replace a car that is already seven or eight years old at the outset of the five-year period and is essential for a long commute to work during the five-year term of the plan.

Finally, making chapter 13 the only avenue for bankruptcy relief for some individuals and imposing the bill's strict income and expense tests will undoubtedly result in an even smaller proportion of successful chapter 13 plans. It is also somewhat unrealistic to expect many chapter 13 cases to result in successful completion of repayment plans. The current chapter 13 completion rate is less than one-third,[92] for chapter 13 plans which are voluntary and with disposable income tests are less rigid than that proposed in this bill. Moreover, changes to chapter 13, such as the curtailment of stripdown, will make it more difficult for even debtors who file for chapter 13 voluntarily to confirm or complete a plan.

2. Means Testing Will be Costly and Bureaucratic

The bill's attempt to impose rigid financial criteria on debtors' eligibility for chapter 7 and the operation of chapter 13 will impose substantial new costs on the bankruptcy system – both the portions paid for by private parties (through payment for private chapter 7 and chapter 13 trustees and higher attorneys' fees) and the federal government (through the bankruptcy courts and the U.S. Trustees Program).

Testifying about the costs to private trustees, the National Association of Bankruptcy Trustees has complained:

> [U]nder the bill, trustees must (1) review the debtor's income and expenses prior to five days before the section 341 hearing, (2) file a 'certification' that the debtor

including reasonable attorneys' fees. In addition, the court must assess an appropriate civil penalty, payable to the private trustee, bankruptcy administrator, or the United States trustee. FED. R. BANKR. P. 9011(B).

92 NATIONAL BANKRUPTCY REVIEW COMMISSION, FINAL REPORT: BANKRUPTCY - THE NEXT TWENTY YEARS 90-91 (1997).

> is qualified to be a chapter 7 debtor at least five days before the section 341 hearing, (3) filed motions to dismiss under section 707(b) where the debtor's disposable income would yield [specified payments] to a chapter 13 trustee over a five-year plan. This is a great deal of work for trustees who only receive $60 in the typical chapter 7 case. In addition, the plight of the trustee is multiplied when, even if he is successful, he cannot count on any compensation.[93]

The most recent CBO estimate of the bill's cost to the federal government is $392 million over the next five years.[94] An additional cost of $26 million is estimated for additional judges necessary to administer the new rules. The total net increase in discretionary spending would be $146 million over the next five years since the bill would treat approximately $246 million in fees as an offset to the $392 million that it will cost the federal government. The two intergovernmental mandates would cost a combined $62 million but the unfunded mandate on private entities would exceed the Unfunded Mandates Reform Act (UMRA)[95] threshold at $123 million.[96] CBO's cost estimate for additional bankruptcy judges does not include the additional judges that the Judicial Conference estimates will be needed to apply current law, much less the additional need for judges to implement the costly and cumbersome changes in the bill. This request is based on current needs, not on actual needs if the bill passes. Hence the estimate of costs to the judiciary must be considered unrealistically low. Part of this cost-estimate derives from implementing the complex and paperwork-heavy means-testing program. CBO estimates it will cost some $150 million over the next five years.[97] However, this estimate may well be far too low. For example, Henry E. Hildebrand, Chair of the Legislative Committee of the National Association of Chapter Thirteen Trustees estimated that:

> Assuming that one out of nine cases filing for chapter 7 relief would be contested and further assuming that the contest would require about two hours of pretrial preparation and one hour of court time, the litigation would require 276,000 additional hours, about 90,000 of which would occupy the court.[98]

Another source of higher costs for the government is the requirement that one in every 250 cases in each federal district be randomly audited by independent certified public accountants or independent-licensed public accountants, at taxpayer expense under generally-accepted auditing standards. CBO estimated it will cost the federal government $66 million over five years to

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[93] *March 17, 1999 House Judiciary Committee Hearing on H.R. 833, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. 433 (March 17, 1999) (written statement of Robert H. Waldschmidt, National Association of Bankruptcy Trustees at 3).

[94] CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: S. 256 BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 AS REPORTED BY THE SENATE COMMITTEE ON THE JUDICIARY ON FEBRUARY 17, 2005, at 1 (February 28, 2005) [hereinafter CBO 2005].

[95] Unfunded Mandates Reform Act of 1995, Pub. L. 104-4; 109 Stat. 50 - 60.

[96] *Id.*

[97] *Id.* at 5.

[98] Henry E. Hildebrand, *The Hidden Costs of Bankruptcy Reform* 2 (1998) (unpublished manuscript on file with the Committee on the Judiciary, minority staff).

effectuate this requirement.[99] It is unclear whether such costs will yield any comparable benefits. For example, the Honorable William Houston Brown, a U.S. Bankruptcy Judge in the Western District of Tennessee, testified on behalf of the ABI that the audits required "are likely to be very expensive, and such formal audits are likely unnecessary to determine significant misstatements in debtors' petitions and schedules."[100]

Other costs to the government under the bill include, the costs of the U.S. Trustee certifying the availability of credit counseling ($17 million over 5 years) and requiring the U.S. Trustee to visit sites in chapter 11 cases ($12 million over 5 years).

Another concern is the many, many new opportunities for litigation and confusion created by the bill. Judge Randall Newsome testified on behalf of the National Conference of Bankruptcy Judges that at least 16 potential sources of litigation are contained in the means testing provisions alone, and that another 42 litigation points have been identified in the other consumer provisions, noting that "[t]his is probably only the tip of the iceberg."[101]

Costs imposed on the private sector will also be substantial. The CBO said: "S. 256 would impose private-sector mandates, as defined in UMRA [the Unfunded Mandates Reform Act] on bankruptcy attorneys, creditors, bankruptcy petition preparers, debt-relief agencies and credit and charge-card companies. CBO estimates that the direct costs of these mandates would exceed the annual threshold established by UMRA ($123 million in 2005, adjusted annually for inflation)."[102]

Many of the costs and burdens on the private sector are illustrated in the American Bar Association's (ABA) recent letter concerning S. 256[103]. In particular, the ABA expressed its concern regarding provisions in the bill that would require attorneys to: (1) certify the accuracy of factual allegations in the debtor's bankruptcy petition and schedules, under penalty of harsh court sanctions; (2) certify the ability of the debtor to make payments under a reaffirmation agreement; and (3) identify themselves as "debt relief agencies" subject to a host of new intrusive regulations.

As the ABA has explained,

> The three general types of enhanced attorney liability provisions outlined above, when taken together, will have a substantial negative impact on the availability of quality legal counsel in bankruptcy. As a result of these

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[99] CBO 2005, at 8.

[100] *March 17, 1999 House Judiciary Committee Hearing on H.R. 833, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. 68 (March 17, 1999) (written statement of the Honorable William Houston Brown).

[101] *March 17, 1999 House Judiciary Committee Hearing on H.R. 833, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 106th Cong. 407 (March 17, 1999) (written statement of the Honorable Randall J. Newsome, President, National Conference of Bankruptcy Judges at 1).

[102] CBO 2005, at 1.

[103] Letter from Robert D. Evans, Director of Governmental Affairs, American Bar Association, to Hon. Arlen Specter, Chairman, Senate Committee on the Judiciary (Feb. 8, 2005).

> burdensome and one-sided mandates on debtors' attorneys, many attorneys who currently represent both debtors and creditors will stop handling debtor cases altogether rather than comply with these new regulations. With fewer attorneys available to represent debtors, many more debtors will be forced to file their bankruptcies *pro se*, without first obtaining adequate advice regarding the necessity or advisability of filing for bankruptcy. Therefore, the enhanced attorney liability provisions ultimately will have an adverse effect on debtors, creditors, and the bankruptcy system as a whole.[104]

3. Means Testing and the Other Consumer Provisions Will Harm Low- and Middle-Income People

a. Concerns Regarding the Means Test

It is incorrect to assume that the effect of S. 256's harmful provisions would be limited to individuals seeking bankruptcy relief who earn more than the state median income.

The definition of "current monthly income" used in the means test measures a debtor's income based upon how much the debtor earned in the six months prior to bankruptcy. If the debtor lost a good job in month three and has been working at a low-wage job ever since, the income from that good job, and help from family members, would be counted as if that is what his future income would be. The debtor would be expected to pay out of income that may no longer exist. Also, the means test will pick up a variety of revenue sources – such as disaster assistance, and Veterans' benefits – which will result in lower- and middle-income individuals being cast as bankruptcy "abusers" with income above the median.

In addition, due to the fact that S. 256, unlike current law, will permit creditors and other parties-in-interest to bring motions to dismiss or convert, more aggressive and well-funded creditors will have extremely wide latitude to use such motions as a tool for making bankruptcy an expensive, protracted, and contentious process for honest debtors, their families, and other creditors. Creditors could use such motions as leverage to obtain reaffirmation agreements so that their unsecured debts survive bankruptcy. The inability to obtain bankruptcy relief will force

[104] *Id.*

more families out of the above ground economy and into a permanent state of unmanageable indebtedness.[105]

b. Other Concerns

The bill makes nondischargeable a wider range of debts including cash advances, and debts incurred for so-called luxury goods, and debts incurred to pay nondischargeable tax debts.[106] These new exceptions from discharge obviate many of the benefits that debtors may realize from filing for bankruptcy, under chapter 7 or 13 and increase the opportunity for creditor abuse. The provisions were opposed by then-President Clinton. In a communication to the Congress, that administration wrote that it is "generally inappropriate to make post-bankruptcy credit card debt a new category of nondischargeable debt . . . . We remain skeptical that the current protections against fraud and debt run-up prior to bankruptcy are ineffective and that the additional debts made nondischargeable by [S. 256] meet the standard of an overriding public purpose."[107]

Consumer bankruptcy expert Henry Sommer also has explained that such provisions:

> increase the opportunity for creditors to file the types of abusive fraud complaints which have been found by many courts to be baseless and unjustified attempts to coerce reaffirmations by debtors who cannot afford to defend them. The new presumptions of nondischargeability will fall mainly on low income debtors who are unsophisticated, do not have the time, budget flexibility, or attorney advice to plan their bankruptcy cases carefully, have to file on short notice to prevent utility shutoffs or other impending creditor actions and will not have the funds to defend dischargeability complaints."[108]

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[105] A study by the University of Maryland Department of Economics, illuminates the phenomenon of "informal bankruptcy", whereby debtors, especially those who are difficult to find or those with few attachable assets, may choose simply to stop making payments altogether and enter the underground economy. Amanda E. Dawsey &and Lawrence M. Ausubel, Informal Bankruptcy 1, U. MD. Dept. Econ., (Feb. 2002), at 2 (unpublished manuscript, *available at* http://www.ausubel.com/creditcard-papers/informal-bankruptcy.pdf). This then puts the burden on the creditors to collect. While informal bankruptcy lacks the legal protections afforded by (formal) bankruptcy, the incentives of informal bankruptcy cannot be underestimated, not the least of which is the lack of any administrative or legal costs initially. *Id.* at 2. Importantly, little consideration has been given to informal bankruptcy with respect to legislation, yet in 1996 some 66.7% of credit card loans were charged off for reasons other than bankruptcy. Id. at 1 (citing Visa U.S.A., 19997 Annual Bankruptcy Survey, Visa U.S.A. Inc., (September 2000)) .

[106] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. §§ 310, 314 (2005) (proposed amendment to 11 U.S.C. § 523(a)(2)(C)), and sec. 314.

[107] Letter from Jacob J. Lew, Director, Office of Management and Budget, to the Honorable Jerrold Nadler, Ranking Member, House Subcomm. on Commercial and Admin. Law 2 (Mar. 23, 1999) (on file with Minority staff of House Judiciary Comm.).

[108] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong., 2d Sess. 249 (Mar. 10, 1998) (written statement of Henry J. Sommer).

The new ban on loan bifurcations for car loans less than 910 days old will further erode the possibility of obtaining a fresh start through bankruptcy.[109] Automobiles depreciate rapidly once they leave the showroom. Before the loan is repaid, the value of the vehicle is often less than the unpaid balance of the loan. By prohibiting bifurcation, a lender with a secured loan that is underwater would be unjustly enriched by being able to treat the unsecured portion of that loan as fully secured to the detriment of other unsecured creditors. Such a prohibition on loan bifurcation is likely to render many chapter 13 plans unfeasible because a debtor may be able to repay the entire secured value, but not the entire purchase price of the car along with penalties. The provision also permits the lender to come out of the bankruptcy in a superior position than if it had foreclosed on the loan under applicable non-bankruptcy law.

Several other consumer provisions also will impose significant hardships on all debtors, regardless of income level or degree of culpability. For example, by allowing landlords to continue eviction or unlawful detainer actions even after debtors have obtained an automatic stay, the bill will force many battered women and families with children and seniors out onto the streets, without ever having an opportunity to use bankruptcy to catch up on their rent.[110]

Extending the permitted period between bankruptcy discharges to eight years[111] could prove a substantial hardship to families in already unstable economic situations.[112] The bill's narrow definition of exempt household goods could allow creditors to threaten foreclosure on household tools and children's sporting equipment, in order to obtain preferential treatment for itself.[113] This provision would work to the benefit of predatory and subprime lenders that take a security in interest in the borrower's personal effects.

4. The Consumer Provisions Will Have a Significant, Adverse Impact on Women, Children, Minorities, Seniors, Victims of Crimes and Severe Torts, Victims of Identity Theft, and the Military

a. Women and Children

S. 256 will have an adverse impact upon single mothers and their children, both as debtors and as creditors. On the debtor side, the means test, and all the additional paperwork burdens, will make it far more difficult for women to access the bankruptcy system. For example, women whose average income was at the median during the last 180 days, before the support checks stopped, may be denied access to chapter 7 and forced into restrictive chapter 13 repayment plans. Second, the bill does not exempt child support or foster care payments from the means test

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[109] S. 256, § 306.
[110] *Id.* at S. 256, § 311.
[111] *Id.* at S. 256, § 312 (proposed amendments to 11 U.S.C. §§ 727(a)(8), 1328).
[112] *Cf. Deuteronomy* 15:1-2 ("Every seventh year you shall grant a remission of debts. And this is the manner of the remission: every creditor shall remit the claim that is held against a neighbor, not exacting it of a neighbor who is a member of the community because the Lord's remission has been proclaimed").
[113] *Id.* at S. 256, § 313.

definition of disposable income.[114] By eliminating stripdown, the bill will also make it more difficult for women to hold onto the car they need to get to work, or the refrigerator or washing machine they need to care for their families if a creditor claims a security interest in such items.[115] The new nondischargeability categories also are problematic. It will be more difficult for custodial parents to discharge basic credit card debts. Even if a custodial parent filing for bankruptcy obtained cash advances to purchase basic necessities such as diapers or food, she could face litigation brought by a credit card company objecting to the discharge of the debt.[116]

The bill will have a particularly adverse impact on the payment of domestic support to women and children as holders of claims for alimony and child support. These concerns are by no means insignificant given that an estimated 243,000-325,000 bankruptcy cases involved child support and alimony orders during the most recent years.[117]

Under current law, alimony and child support are treated as priority debt and are not subject to discharge.[118] This preferential treatment dates from as early as 1903 and is based on Congress's determination that the payment of these debts is so important to society that it should come ahead of most general creditors. Although S. 256 does not revoke this special treatment, viewed as a whole, the legislation will have the effect of diminishing the likelihood of full payment of alimony and child support. This arises as a result of several features of the bill: its creation of significant new categories of nondischargeable debt, the extension of the length and onerousness of chapter 13 plans, and the bill's general limitations on the availability of chapter 7 relief.

Each one of these changes will make it less likely that a former spouse will be able to make his required alimony and child support payments. First, by making significant amounts of credit card debt nondischargeable, more of these debts will survive bankruptcy. Since most chapter 7 and 13 debtors do not have the ability to repay most of their unsecured debts, financial pressure on the debtor will continue after bankruptcy, decreasing his ability to handle important support obligations.

Collectively considered, these changes will help foster an environment where unsecured and credit card debt is far more likely to compete against alimony and child support obligations in the state law collection process. As a Congressional Research Service Memorandum analyzing an

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[114] *Id.* at S. 256, § 102.
[115] *Id.* at S. 256, §§ 310, 314.
[116] *Id.* at S. 256, § 310.
[117] Teresa Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-91*, 68 AM. BANKRUPTCY L.J. 121, ## (1994). The reported data are from the Consumer Bankruptcy Project, Phase II. Principal researchers are Dr. Teresa Sullivan, Vice-President of the University of Texas; Jay Westbrook, Benno Schmidt, Chair in Business Law, University of Texas; and Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School. These estimates are based on data collected in 1991 in 16 judicial districts around the country. For more details about the study, see Teresa Sullivan et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-91, 68 AM. BANKRUPTCY L.J. 121 (1994).
[118] 11 U.S.C. §§ 507(a)(7), & 523(a)(5).

earlier version of this legislation concluded that "child support and credit card obligations could be 'pitted against' one another. . . . Both the domestic creditor and the commercial credit card creditor could pursue the debtor and attempt to collect from post-petition assets, but not in the bankruptcy court."[119]

Outside of the bankruptcy court is precisely the arena where sophisticated credit card companies have the greatest advantages. While federal bankruptcy court enforces a strict set of priority and payment rules generally seeking to provide equal treatment of creditors with similar legal rights, state law collection is far more akin to "survival of the fittest." Whichever creditor engages in the most aggressive tactic – be it through repeated collection demands and letters, cutting off access to future credit, garnishment of wages or foreclose on assets – is most likely to be repaid. As Marshall Wolf has written on behalf of the Governing Counsel of the Family Law Section of the American Bar Association, "if credit card debt is added to the current list of items that are now not dischargeable after a bankruptcy of a support payer, the alimony and child support recipient will be forced to compete with the well organized, well financed, and obscenely profitable credit card companies to receive payments from the limited income of the poor guy who just went through a bankruptcy. It is not a fair fight and it is one that women and children who rely on support will lose."[120]

It is for these reasons that groups concerned with the payment of alimony and child support have expressed their strong opposition to the bill and its predecessors. Professor Karen Gross of New York Law School stated succinctly that "the proposed legislation does not live up to its billing; it fails to protect women and children adequately."[121] Joan Entmacher, on behalf of the National Women's Law Center, testified that "the child support provisions of the bill fail to ensure that the increased rights the bill would give to commercial creditors do not come at the expense of families owed support."[122]

Assertions by the legislation's supporters that any disadvantages to women and children under S. 256 are offset by supposedly pro-child support provisions are not persuasive. It is useful to recall the context in which these provisions were added. In the 105th Congress, the bill's proponents adamantly denied that the bill created any problems with regard to alimony and child support.[123] Although the proponents have now changed course, the child support and alimony provisions included do not respond to the provisions in the bill causing the problem – namely the provisions limiting the ability of struggling, single mothers to file for bankruptcy; enhancing the bankruptcy and post-bankruptcy status of credit card debt; and making it more difficult for debtors

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[119] CONGRESSIONAL RESEARCH SERVICE, IMPACT OF CONSUMER BANKRUPTCY REFORM PROPOSALS ON CHILD SUPPORT OBLIGATIONS (May 13, 1998).

[120] Statement of Marshall J. Wolf (May 13, 1998) (on file with the House Comm. on the Judiciary).

[121] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 87 (Mar. 18, 1999) (written statement of Karen Gross, Professor, New York Law School).

[122] *Id.* at 56 (testimony written statement of Joan Entmacher, National Women's Law Center).

[123] Letter from Representative George W. Gekas, et al., to Members of Congress (Apr. 29, 1998).

to eliminate debts and devote post-discharge income to the payment of domestic support obligations. In some instances, the new sections are counterproductive in furthering the goal of payment of support obligations to ex-spouses and children.

For example, section 211 provides a definition of "domestic support obligation" that includes funds owed to government units.[124] If the government is acting as the debt collector for a woman or child, this is appropriate; the benefits of this inure to women and children directly. However, if the government is collecting for its own benefit (say, for example, the woman recipient is on welfare and the government is collecting arrearages to reduce a state or Federal deficit), then the result is inappropriate and will put the government collection agency in direct competition with single mothers and children, particularly in chapter 13.[125]

Section 212 purportedly increases to first priority from seventh priority obligations for domestic support, including debts owed to the government. It is misleading to suggest that moving up to "first priority" from "seventh priority" makes a significant difference to a custodial parent seeking to collect child support: the debts that have second through sixth priorities almost never appear in consumer cases.[126]

In most consumer cases, the place of a creditor in the priority order is meaningless. In chapter 13, all priority debts must be paid in full.[127] In approximately 97% of all individual chapter 7 cases, the debtor has no non-exempt assets and so is unable to pay any priority or non-priority unsecured debts, regardless of their placement in the priority order. Outside bankruptcy, of course, the priorities in the Bankruptcy Code are inapplicable and unenforceable. It is in state court, after the case is over that the custodial parent must compete with newly non-dischargeable credit card debts. Being first priority is of no help.

Section 214 creates additional exceptions to the automatic stay[128] that, like other provisions in the bill, have the potential of placing women and children at a disadvantage. First, these provisions apply only to income withholding orders issued by government agencies under the Social Security Act, even though an estimated 40-50% of all child support cases, and all alimony-

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[124] Under current law, domestic support owed to families is a priority debt; support owed to the government is nondischargeable, but is not priority debt.

[125] Although the bill gives priority to support claims owed to actual people over those owed to the government in chapter 7 cases where there are assets to distribute, those cases are few, and the new definition could serve to hurt women and children, the most likely creditors of domestic support.

[126] Those priorities which would likely apply in less than 1% of all cases deal with debts of grain storage facility operators, debts of fishermen, employee wage claims, retail layaway claims, and the like. 11 U.S.C. § 507(a) (2000).

[127] *Id.* at § 11 USC 1322(a)(1).

[128] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. § 214 (2005)(proposed amendment to 11 U.S.C. § 362(b)). Specifically, the bill creates exceptions to the automatic stay for enforcement actions undertaken by government child support agencies, including income withholding in cases being enforced by public agencies; actions to withhold, suspend or restrict drivers', professional and occupational, or recreational licenses; reporting overdue support to credit bureaus; intercepting tax refunds; and enforcing medical support.

only cases, are enforced privately, not by government child support agencies. Second, income withholding is helpful only if such orders are placed against debtors with regular income. Yet, in 1997, more than four out of ten cases in state child support systems across the country lacked a support order.[129]

Section 216, which allows domestic support creditors to levy otherwise exempt homesteads and other exempt property, also does not go far enough. Like the other provisions, it is effective only if a single custodial parent goes to the time and expense of hiring an attorney to enforce her new rights.

The bill also fails to address the abuse of the bankruptcy system by individuals who systematically violate the constitutional rights of women to safe, legal reproductive health care, and the Freedom of Access to Clinic Entrances Act.[130]

Women and their health care providers must live with the fear that violent and reckless individuals will be able to terrorize and blockade abortion clinics, and seek to eliminate their liability from that action through the bankruptcy process. Although the current bankruptcy laws prevent discharge for "willful and malicious injuries,"[131] some have questioned whether the law applies to fines and judgements resulting for barricading clinic entrances or violating court orders that may fall short of that standard.[132] At the same time, notorious clinic bomber and "Operation Rescue" found Randall Terry specifically filed for bankruptcy in order to void a $1.6 million judgment he owed to the National Organization for Women and Planned Parenthood,[133] and many of the notorious "Nuremberg files" defendants have filed for bankruptcy.

Although a bankruptcy discharge has proved elusive for these law-breakers, they have succeeded in abusing the bankruptcy courts to hinder, delay and defraud the women whose rights they have violated, imposing substantial costs on them to collect lawful judgements. As NARAL Pro-Choice America has written, "[d]ebtors whose debts arise from their own clinic violence are not honest debtors and should not be able to escape the financial liabilities incurred by their illegal conduct."[134]

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[129] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 57, 60 (Mar. 18, 1999) (testimony and written statement of Joan Entmacher, National Women's Law Center) (citing U.S. DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, PRELIMINARY DATA REPORT: CHILD SUPPORT ENFORCEMENT FY 1997 (Aug. 1998)).

[130] 18 U.S.C. §248 (2004).

[131] 11 U.S.C. § 523(a)(6).

[132] KAWAAUCHAU V. GEIGER, 523 U.S. 57 (1998) (holding that the actor must intend the consequences of the act, injury to someone or something, not just the act, itself).

[133] *Operation Rescue Founder Files for Bankruptcy due to Lawsuits*, WASH. POST, Nov. 8, 1998, at A29; *An Anti-Abortion Leader Files for Bankruptcy*, N.Y. TIMES, Nov. 8, 1998, at 45.

[134] Memorandum of NARAL 8 (Mar. 30, 1999).

According to Maria Vullo, lead counsel for the plaintiffs in Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, et al., No. 95-1671-JO (D. Or.), a case in which a Portland, Oregon jury, on February 2, 1999, awarded $109 million under FACE against the defendants for their illegal threats against the plaintiffs' lives, the defendants in that case have abused the protection of the bankruptcy courts in six districts to avoid paying those judgements.[135] Although none of the defendants have been able to obtain a discharge in those cases,

> In the now five years since the jury's verdict, my firm has committed enormous resources to enforcing the judgment, including by representing the plaintiffs in six different bankruptcy courts. In connection with these bankruptcy proceedings, the defendants took the position that the jury's verdict is fully dischargeable in bankruptcy, despite the "willful and malicious injury" exception to discharge that currently exists in the Bankruptcy Code. These filings, and the relitigation that has followed, demonstrate the utmost importance of an amendment to the U.S. Bankruptcy Code . . . . My firm expended over 3,500 attorney hours in litigating these bankruptcy proceedings, in addition to the time spent by local counsel in each jurisdiction and the substantial expense of filing fees, service fees, and travel around the country.[136]

Despite these abuses, the Senate rejected an amendment offered by Senator Schumer, that would have dealt with abuse of the bankruptcy system, not just with respect to violations of the Freedom of Access to Clinic Entrances Act, but any unlawful interference with the delivery of lawful goods or services.[137] Although the amendment had been adopted by substantial margins by the Senate in the past, opponents of the Schumer amendment argued that, regardless of the merits, it should be defeated in order to ensure passage of the larger bill.[138]

In Committee, Rep. Nadler offered an amendment that would have made non-dischargeable debts arising from violations of federal or state civil rights laws. It too was rejected. The Chairman of the Subcommittee, Mr. Cannon, made a similarly practical, if non-substantive, argument against the amendment:

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[135] *Hearing on S.256, the "Bankruptcy Abuse and Consumer Protection Act of 2005," Before the Senate Committee on the Judiciary, Hearing on Bankruptcy Reform*, 109th Cong. (February 10, 2005) (written statement of Ms. Maria Vullo, Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP).

[136] *Id.*

[137] *E.g., Operation Rescue Founder Files for Bankruptcy due to Lawsuits*, WASH. POST, Nov. 8, 1998, at A29; *An Anti-Abortion Leader Files for Bankruptcy*, N.Y. TIMES, Nov. 8, 1998, at 145.

[138] "What is the practical reason? The House of Representatives rejected this bill the last time for the sole reason of the Schumer amendment. It is unbelievable. As much as we had in this bill, all the pages of this legislation, one little amendment killed this legislation, an amendment that I believe is bad policy, certainly not necessary, and I submit could result in killing this legislation again if we move it forward. So let's not do it. Let's not do this. Let's not go beyond the bill that we have now, that came out of the Judiciary Committee with a bipartisan vote, an overwhelming vote out of the Judiciary Committee to come to the floor without the Schumer amendment in it. Let's not add this amendment and jeopardize the passage of the bill." 151 CONG. REC. S.2207 (daily ed. Mar. 8, 2004) (statement of Sen. Sessions).

> This really, this amendment is just a revised version of the Schumer amendment, which has been responsible for scuttling the bankruptcy – passage of the entire bankruptcy bill for some time now. And it was defeated, this amendment was defeated in the Senate last week by a vote of 46 yeas and 53 noes.[139]

b. Minorities

S. 256 will have a disparate impact upon minorities. The Leadership Conference on Civil Rights has warned that "African American and Hispanic American homeowners are 500 percent more likely than white homeowners to find themselves in bankruptcy court largely due to discrimination in home mortgage lending and housing purchases, and to inequalities in hiring opportunities, wages, and health insurance coverage."[140] We know this because the economic struggle for Hispanic-American and African-American homeowners is harder than for any other group. While 68% of whites own their own homes, only 44% of African Americans and Hispanic Americans own their homes. Both African-American and Hispanic-American families are likely to commit a larger fraction of their take-home pay for their mortgages, and their homes represent virtually all their family wealth. Experience has also shown that minorities are also particular targets of predatory lenders. The LCCR also opposes this bill because it does nothing about the abusive practices used by the credit industry to saddle more people with debt. The LCCR states: "[S.256] also fails to address one of the key reasons that bankruptcy filings have increased in recent years . . . the aggressive marketing of credit cards to our most financially vulnerable citizens . . . ."[141]

c. Seniors

Similar concerns have been raised on behalf of seniors, who could lose their retirement savings if forced into chapter 13 plans.[142] The National Council of Senior Citizens has warned that legislation of this nature:

> [This legislation] would have a harsh impact on a group of people who are often subject to job loss or catastrophic health costs; instead of ameliorating these problems, this bill will only exacerbate them . . . . Since 1992, more than a million people over the age of 50 have filed for bankruptcy; in 2001, an estimated 450,000 older Americans filed. This number is up from the 180,000 that did so in 2001.[143] For seniors it is particularly hard. If they are forced into prolonged

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[139] *Markup of S. 256 before the House Comm. on the Judiciary*, 109th Cong. (Mar. 16, 2005) (statement of Rep. Cannon).
[140] Letter from Leadership Conference on Civil Rights, to Members of Congress (Mar. 14, 2005).
[141] *Id.*
[142] Letter from Dan Schulder, Director Legislation, National Council of Senior Citizens, to the Honorable Jerrold Nadler, Ranking Member, House Subcomm. on Commercial and Admin. Law (June 9, 1998) ([hereinafter Schulder letter].
[143] Lucretia Marmon, *Older Americans Going Deeper in Debt*, AARP BULL., Mar. 2003, *available at* http://www.aarp.org/bulletin/yourmoney/Articles/a2003-06-25-olderamericans.html.

> repayment schedules, they may not be able to maintain or accumulate savings for retirement. As you know, approximately two-thirds of voluntary Chapter 13 workout plans fail, and we believe that retirement savings must be protected for that purpose.[144]

Furthermore, the Alliance for Retired Americans also opposes S. 256. They stated:

> The fastest growing group of Americans filing for bankruptcy is those over 65. This unfortunate situation has been caused by skyrocketing health care costs that can drain a lifetime of savings in a very short period of time. In addition, many older Americans have seen their pensions and retirement savings disappear as well. The result has been that many older Americans cannot enjoy financial security in their retirement through no fault of their own. The legislation before the Senate actually increases the burden on older Americans who undergo financially difficult times through health care costs or loss of retirement income . . . . And while millions of older Americans have lost pension payments and retirement savings due to corporate abuses during the past five years, this legislation does nothing to make them whole or prevent future abuses.[145]

d. Victims of Crimes and Severe Torts

With regard to the concerns of victims' groups, it is important to note that current law reserves the nondischargeability of debts for obligations arising out of willful or malicious injury, death or personal injury caused by the operation of a motor vehicle, or criminal restitution payments.[146] However, making more credit card debt nondischargeable, encouraging more reaffirmations of general unsecured debt, and discouraging more financially troubled individuals from seeking debt relief will place these individual creditors at a relative disadvantage. As the National Organization for Victim Assistance has written, "more exempted creditors with rights to the same finite amount of resources means lower payments to all. Inevitably, for victim-creditors, that means either a smaller return on the restitution owed, or a longer period of repayment, or both."[147] The National Center for Victims of Crime has similarly observed, "to equate contractual losses of a commercial creditor with . . . personal obligations [for victim claims as the legislation does] is to belittle their importance and to directly reduce the likelihood that crime victims will ever be

[144] Schulder letter.

[145] Letter from Edward Coyle, Executive Director, Alliance for Retired Americans, to Members of Congress (Feb. 28, 2005).

[146] 11 U.S.C. §§ 523(a)(6), (9), (13). (2004).

[147] Letter from Marlene A. Young, Executive Director, NOVA, to the Honorable Henry J. Hyde, Chair, House Comm. on the Judiciary (Apr. 26, 1999).

financially restored, despite obtaining an order of restitution or a civil judgment."[148] Mothers Against Drunk Driving ("MADD") has also complained that if "individuals [whose lives] have been shattered financially and emotionally by the death or serious injury of their family members . . . have to compete with credit card debt holders for the limited post-discharge income of debtors available [as the predecessor legislation requires], they may themselves end up in bankruptcy."[149] MADD also noted that in contrast to crash victims, "lending institutions have the ability to provide some degree of protection to themselves when they issue credit cards to individuals and they are in a better financial position to absorb losses, which to them is a cost of doing business."[150]

e. Victims of Identity Theft

S. 256 will also have a significant adverse impact on a growing number of identity theft victims who are forced into bankruptcy. In fact, the manager of the identity-theft program at the Federal Trade Commission commented a few years ago that not only can identity theft wreak havoc on the credit of a victim, but it can even force them into bankruptcy[151]. Since then, the problem has grown at epidemic rates, topping the list of consumer complaints filed with the FTC for the last four years in a row. In September 2003, the FTC released a comprehensive survey concluding that a staggering 27.3 million Americans have been victims of identity theft in the last five years - costing consumers and businesses an estimated $53 billion in 2002 alone.[152]

Recent news is rife with reports of identity theft scandals. Most notably, reports have revealed that identity thieves posing as legitimate customers gained access to ChoicePoint's database of 19 billion public records. The company has acknowledged that hackers had access to data on 145,000 people and that the stolen information has since been used in at least 700 identity theft scams.[153] In recent weeks, databases belonging to Lexis/Nexis were also compromised, with hackers stealing information on at least 32,000 people.[154] Even further, the University of California, Berkeley has revealed that a laptop containing the names and social security numbers of 100,000 people was stolen just this month[155].

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[148] Letter from David Beatty, Director of Public Policy, The National Center for Victims of Crime, to the Honorable Jerrold Nadler, Ranking Member, House Subcomm. on Commercial and Admin. Law (Apr. 28, 1999).

[149] Letter from Karolyn V. Nunnallee, National President, MADD, to Members of Congress (Apr. 26, 1999).

[150] *Id.*

[151] Kirstin Downey Grimsley, *Social Insecurity Numbers*, WASH. POST, Dec. 8, 1999, at E1.

[152] FEDERAL TRADE COMMISSION, IDENTITY THEFT SURVEY REPORT 7, 12 (2003) *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

[153] Rachel Konrad, *The High Cost of Id Theft: Pressure is Mounting Nationally for Securing Personal Data*, PHILA. INQUIRER, at E2.

[154] Ellen Simon, *Hackers Enter Database for 32,000 in U.S.*, PITTSBURGH POST-GAZETTE, at C12.

[155] Todd R. Weiss, *Laptop with 98,000 Names Stolen at UC-Berkeley*, March 29, 2005 *at* www.computerworld.com.

In all of these cases, criminals have an opportunity to use victims' identities to apply for credit cards, acquire loans and make exorbitant purchases.[156] However S 256 creates an arbitrary means tests that does nothing to distinguish between the creditor claims related to crimes of identity theft and legitimate debt incurred by the debtor. Even if more than 51 percent of the creditor claims in bankruptcy are the result of identity theft, the debtor will still be subject to the unfair and arbitrary means test and forced out of the protections of Chapter 7.

Congressman Schiff offered a narrowly tailored amendment during the mark-up of S. 256 to directly address the plight of identity theft victims forced into bankruptcy. The Schiff amendment required that if at least 51% of the claims against a debtor in bankruptcy are a result of identity theft, the debtor should not be forced out of the protections of Chapter 7. The majority was unable to state any clear reason to oppose this simple amendment and even acknowledged that it was an "an important idea"[157]. However, the amendment was narrowly defeated in a party line vote 13-15.

f. Military

S. 256 will have an unfair impact on military families who serve this country by imposing an arbitrary means test on these brave men and women that will prevent many from receiving needed debt relief. In the of conflicts in Iraq and Afghanistan, military families and veterans have faced unusual financial stress because of the large numbers of reserve and guard units that have been mobilized. These financial hardhips have a number of significant causes.

First, military service constitutes a significant and real hardship for soldiers and their families. Groups such as The National Military Family Association and Military Officers Association of America report hearing from many servicemembers in the Guard and Reserve who have made special sacrifices when called to duty, particularly when they own their own business and have experienced hardships with that business while they were deployed. According to a 2004 GAO report, in 1999, 16,000 active duty members of the military filed for bankruptcy relief over a 12-month period.[158] With our military extended from Iraq to

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[156] News stories highlight the extent of the personal damage caused by identity theft crimes. A man was sentenced in New York to two years in prison for using a former girlfriend's identity to commit fraud. The scheme lasted several months, during which the perpetrator took out three personal loans in the victim's name and purchased an Audi and a large Chevrolet pickup truck. Ultimately, the fraud resulted in the theft of over $300,000, forcing the victim to declare bankruptcy. *See* Carol DeMare, *Man gets prison for $300,000 identity fraud*, ALBANY TIMES-UNION, Feb. 8, 2005, at B4; *see also Avonmore woman has identity stolen*, GREENSBURG TRIBUNE-REVIEW, November 30, 2004.

[157] Representative Cannon stated during debate on the Schiff amendment, "its obvious to me that its an important idea and maybe something we would want to consider in the context of future changes . . . ." Representative Cannon continued later that he encouraged his colleagues to oppose the amendment because it would "clearly disrupt the whole process of moving forward a bill."

[158] U.S. GENERAL ACCOUNTING OFFICE, MILITARY PERSONNEL: BANKRUPTCY FILINGS AMONG ACTIVE DUTY SERVICE MEMBERS, GAO-04-465R (2004).

Afghanistan, and reservists separated from their families and jobs for long stretches of time, that number has undoubtedly increased greatly today. The Pentagon reported in 2002 that nearly one-third of all military families reported a drop in income when a spouse was deployed. For members of the National Guard and Reserve, the rate was even higher – more than 40% reported lost income when a spouse was deployed.[159]

There is little doubt that servicemembers are suffering financial hardships because of service to their country. Guardsmen and reservists who are also small business owners and employees of small companies often suffer grievous setbacks, as their carefully built companies lose business, struggle to survive, or simply shut their doors.[160] Notwithstanding protection afforded military members and their families through other Federal laws, many find that their financial problems still become so severe that they have no choice but to file for bankruptcy.[161]

Second, active-duty military members and their families' hardships are compounded by unscrupulous pay-day lenders who target armed service members with high-interest loans. A 2003 National Consumer Law Center Report found that "scores of consumer-abusing businesses directly target this country's active duty military men and women daily." These pay-day lenders are modern-day loan sharks, that offer small short-term loans at interest rates of 100, 500, even 1000%. They use deceptive names like "Force One Lending," and "Armed Forces Loans." They go after military members because they know that they: have a steady source of income, are young, have family obligations, are often strapped for cash, and are

[159] U.S. GENERAL ACCOUTING OFFICE, DOD NEEDS MORE DATA TO ADDRESS FINANCIAL AND HEALTH CARE ISSUES AFFECTING RESERVISTS, GAO-03-1004 (003).

[160] Dave Moniz, *Guardsmen, Reservists Hit Hard at Home by Call-ups*, USA TODAY, Feb. 6, 2005.

[161] The Servicemembers Civil Relief Act, signed into law, December 2003, protects all active duty military families from foreclosures, evictions and other financial consequences of military service. Yet due to the increased reliance on Reserve and National Guard units from non-traditional military towns, the members find themselves facing creditors and courts that may never have dealt with the relief act. In addition, the burden of enforcement is on the service members themselves to show that he or she has been "materially affected" by being called to duty, and ends as soon as the duty ends, and the Act applies only to debts incurred before the Servicemember was mobilized. The impact of the mounting debts while the servicemember is overseas and the family business founders are not covered, yet these are the ones driving many families into bankruptcy. Unlike the bankruptcy laws, the Relief Act buys some time, but not forgiveness. The servicemember finds themselves without the time and money to fight back when they are getting ready for overseas duty. Diana B. Henriques, *Some Creditors Make Illegal Demands on Active-Duty Soldiers*, N.Y. TIMES, Mar. 28, 2005.

Another means of protection for servicemembers is the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) which protects the re-employment rights of service members or veterans upon their return to civilian life from active duty. On March 20, 2005 the DOJ announced the signing of a consent decree, resolving a lawsuit against Bridgestone/Firestone North American Tire, LLC filed to protect the rights of a national guardsman returning from active duty. Bridgestone agreed to provide employment benefits to the returning national guard member. While we are encouraged by the successful enforcement of this law by the DOJ, it is important to note that a large number of national guardsmen and reservists are self-employed and therefore without legal re-employment rights and judicial recourse. Press Release, Department of Justice, Justice Department Reaches Agreement with Bridgestone/Firestone Over Employment Benefits for National Guardsman (March 29, 2005) (on file with author).

easy to find. Most offensive, payday lenders target military members because they know these are people who are hard-working and honest and believe in personal responsibility and integrity.

To a servicemember's great detriment, S. 256 does not prevent a creditor from recovering in bankruptcy amounts owed on a high-cost payday loan made to a servicemember or a dependent secured by a personal check for future deposit or electronic access to a bank account. The bill would also permit claims based on a debt that requires payment of interest, fees, or other charges which would cause the annual percentage rate to exceed 36%. In addition, lenders who provide servicemember loans at exorbitant interest rates can obtain an assignment of military retirement and disability payments. It is unconscionable that these lenders can lawfully take military retirement and disability payments from the people who spend months often years away from home to protect our nation.

An amendment offered by Sen. Durbin reflected an understanding that service men and women who have been mobilized and are serving in Iraq, Afghanistan, and in the war on terror are paying a terrible price in the economic well being of their families, in addition to the heavy burdens they have been asked to shoulder. Senator Durbin's amendment would exempt disabled veterans filing from dismissal or conversion of their ch. 7 petition under the means test if their indebtedness occurred primarily while on active duty or performing a homeland defense activity. Congressman Meehan offered a broader version of the Durbin amendment by exempting disabled service members who accumulated, amounted debt after their return home as well as those whose indebtedness was due to their injury or the disability sustained while on active duty. The amendment was rejected with 12 ayes and 19 noes.

Senator Sessions offered a "Military and Medical" amendment which simply inserts "such as a serious medical condition or a call or order to active duty in the Armed Forces" as examples of *special circumstances* that would allow adjustment of income or expenses. Senator Sessions did not offer a solution to the problem as the Durbin and Meehan amendments did but merely reiterated *special circumstances* that were already allowed by the bill.

In an effort to build on Sen. Durbin's effort, Rep. Conyers offered an amendment to crack down on unscrupulous and usurious payday lenders who prey military members with deceptive, high interest rate loans. The amendment would have disallowed a claim based on an extension of credit made and secured by a military paycheck, pension, or disability payment where the annual interest rate and fees exceed 36 percent a year. The amendment was rejected with 15 ayes and 20 noes.

We believe that Congress can provide greater support for military families suffering economic distress as a result of their service to our nation. Many servicemembers are unable to return to their jobs because of physical or psychological injuries. To date, more than 11,000 servicemembers who served in Iraq and Afghanistan have been wounded. The means test in this bill establishes completely arbitrary expenses that have nothing to do with the types of new expenses a disabled servicemember might actually be facing. If any group of people deserves some relief from this burdensome means test process, it is America's disabled veterans who suffered both physical and financial devastation while they were wearing a military uniform.

Whether returning home disabled or not, servicemembers oftentimes face their greatest challenges within the two years after their service is completed rebuilding their families, their businesses, and their finances in general. These men and women struggling to get their lives back in order after serving their country need to be exempted from the means test if they were called or ordered to active duty since 9/11 and then forced to file for bankruptcy as a direct result of their military service within 24 months of being released from duty. We cannot repay the debt we owe these men and women, but we can protect them from having to spend the rest of their lives in debt.

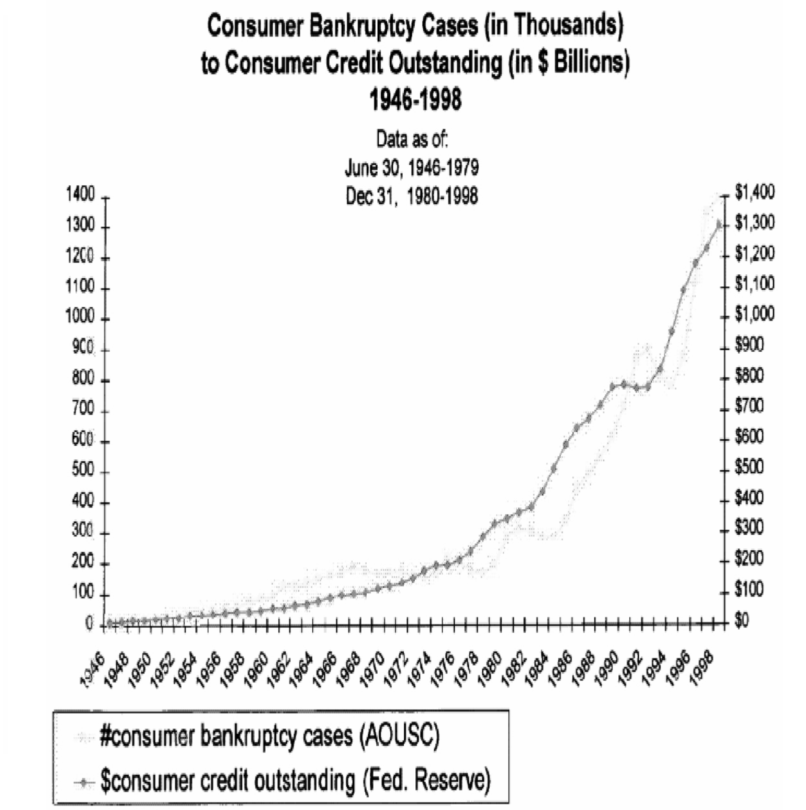
5. The Bill Does not Address Abuses of the Bankruptcy System by Creditors

Perhaps the bill's most glaring omission is its failure to address seriously the problem of abusive lending practices. At the same time the legislation responds to scores of alleged debtor excesses – whether real or imagined – it largely ignores the transgressions of the credit industry. The only significant "reform" with regard to lending industry disclosure is that requirement that credit card companies provide the consumer with an "800" number to call and unrealistic examples of credit card debt paydowns (which may not reflect the actual situation of the debtor and thus prove misleading), as well as a series of boilerplate warnings regarding real estate loans and teaser rates.[162]

As noted at the outset, the overwhelming weight of authority establishes that it is the massive increase in consumer debt, not any change in bankruptcy laws, which has brought about the increases in consumer filings. Indeed, there is an almost perfect correlation between the increasing amount of consumer debt and the number of consumer bankruptcy filings. For example, credit card debt more than tripled between 1989 and 2001 from $238 billion to $692 billion, and personal bankruptcy filings increased accordingly.[163] The same basic correlation holds from 1946 through 1998, as the below chart indicates.

[162] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. § 1303 (2005).

[163] *See* TAMARA DRAUT & JAVIER SILVA, DEMOS: A NETWORK FOR IDEAS AND ACTION, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE 90S 9 (2003) *available at* www.demos-usa.org



Review of this data indicates that the primary factor that led to the increase in bankruptcy filings after 1978 was not the enactment of the revised bankruptcy laws, but the deregulation of credit. The deregulation resulted from the Supreme Court decision in *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*, which held that out-of-state banks were not subject to the usury laws of the state where the consumer was located.[164] This decision led credit card companies to relocate to states with lax usury laws that gave banks the ability to charge exorbitant interest rates in all 50 states. Subsequently, other legal changes permitted a broad range of new entities to get into the ever-growing, and lucrative, credit card business.[165] Among other things, we know that it was this unprecedented increase in high-cost credit, not the changed bankruptcy laws, that led to the change by virtue of Canada's experience. In Canada, bankruptcy filings began to explode in the late 1960's, simultaneous with the entry of VISA and MasterCard into that nation and the growth in credit card lending. There was no change in Canada's laws that could account for the increase.[166]

This deregulation of credit and the accompanying explosion in credit availability – the number of credit card solicitations in 2004 reached 5 billion – and in consumer debt, have been accompanied by a wide variety of abusive credit card practices, including ever growing fees and penalties. As the *Wall Street Journal* pointed out in a July 6, 2004 article, "[c]ard users, consumer advocates and some industry experts complain that banks are attempting to squeeze more and more revenue from consumers struggling to make ends meet. Instead of cutting these people off as bad credit risks, banks are letting them spend – and then hitting them with larger and larger penalties for running up their credit, going over their credit limits, paying late and getting cash advances on their credit cards."[167]

Cardweb.com, a consulting group that tracks the card industry, says credit-card fees, including those from retailers, rose to 33.4 percent of total credit card revenue in 2003. That was up from 27.9 percent in 2000 and just 16.1 percent in 1996. A November 21, 2004 *New York Times* article also examined credit card practices and concluded that "In the last few years, lenders have more frequently raised customers' rates because of slip-ups elsewhere, like late payment of a phone or utility bill, or simply because they felt a customer had taken on too much debt . . . . To some cardholders and consumer advocates, credit card companies are acting like modern-day loan sharks, strong-arming their customers to pay more – with no legal limit on how much they can charge."[168]

Credit card companies even go so far as to solicit business from the developmentally disabled.[169] One developmentally disabled man, aged 35, has the reading and mathematic skills of a second-grader and an annual income of $7,000 from Social Security disability benefits;

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[164] Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299, 313, 318 (1978).

[165] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 226 (Mar. 16, 1999) (written statement of Joe Lee). *See March 16, 1999 Hearing* (written statement of Hon. Joseph Lee at 1–3).

[166] *Id.* at 227. (written statement of Hon. Joseph Lee at 4–5).

[167] Michelle Pacelle, "Fees From Riskiest Card Holders Fuel Profits: Late Payers and Big Borrowers are Becoming Cash Cows as Rates Balloon," Michelle Pacelle, WALL ST. J., July 6, 2004.

[168] Patrick McGeehan, "The Plastic Trap: Soaring Interest Compounds Credit Card Pain for Millions," Patrick McGeehan, N. Y. TIMES, November 21, 2004.

[169] Dan Herbeck, *Where Credit Isn't Due: Developmentally-Disable Become Victims*, BUFF. NEWS, Apr. 7, 1998, at 1A.

nevertheless, he has 13 credit cards, generating a debt of $11,745.[170] When his counselor asked the bank to lower his credit limit to $500, his limit was instead raised to $4,900.[171] Credit card companies have no answer for how this occurs other than to say that they screen all applicants to ensure they can handle the risk.[172] Clearly, however, credit card companies have not been doing a sufficient job of screening their applicants. Unfortunately, S. 256 does nothing to discourage any of these practices.

The bill also ignores the problem of credit card companies lending to individuals with already substantial debts and little prospect of repayment. Gary Klein of the National Consumer Law Center noted "offering additional credit . . . to families already struggling to pay their debts hurts not only borrowers, but also the borrowers' honest creditors if the new credit pushes the family over the edge. Similarly, failure by one creditor to seriously consider payment arrangements outside bankruptcy for families facing hardship may lead to a bankruptcy filing which affects all creditors."[173] One credit card company goes so far as to solicit debt counselors and offers them $10 for each chapter 7 client who requests a credit card.[174]

A particularly pernicious credit card practice occurs in the so-called "subprime" market, where lenders seek out riskier borrowers and offer home equity financing at loan to value ratios in excess of 100%. Another lending abuse targets low-income and minority neighborhoods with "serial" refinancing loans that carry high-interest rates and other onerous terms.[175] In essence this causes poor individuals to place their homes at risk in order to finance their credit card purchases.

These problems are compounded by the fact that credit card companies fail to disclose clearly on their account statements the total amount and total time it would take to pay off balances if only the consumer only paid the minimum amount due was paid each month. Unlike mortgage loans and car loans, credit card loans do not disclose the amortization rates or the total interest that will be paid if the cardholder makes only the minimum monthly payment. As a result, using a typical minimum monthly payment rate on a credit card, it could take 34 years to pay off a $2,500 loan, and total payments would exceed 300 percent of the original principle. This is why many lenders encourage minimum payments that do not pay down the loan.

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[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 120 (Mar. 11, 1999)(written statement of Gary Klein, National Consumer Law Center).

[174] Letter from American Bankruptcy Service, to Michael Schwartz (Dec. 18, 1998).

[175] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 240 (Mar. 18, 1999) March 18, 1999 Hearing (written statement of Damon A. Silvers, AFL-CIO, n.9) ([citing Debra Nussbaum, "*Lenders Laud the Value of Home Sweet Equity*," N.Y. TIMES, Mar. 22, 1998, § 3 at 10; Richard W. Stevenson, "*How Serial Refinancings Can Rob Equity*," N.Y. TIMES, Mar. 22, 1998, § 3 at 10). *See also* Julia Patterson Forrester, "*Mortgaging the American Dream: A critical Evaluation of the Federal Government's Promotion of Home Equity Financing*," 69 TULANE L. REV. 373 (1994).

Finally, the legislation fails to address adequately the problem of abuse in the area of reaffirmation agreements, by for example, placing effective and meaningful restrictions on their use with respect to unsecured and dischargeable loans. Although it requires lengthy and confusing "disclosures," it exempts credit unions from any restrictions on unduly burdensome reaffirmations, defined as requiring the debtor to make monthly payments in excess of 100% of the debtor's post-discharge monthly disposable income.[176] This failing is especially glaring in view of the fact that the bill will provide numerous opportunities for creditors to coerce reaffirmations making the provisions of this bill, which will render it more difficult to obtain effective remedies against abusive creditors like Sears, even less defensible.[177]

Neither the witness representing the Credit Union National Association, nor any proponent of the bill, has ever attempted to explain why a credit union should be permitted to reaffirm a debt requiring payments that, as a matter of simple arithmetic, the debtor will be unable to pay. This provision is unconscionable and runs counter to the historic commitment of credit unions as defenders of the rights of their members.

III. BUSINESS AND SINGLE-ASSET REAL ESTATE PROVISIONS

Under current law, businesses may use chapter 11 of the Bankruptcy Code in an effort to obtain relief from the creditors while they seek to develop a plan to reorder their affairs and pay as much of their debts as their operations will allow. Under this chapter, businesses obtain an "automatic stay," which forestalls creditor collection efforts. During this time period, debtors have an opportunity to examine their contracts and leases and determine which ones to assume and which ones to reject (with rejection leading to a claim for damages). Debtors are subject to a number of requirements during this period, such as the formation of creditor committees and various ongoing financial disclosures.

"By permitting reorganization, Congress anticipated that the Business would continue to provide jobs, to satisfy Creditors claims and to Produce a return for its owners .... Congress presumed that the asset of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" *United States v. Whiting Pools, Inc.*[178]To this end, the debtor is given an exclusive 120-day period (unless lengthened or shortened for cause) in which to develop a reorganization plan that satisfies a host of statutory requirements and convince a majority of the creditors that the plan is in their best interests and is preferable to a liquidation "fire sale."

In 1994, Congress enacted two exceptions to the general rules of chapter 11. The first related to "small businesses," defined as entities engaged in commercial or business activities whose aggregate debts do not exceed $2 million. Debtors that elect to be treated as small

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[176] S. 256, § 203(a) (creating a new 11 U.S.C. § 524(m)).
[177] *See* Leslie Kaufman, *Sears to Pay Fine of $60 Million in Bankruptcy Fraud Lawsuit*, N.Y. TIMES, Feb. 10, 1999, at C2.
[178] 462 U.S. 198, 203 (1983).

businesses are permitted to dispense with creditor committees, receive only a 100-day plan exclusivity period, and are entitled to more flexible provisions for disclosure and solicitation for acceptances of their proposed reorganization plan.

In 1994, Congress also developed a special set of rules applicable to "single asset real estate," generally defined as cases in which the principal asset is a single piece of real estate subject to debt of no more than $4 million. In cases falling within this definition, secured creditors are permitted to foreclose on their collateral unless the debtor files a reorganization plan which is likely to be confirmed or commences payment on the secured loan within a 90-day period. This exception to chapter 11 procedures was justified on the grounds that single- asset real estate cases were seen as essentially private two-party loan disputes, which did not implicate ongoing businesses or jobs.

A. Business Provisions

The business provisions of the bill would effectuate a number of changes in the manner in which corporations, partnerships, and other business entities are permitted to reorganize their financial affairs. With respect to small business, S. 256 would expand the definition of covered small business to those companies having debts of not more than $2 million,[179] subsuming more than 80% of all chapter 11 cases.[180] It would also make the small business requirements mandatory (rather than optional) and mandate the operation of numerous additional requirements on debtors.[181] For example, under S. 256, small business debtors would be required to provide balance sheets, statements of operations, cash-flow statements, and income- tax returns within three days after filing a bankruptcy petition, the time period the debtor has the exclusive right to file a plan of reorganization would be modified (to 180 days without the possibility of extension), and the standards for being able to seek an extension of this time period would be substantially narrowed.[182]

It is for these reasons that the AFL-CIO, and a number of other organizations representing both debtor and creditor interests have opposed, or have serious concerns with, the small business provisions of the bill. The AFL-CIO warned that the small business provisions in the bill will "threaten jobs by placing substantial procedural and substantive barriers in the way of small businesses' access to the protections of Chapter 11 . . . . threaten jobs by requiring commercial debtors to assume or reject commercial leases within a rigid timetable, which would force debtors to favor one class of creditors over others, and threaten their overall ability to successfully

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[179] S. 256, § 432 (proposed amendment to 11 U.S.C. § 101(51D)).
[180] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 255 (Mar. 18, 1999)(written statement of Jere W. Glover, Chief Counsel for Advocacy, SBA).
[181] S. 256, § 436 (proposed 11 U.S.C. § 1116).
[182] S. 256, § 437 (proposed amendment to 11 U.S.C. § 1121(e)).

reorganize."[183] All of these concerns are compounded at a time we are experiencing an economic slowdown, if not an outright recession.

> "[T]he bill does little to address the devastating effects of the past seven years of business bankruptcies on workers. During this period, worker shave sustained unprecedented job loss, endured the termination of pension plans, and faced wage cuts, elimination of health care and other benefits, often all in the same bankruptcy case."[184]

> This new bankruptcy mandate, particularly sections 437 through 439, would impose substantial new costs on small businesses, both in terms of document production and legal fees, and limit the time frame that the business has to develop a reasonable reorganization plan.[185] Section 437 provides an absolute limit on the period the business debtor has the exclusive right to file a plan of reorganization. Congress has previously enacted laws that have made it far more difficult for debtors to unduly delay filing a plan of reorganization, and these appear to have had a salutary effect. The proposed rigid deadline goes much farther and could work to detriment of debtors involved in complex reorganizations and force unnecessary liquidations and job losses. In turn, these changes will lead to the premature liquidation of small businesses with the attendant loss of jobs. The provisions are particularly unnecessary at a time when business bankruptcies have declined by one-third over the most recent ten-year period.[186]

Describing the earlier version of the bill, the SBA's Office of Advocacy summed up the situation as follows: "the proposals in [the legislation] go too far in addressing the relatively small number of problem cases."[187] Even more dangerously, it has been noted that many – if not most –

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[183] Letter from Peggy Taylor, Director of Legislation, AFL-CIO, to the Honorable Henry J. Hyde, Chair, House Comm. on the Judiciary (Apr. 20, 1999).

[184] Letter from American Federation of Labor and Congress of Industrial Organizations, American Federation of State and County Municipal Employees (AFSCME), American Federation of Teachers, Communications Workers of America, International Association of Machinist and Aerospace Workers, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers, International Brotherhood of Electrical Workers, International Brotherhood of Teamsters, International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), Laborers International Union of North America, National Association of Government Employees, Air Line Pilots Association, PACE International Union, Service Employees International Union, United Food and Commercial Workers International Union, United Mine Workers of America, United Steel Workers of America, and UNITEHERE, to Members of Congress (Feb. 28 2005).

[185] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law,* 105th Cong. 256 (Mar. 18, 1999) *March 18, 1999 House Judiciary Committee Hearing* (written statement of Jere W. Glover, Chief Counsel for Advocacy, SBA).

[186] Letter from Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration, to the Honorable Jerrold Nadler, Ranking Member, House Subcomm. on Commercial and Admin. Law (Apr. 22, 1998).

[187] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law,* 105th Cong. 253 (Mar. 18, 1999)(written statement of Jere W. Glover, Chief Counsel for Advocacy, SBA).

of the business cases in the average district would fall prey to these harsh new rules.[188]

Prof. Douglas Baird has studied small business bankruptcies and reports:

> S. 256 imposes many new burdens on small business. The justification for singling them out rests upon an unsound empirical assumption that Chapter 11 offers a haven for failing small business and allows them to die a lingering death. Based on our study of practices int eh Northern District of Illinois, we believe the realities of small business bankruptcies today simply do not support this assumption
>
> More than half of small business Chapter 11 cases that fail (i.e., those that are dismissed or converted to Chapter 7 liquidations) are terminated within four months of filing. Over 70% are terminated within 6 months. By 300 days, the deadline for filing a plan under §347, 90% have already left the system. The burdens that S. 256 imposes fall not upon the Chapter 11 debtors that are going to fail, but rather on those that are likely to succeed. Nearly 40% of these, the ones Chapter 11 is intended to help, need more than 300 days to put their plans in place.
>
> By the time the deadlines of S. 256 take effect, the vast majority of failing firms have long since been weeded out. The burdens fall disproportionately on exactly he wrong debtors – the viable firms Chapter 11 is intended to help[189].

B. Single-Asset Real Estate Provisions

A similar concern relates to single-asset real estate ("SARE") debtors. The legislation would significantly expand the definition of SARE by eliminating the $4 million debt cap pursuant to a "technical correction" in section 1201(5) of Title XIII of S. 256, would take in SARE bankruptcies below that cap and treat them as small businesses.

As a result of these changes, a much wider range of real estate operations would be required to conform with the SARE and small business requirements when they seek to reorganize, notwithstanding the fact that those requirements were drafted with a much smaller and simpler entity in mind. Large operating entities such as Rockefeller Center, as well as hotels and nursing homes, could be considered SARE and put back on the track set forth in section 362(d)(3) of the Bankruptcy Code. It would also create new incentives for lenders to require that all of their real estate borrowers place their holdings in the single asset form in order to avoid ordinary bankruptcy rules in the future. The AFL-CIO noted, "the significant limiting factor in the application of these rules has been the $4 million cap. [Eliminating] the cap would place a wide variety of properties . . . at risk of foreclosure and threaten jobs at these properties. Absent rules

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[188] *Id.* at 232 (written statement of Damon A. Silvers, AFL-CIO at 4); *Id.* at 105 (March 17, 1999) (written statement of Kenneth Klee, National Bankruptcy Conference).
[189] Letter from Douglas G. Baird, Harry A. Bigelow Distinguished Service Professor of Law, University of Chicago School of Law to Senator Russell D. Feingold (Feb. 16, 2005).

that specifically exclude properties such as housing and those with significant business enterprises, there should be no expansion in the definition of single-asset real estate debtor."[190]

By design, the SARE changes will "broaden the scope of single asset real estate debtors subject to rules which increase the threat of disruptive summary foreclosures of commercial property."[191] This, in turn, would likely lead to significant job losses.[192] Even if a hotel or nursing home remains in existence, the new owner would not necessarily be required to honor any previously negotiated collective-bargaining agreements applicable to employees at the facility. In the case of a large real estate operation, premature foreclosure could also allow the new owner to terminate many leases, leading to further job losses to the extent the business is relying on these leases.

C. Failure to Safeguard Employee Rights and Stem Corporate Abuses.

While S. 256 unfairly penalizes small companies and real estate entities and their employees, it gives a pass the very real abuse of large corporate debtors.

Testimony presented before the Senate Judiciary Committee hearing described the devastating impact corporate bankruptcies often have on the financial well-being of the workers and retirees associated with the companies. Indeed, many of the largest corporate bankruptcy cases in American history have occurred in the eight years since this bankruptcy bill first was written. Some of those cases already are legend for the corporate scandals that accompanied them.

Because it was written eight years ago, S. 256 does precious little to deal with these abuses and the all too often painful consequences for workers and retirees who have their pension plans and health benefits cancelled during the course of a corporate restructuring. Corporate collapses such as Enron, Worldcom, Adelphia and Polaroid have become all too common. Current bankruptcy laws are inadequate to address the resulting financial woes imposed on workers, retirees and stockholders. This bill has no meaningful response to the rise in corporate bankruptcy abuses.

The United Steelworkers of America observed that the bill does nothing to stem the rapid loss of pension benefits for members and retirees:

> In the steel industry alone, 45 steel companies have filed for bankruptcy since 1997. This has left over 250,000 USWA members and retirees with greatly reduced pensions and the burden of paying out-of-pocket medical expenses, which the Center for American Progress (CAP) has found to be one of the key factors that

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[190] *Id.* at 237 (written statement of Damon A. Silvers, Associate General Counsel, AFL-CIO).

[191] Letter from Peggy Taylor, Director of Legislation, AFL-CIO, to the Honorable Henry J. Hyde, Chair, House Comm. on the Judiciary (Apr. 20, 1999).

[192] *Id.*

> consistently leads to personal bankruptcy. We strongly feel that this legislation needs to address the effects corporate bankruptcies have on workers and retirees.[193]

According to a coalition of twenty unions,

> Provisions affecting business bankruptcies fare no better. Packed with terms that are tailored to well-funded creditor interests, the bill does little to address the devastating effects of the past seven years of business bankruptcies on workers. During this period, workers have sustained unprecedented job loss, endured the termination of pension plans, and faced wage cuts, elimination of health care and other benefits, often all in the same bankruptcy case. They have watched businesses disappear from their communities. No sector of the economy has escaped. Bankruptcies have plagued over 45 steel companies and countless other manufacturing, retail, service, energy, mining, transportation, textile and telecom businesses since the time the bill was first introduced.
>
> *Real* bankruptcy reform would fix an inadequate wage priority which subjects workers' wages and benefits to arbitrary payment rules. Real bankruptcy reform would rationalize the treatment of claims by injured workers. Real bankruptcy reform would fix the asset sale rules to prevent companies from simply walking away from retiree health care. S. 256 does none of these things. If the goal is bankruptcy reform, then S. 256 needs a lot of work and a lot more time. Congress needs to take an in-depth look at bankruptcy legislation and address the need for reform as it exists now, not as it existed eight years ago.[194]

D. Other Business Concerns

A host of additional concerns have been raised by groups such as the AFL-CIO and the National Bankruptcy Conference regarding the business titles of the legislation. These include concerns about the expansion of remedies available to secured creditors in the transportation industry;[195] the imposition of mandatory deadlines for extensions of "exclusivity";[196] limits on

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[193] Letter from William J. Kleinfelter, Assistant to the President, United Steelworkers of America to Members of the U.S. Senate (Feb. 28, 2005).

[194] Letter from American Federation of Labor and Congress of Industrial Organizations; American Federation of Sate and county Municipal Employees (AFSCME); American Federation of Teachers; Communications Workers of America; International Association of Machinist and Acrospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers; International Brotherhood of Electrical Workers; International Brotherhood of Police Officers; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Workers of America; Laborers International Union of North America; National Association of Government Employees; Air Line Pilots Association; PACE International Union; Service Employees International Union; United Food and Commercial Workers International Union; United Mine Workers of America; United Steel Workers of America; and UNITEHERE to Members of the U.S.Senate (Feb. 28, 2005).

[195] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 235 (Mar. 18, 1999). *March 18, 1999 House Judiciary Committee Hearing* (written statement of Damon A. Silvers, AFL-CIO); March 17, 1999 Hearing (written statement

subsequent filings for troubled small businesses,[197] and provisions giving utility companies an enhanced position in bankruptcy.[198] In general, the AFL-CIO has warned that "the real danger posed by H.R. 3150 [an earlier version of S. 256] is the threat it poses to our economy's ability to weather downturns. The bill aims to make access to the bankruptcy process more difficult for our economy's most vulnerable links – small businesses and consumers. This will likely result in increased business closures, job loss and home foreclosure, increasing the severity and length of any future economic downturn."[199]

Similar concerns relate to the power of creditors who lease retail property. Section 404 unfairly grants lessors of commercial property the ability to coerce debtor-tenants into deciding prematurely whether to assume or reject a lease. In a retail insolvency, a debtor may need to wait beyond the 210-day period – 120 days with the ability to gain a 90-day extension upon a motion for cause and with the lessor's consent – until the holiday season is complete to determine which locations have a realistic chance to succeed; a trustee or debtor in possession may decide to assume and reject some of the leases based upon this practical experience.[200] If the trustee or debtor in possession assumes a nonresidential lease in chapter 11, and the case subsequently converts to chapter 7, under the bill, the rent due for a one-year period following rejection of the lease becomes an administrative expense for compensation, gaining priority over all other unsecured claims and limiting the opportunity for other unsecured creditors to receive compensation.[201] By giving the lessor veto power at the end of 210 days, as the bill now does, the legislation would have the effect of giving a single creditor inordinate bargaining power among creditors and with the debtor.

Another problematic provision appears in section 442 of S. 256. Section 442 amends section 1112(b) of the Code to expand the grounds on which the court can dismiss or convert a small business case. For example, a case will be presumptively dismissed when the debtor fails to comply with a lengthy list of requirements. To overcome the presumption, the debtor must show that a reasonable justification exists for the debtor's action, that the debtor will rectify the situation within a reasonable time prescribed by the court, and that the plan will be confirmed within a reasonable period of time. Again, the concern is that section 442 may be too inflexible and could be used by some creditors to obtain leverage over other creditors,[202] or the case could be converted

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of Kenneth Klee, National Bankruptcy Conference).

[196] S. 256, § 411.

[197] S. 256, § 441.

[198] S. 256, § 417.

[199] Letter from Peggy Taylor, Director of Legislation, AFL-CIO, to the Honorable Henry J. Hyde, Chair, House Comm. on the Judiciary (Apr. 20, 1999).

[200] The value to the estate of retaining the ability to assign certain leases is often a significant issue in determining which leases to assume or reject because it impacts upon the ability to pay other creditors. It should also be noted that the lessor already is entitled to get paid post-petition rent for the use of the property – the debtor is not using it for free.

[201] In re Klein Sleep Prods., 78 F.3d 18, 22-24 (2d. Cir. 1996) (holding that bankruptcy practice requires that the courts treat the breach of the lease as a cost of administering the estate).

[202] National Bankruptcy Conference, Report on H.R. 2415 [hereinafter Bankruptcy Report].

to chapter 7 when it may have successfully reorganized, costing jobs and sacrificing going concern value for the creditors and the estate.

IV. TAX PROVISIONS

The Bankruptcy Code seeks to effectuate a delicate balance between the rights of the Internal Revenue Service and state tax agencies to the repayment of any taxes, interest, and penalties owed them, and the rights of other creditors and the ability of individuals and corporations to be financially rehabilitated for the benefit of all parties. Title VII of the bill, on balance, manifests a strong preference for the IRS and other taxing authorities to the detriment of other participants in the bankruptcy system. Concerns have been expressed that, not only does S. 256 generally enhance the rights and position of the IRS and state authorities in bankruptcy, but the bill grants the IRS certain rights in bankruptcy cases that it does not enjoy outside of bankruptcy, and vests the IRS with new enforcement powers that ordinary creditors do not posses.[203] Of particular concern is the fact that the bill varies in many significant respects from the nonpartisan, and often unanimous, recommendations of the Bankruptcy Commission and its Tax Advisory Committee.

Title VII of S. 256 deals with the treatment of tax debts owed to the government by a debtor. It is ironic that the bill, whose sponsors have normally taken such an anti-tax posture on most issues, not only uses the IRS collection standards for the means test but also presses for changes to the Bankruptcy Code that favor governmental collections over the rights of debtors and private sector creditors.

Arguably one of the bill's most important provisions affecting business bankruptcies appears in Section 708 of Title VII. This section provides that a corporation will not be discharged from a tax or customs duty where the debtor made a fraudulent return or willfully attempted to evade or defeat the tax or duty. More significantly, by referencing any debt in section 523(a)(2) of the Code, the provision even would encompass claims that were fraudulently incurred that are *not* tax claims. In its critique of section 708, the National Bankruptcy Conference wrote:

> "A rule such as the one proposed in section 708 advantages one creditor at the expense of others. It is a recipe for certain mischief, especially in large reorganizations. There is no public policy reason to grant this kind of leverage to some creditors as the purpose in making these assertions transparently will likely be to obtain a better deal that other creditors."[204]

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[203] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 337 (Mar. 18, 1999). (written statement of Paul Asofsky, Chair, Task Force on the Tax Recommendations of the National Bankruptcy Review Commission of the American Bar Association's Tax Section).

[204] Bankruptcy Report, *supra* note 202, at 16.

In addition, Paul Asofsky, who served as the Chair of the Task Force on the Tax Recommendations of the National Bankruptcy Review Commission of the American Bar Association's Tax Section, testifying about H.R. 3150 on behalf of the American Bar Association's Section on Taxation, observed that: "[T]here are many provisions in this legislation with which we agree as a matter of principle, but the specific provisions are either ambiguously drafted or cut against the grain of the principal proposal, causing us to oppose what should be noncontroversial proposals."[205]

Mr. Asofsky provided a somewhat more detailed discussion of his concerns in a letter to the Subcommittee's Ranking Member.[206] Section 704 of S. 256 provides for a significantly higher uniform interest rate to be applied to tax claims in a bankruptcy case. The Tax Advisory Committee, which included governmental representatives, concluded that the rate for all types of tax claims should be the regular tax deficiency rate for federal income tax purposes. The bill, however, provides that the rate shall be determined by applicable nonbankruptcy law. Of greater concern, local governments can set their own interest rates, many of which are substantially higher than either of the IRS rates.[207]

Section 707 severely limits the broader discharge available to debtors in chapter 13. It would prevent a debtor from discharging certain tax debts, which is now permitted in chapter 13, but not in chapter 7. Eliminating the benefit of the superdischarge also eliminates the single greatest incentive for an individual debtor to choose chapter 13. As Mr. Asofsky observed,

> [T]he problem faced by many taxpayers who are delinquent in their obligations is that the IRS standard allowances for installment payment agreements[208] clearly do not leave many taxpayers with the minimum amounts necessary to provide for basic necessities, and so called "offers in compromise" are very difficult to obtain. Thus, for the most desperate of taxpayers, the chapter 13 superdischarge affords a safety net which is the only thing that provides them with the possibility of living somewhat of a normal life in dignity . . . elimination of the chapter 13 superdischarge would be devastating to large numbers of unfortunate individual debtors.[209]

Section 717 requires disclosure of the tax consequences of a chapter 11 plan of reorganization. Although originally an uncontroversial idea, the bill adds extra requirements that will likely cause confusion and may be impossible for debtors to comply with fully. The section

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[205] *Hearing on Consumer Bankruptcy Issues in H.R. 3150, the "Bankruptcy Reform Act of 1999," Before the House Subcomm. on Commercial and Admin. Law*, 105th Cong. 337 (Mar. 18, 1999). *March 18, 1999 House Judiciary Committee Hearing* (written statement of Paul Asofsky, Chair, Task Force on the Tax Recommendations of the National Bankruptcy Review Commission of the American Bar Association's Tax Section).
[206] Letter from Paul Asofsky to the Honorable Jerrold Nadler, Ranking Member, House Subcomm. on Commercial and Admin. Law (Feb. 5, 1999) [hereinafter Asofsky Letter].
[207] *Id.* at 3–4.
[208] These are the same standards used in the means test in section 102 of S. 256.
[209] Asofsky Letter, *supra* note 206, at 4.

now requires "a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interest in the case." The use of a vague term such as "discussion" – although an improvement over the requirement in the earlier version of a "*full* discussion" – will likely lead to extensive litigation as these statements are scrutinized. In some instances, the precise tax consequences of a plan at all levels of government, and for a "typical" holder of claim, may be difficult to produce with great precision.[210]

Finally, section 718 requires that a debtor actually have commenced an action against the taxing authority to determine the amount of a disputed tax before a setoff can be prevented. Absent such an action by the debtor, a governmental entity generally is free to "setoff" any pre-petition refund with a liability. The Advisory Committee had recommended that such setoff should only be permitted in cases where the liability was undisputed. The bill goes much further and to the disadvantage of the debtor and other, non-governmental creditors.

V. CORRUPTION OF THE BANKRUPTCY SYSTEM

Although the legislation purports to wring fraud and abuse from the bankruptcy system, there are a number of provisions that will open the door to further abuse by certain parties.

Section 324 of the bill would overturn the result in the *Merry-go-Round* case in which the accounting firm of Ernst and Young was held liable for fraud, fraudulent concealment, and negligence/malpractice for its conduct while serving as restructuring accountants and business advisors in the Merry-go-Round bankruptcy. The suit was brought in the Circuit Court for Baltimore City, but Ernst & Young attempted to move the case to the bankruptcy court. The case was remanded back to state court and the remand was ultimately upheld by the District Court.[211] Faced with a jury trial in state court, Ernst & Young ultimately settled the case with the trustee for $185 million.

The import of the *Merry-Go-Round* case is the issue of holding professionals, such as accounting firms, accountable for their actions in a bankruptcy case. As professionals, they are paid by funds from the estate before other creditors. They have a duty to the estate and the creditors. When they violate that duty, they can be denied fees by the bankruptcy court, or they may face an action for damages. Damages paid to the trustee are made available to the creditors.

This change in the law was inserted for the express purpose of insulating accountants and other professionals from facing the consequences of their wrongdoing. At a time when public policy is moving in the direction of greater accountability, there is no excuse for this change.

Section 414 would relieve investment bankers of the duty of being disinterested persons before they can be retrained as professionals by the trustee. The disinterestedness standard,

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[210] *Id.* at 5–6.

[211] In re: Merry-Go-Round Enterprises, Inc. (Ernest & Young, LLP v. Devan), 222 B.R. 254, 259 (D. Md. 1998).

which has been in existence since 1938, protects the estate from conflicts of interest by professionals in the case. Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit has written, "such a standard can alone protect integrity in the bankruptcy process. If professionals who have previously been associated with the debtor continue to work for the debtor during a bankruptcy case, they will often be subject to conflicting loyalties that undermine their foremost fiduciary duty to the creditors. Strict disinterestedness, required by current law, eliminates such conflicts or potential conflicts . . . . Section 414, in removing investment bankers from a rigorous standard of disinterestedness, is out of character with the rest of this important legislation, however, and it should be eliminated."[212]

Section 102 relieves certain creditors and their attorneys from penalties prescribed in the bill even if they violate Bankruptcy Rule 9011. As discussed earlier, there is never a justification for violating Bankruptcy Rule 9011. Granting such an exception would only encourage inexcusable abuse of the process. Moreover, because this exception is embedded in the attorney sanctions portion of the individual debtor provisions of this bill, it would open the door to creditors abusing the most vulnerable debtors with impunity. There are many instances in which this legislation makes such abuse possible. Enshrining this sort of exemption in the law exemplifies the dangerous distortion of the bankruptcy system this bill represents.

CONCLUSION

The Bankruptcy Code has proven to be a model of pragmatism and equity at law. The proposed legislation would undermine both of those important principles. It may well be that, in the years to come, many of the same interest groups now clamoring for this legislation will come to regret the inefficiencies, uncertainties, and distortions it will inflict on the bankruptcy system. While the Bankruptcy Code could clearly benefit from reforms and modernization, indeed this legislation contains many provisions that are both beneficial and uncontroversial, much if it is unnecessary and harmful to debtors, creditors, and the economy.

We respectfully dissent, and urge our colleagues to reject S. 256.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.

[212] Letter from the Hon. Edith H. Jones, Judge for the Fifth Circuit Court of Appeals, to Hon. F. James Sensenbrenner, Chairman, House Judiciary Committee (Hon. Edith H. Jones) (March 11, 2003).

ADDITIONAL DISSENTING VIEWS

In addition to the concerns raised in the general dissenting views, we remain disappointed by the Committee's consistent refusal to put an end to two of the most notorious abuses of the bankruptcy system—the financial planning strategy by which debtors are able to purchase expensive homes in States which allow a debtor to exempt an interest in a primary residence of a unlimited dollar value,[1] and the development of "asset protection trusts," which would allow individuals to set up a trust for which they are the sole beneficiaries, and potentially place substantial assets outside the estate, and beyond the reach of the creditors.

I. THE UNLIMITED HOMESTEAD EXEMPTION.

The unlimited homestead exemption, known s the "millionaires' loophole," has allowed the very wealthy to shield from their creditors vast sums of money in palatial homes. The current Code allows a debtor to claim a State's exemptions.[2] A State may "opt out" and bar a debtor from using the federal exemptions in sec. 522(d), which are, in many cases, lower than exemptions allowed under State law.[3]

Over the years, many of us have offered amendments that would have placed an overall limit on State homestead exemptions, or repealed State opt-out so that debtors would be able to avail themselves of the federal exemptions if they are higher than applicable State law.[4] In each case, these proposals have been rejected. A proposal to place an absolute cap on State homestead exemptions in the amount of $1 million was even rejected by House conferees to H.R. 333 in the 107th Congress. Apparently, the proponents of this legislation believe that there is no amount too high for the wealthiest debtors to shelter in their homesteads, and that the poorest debtors are not entitled to even the modest floor provided by federal law.[5]

These proposals would have, respectively, helped to eliminate the biggest loophole in the Bankruptcy Code, and eliminate a significant inequity for homeowners of the most modest means. The proposals reflect the recommendations of the National Bankruptcy Re-

[1] The following are the States that have unlimited homestead exemptions: Florida, Iowa, Kansas, South Dakota, Texas, and the District of Colombia.

[2] 11 U.S.C. 522(b)(2)(A).

[3] 11 U.S.C. 522(b)(1).

[4] Rep. Waters offered an amendment setting a $30,000 Federal minimum homestead exemption for debtors 62 and older to protect some or all of the value of their homes from credentials in bankruptcy. The amendment was rejected by voice vote. Rep. Berman and Rep. Meehan offered an amendment to create a uniform Federal floor for homestead exemptions of $150,000 for debtors with substantial medical debts or a substantial loss in income, alimony, or child support due to medical problems. The amendment was rejected with 13 ayes and 18 noes.

[5] 11 U.S.C. 522(d)(1) allows a debtor to exempt up to $18,450 in value in the debtor's residence.

view Commission, that Congress provide a meaningful cap on homestead exemptions as well as a federal floor.[6]

The rationale that has been given for the so-called "needs-based" reforms proposed in S. 256 is to eliminate abuses of the bankruptcy laws-abuses which proponents of the legislation have characterized as the use of the Bankruptcy Code as a "financial planning tool."

Yet while the bill would presume that debtors of modest means are abusing the system if they can pay general unsecured creditors as little as $100 a month in chapter 13, it continues to permit, indeed it endorses—the most notorious abuse of the consumer bankruptcy system of all.

If the sponsors were truly serious about curtailing abuses in bankruptcy, this is the place to start. Some of the more notorious cases have included:

- Marvin Warner, a former ambassador to Switzerland and the owner of a failed Ohio Savings & Loan, who paid off only a fraction of $300 million in bankruptcy claims while keeping his multi-million-dollar horse ranch near Ocala, Florida.[7]
- Martin A. Siegel, a former Wall Street investment banker convicted of insider trading. While facing a $2.75 billion civil suit, he bought a $3.25 million, 7,000-square-foot beachfront home in Ponte Vedra Beach.[8]
- Former baseball commissioner Bowie Kuhn, whose Manhattan law firm went into bankruptcy. After creditors seized his weekend house in the Hamptons and were about to attach his $1.2 million home in Ridgewood, New Jersey, Kuhn acquired a million-dollar house in Florida with five bedrooms and five baths.[9]
- Dr. Carlos Garcia-Rivera, a Miami physician with no malpractice insurance, who was named in four separate malpractice actions, filed for bankruptcy protection, and kept a $500,000 home with a 100-foot swimming pool.[10]
- Dallas developer, Talmadge Wayne Tinsley, who filed under chapter 7 after incurring $60 million in debts. Tinsley objected to the Texas law that permitted him to keep only one acre of his $3.5 million, 3.1-acre magnolia-lined estate. But that acre included a five-bedroom, six-and-a-half-bath mansion with two studies, a pool and a guest house.[11]
- Movie actor, Burt Reynolds, who declared bankruptcy in 1996, claiming more than $10 million in debt. Reynolds kept a $2.5 million home—appropriately named "Valhalla"—while his creditors received 20 cents on the dollar.[12]

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[6] BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, Recommendation 1.2.2, at 125–133 (Oct. 20, 1997). The Commssion recommended a national cap of $100,000, and a national floor of $20,000.

[7] Larry Rohter, "Rich Debtors Finding Shelter Under a Populist Florida Law," *N.Y. Times* A–1 (July 25, 1993).

[8] *Id.*

[9] *Id.*

[10] David J. Morrow, "Key to a Cozier Bankruptcy: Location, Location, Location," *N.Y. Times,* A–1 (Jan. 7, 1998).

[11] *Id.*

[12] Eliot Kleinberg, "Reynolds Gets Out from under Bankruptcy," *The Palm Beach Post,* (Oct. 8, 1998)

- Paul Bilzerian, who used Florida's unlimited homestead exemption to avoid his creditors. He filed for bankruptcy in 1991, and filed again last month. He retains his $5 million Florida home, and can completely avoid the $200 million in debt owed his creditors, including the IRS.[13]

The situation in Florida has become so notorious that one Miami bankruptcy judge told the *New York Times,* "You could shelter the Taj Mahal in this State and no one could do anything about it." [14]

As the *Wall Street Journal* noted recently concerning the Kuhn case, "the bill that Congress will soon send to a welcoming President Bush would make [pre-bankruptcy planning using the unlimited homestead exemption] more difficult, but that's symbolic. Few people anticipating bankruptcy have the cash to pull off that maneuver. This is a national problem that demands a uniform solution. Without a nationwide cap, debtors who live in the 45 States that cap the exemption at $200,000 or less are free to relocate to one of the five so-called "debtors" paradises "that have no cap at all." [15]

Indeed, the Florida Supreme Court has ruled that even fraudulent transfers are protected by the unlimited homestead exemption under that State's constitution.[16]

The sponsors try to claim that they have closed the loophole by placing certain restrictions on State homestead exemptions. While true, these restrictions still leave the unlimited homestead exemption largely intact for most wealthy debtors. To the extent that the restrictions may prevent some forms of abuse, they will also have unintended consequences that might harm innocent debtors who inadvertently run afoul of the complex new rules attached to exempt property.

The bill does not place an absolute national dollar cap on homestead exemptions. People who, with the exceptions made in the bill as described below, would otherwise be entitled to an unlimited homestead exemption, would still be able to claim the exemption.

The bill does not alter the opt out rule in the Bankruptcy Code, so there is still no federal floor.

Domiciliary Requirement: The domiciliary requirement determines which State's exemptions the debtor is allowed to claim.

Sec. 307 of the bill requires a debtor to claim as a domiciliary the place of residence for the greater part of the 730 days preceding the date of the filing of the petition. This applies for claiming any property exemptions, not just the homestead exemption. Current law is 180 days.

While it would make pre-bankruptcy planning more difficult for a wealthy debtor seeking a jurisdiction with generous property exemptions, it would also have a substantial impact on a debtor who moves from a jurisdiction with a low exemption to a jurisdiction with a high exemption.

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[13] *Hearing Before the Senate Committee on the Judiciary on S. 220,* (Written statement of Brady C. Williamson), at 6 (Feb. 8, 2001).

[14] Judge A. Jay Cristol, quoted in Rohter, *supra* note 6.

[15] *Footnote 10:* David Wessel, "A Law's Muddled Course," *The Wall Street Journal,* at 1 (Feb. 22, 2001).

[16] *Havoco of America, Ltd. v. Hill,* No. SC 99–98 (June 21, 2001).

For example, a debtor who lives in New York and retires to Florida would get caught in this net. If the debtor sold her home in New York, moved to Florida, and purchased a home in Florida with the proceeds of the sale, became sick and had to file for bankruptcy (which is a common occurrence) within the 730 period, she would not be able to use the Florida exemption and keep the full value of her home. Instead, she would have to use the New York exemption of $10,000. The rest would be available to pay her creditors. If there is excess value (above the equity and transaction costs) the trustee would have a duty to sell the home to generate funds to pay creditors. The debtor would get a check for $10,000, and lose her home. This would be even less than the federal exemption of $18,450, so she would be harmed even more by the failure of Congress to adopt a federal floor.

Converting a non-exempt asset into an exempt homestead asset: The bill provides, in sec. 308, that a debtor who converted a non-exempt asset into an interest in an exempt homestead within the ten year period ending on the date of the filing of the petition, would have the allowed exemption reduced by the amount of that additional interest. This provision requires proof that the debtor did so with the intent to hinder, delay or defraud a creditor. Because this is such a high standard of proof, it is likely that this provision will be rarely enforced.

Example: Debtor has $100,000 in a bank account. Debtor closes the account and uses it to pay down a mortgage on her residence. She now $150,000 in the home, all of which is exempt. The debtor would get to claim the full amount as exempt unless a creditor is able to prove that the debtor moved the funds from the non-exempt asset (the bank account) to the exempt asset (the homestead) with the intent to hinder delay and defraud a creditor. If the creditor is able to meet that burden of proof, the debtor may claim only the $50,000 interest in the homestead as exempt.

Another domiciliary requirement and conversion of non-exempt assets limitation: Sec. 322 limits a debtor to $125,000 in a homestead exemption for any interest in a homestead that was acquired 1215 days before the date of the filing of the petition that exceeds in the aggregate $125,000 in value. It does not apply to a debtor who is a family farmer under ch. 12 of the Code, or a debtor who acquires the interest within the same State. It only applies to a debtor who acquires the interest in a homestead in a State other than the State in which the debtor lived within the look-back period. Thus, if a debtor who lived in Texas acquired an interest in a homestead in Texas during the look-back period, the $125,000 cap would not apply. It would, however, apply to a New York senior who sold her home, moved to Florida, purchased a home in Florida with the proceeds from the sale of the New York home, got sick and had to file within the 1,215-day period. Because she would have acquired an interest in the property in excess of $125,000, she would be limited to $125,000. The rest of her equity could be used to pay her creditors.

Cap on homestead exemption for certain types of wrongdoing: Sec. 322 also caps a debtor's homestead exemption at $125,000, if:

- The court, after notice and a hearing, determines that the debtor has been convicted of a felony, as defined in 18 U.S.C. 3156, which, under the circumstances, demonstrating that the filing of the case was an abuse of the provisions of the Code;
- The debtor owes a debt arising from a violation of the Federal or State securities laws; fraud, deceit or manipulation in a fiduciary capacity or in connection with he purchase or sale fo any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934, or section 6 of the Securities Act of "1933; any civil remedy under 18 U.S.C. 1964 [the RICO statute]; any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years. The last clause does not include simple negligence resulting in serious physical injury or death. This reflects a concern among some proponents of the bill that doctors whose malpractice caused serious physical injury or death not lose their unlimited homestead exemption. The limitations due to securities violations and the RICO judgments were added in response to concerns that former Enron Chairman Kenneth Lay would be entitled to an unlimited homestead exemption in his native Texas should he file for bankruptcy. Mr. Lay has not, however, filed for bankruptcy, and it is not yet clear whether he will be found by a court to have run afoul of any of the enumerated offenses.

There is also a savings clause that a debtor who owes a debt of the kind described above would not lose her homestead exemption over $125,000, to the extent that the equity is reasonably necessary for the support of the debtor and any dependent of the debtor. It is an outrage that the same "reasonably necessary standard" that would protect the unlimited homestead exemption is the same one that the drafters of the bill specifically chose to remove from the Code, in favor the means test in sec. 102 of the bill, and the IRS standards to determine a debtor's allowed expenses.

While these amendments may eliminate a few of the abuses, they do not solve the problem. Wealthy debtors who are able to afford skillful legal advice, and are sophisticated enough to engage in complex pre-bankruptcy planning, will, in many cases, will be able to evade the paltry restrictions in this bill. Truly needy debtors, the kind whose life savings may be bound up in their residence, and who can afford neither sophisticated legal advice, or complex pre-bankruptcy planning, will get caught in the many twists and turns that will now be added to the Code. Far from eliminating the abuse of the unlimited homestead exemption, this bill will have the perverse effect of perpetuating it while creating new traps for the truly needy unsophisticated debtor.

What message does it send when Congress subjects middle-class debtors to a means test and other onerous changes to the Code, while permitting the wealthy to continue to place their millions out of reach of their creditors? A bill this rife with favoritism toward wealthy debtors and against middle class families is anything but a "Bankruptcy Abuse Prevention and Consumer Protection Act."

If Congress is serious about curbing abuse, a national, absolute dollar amount cap, without any loopholes, is the only way to do it. The bill, as reported, fails this test and so bears the burden of treating poor and middle class families harshly while letting the wealthiest individuals, who are clearly abusing the system and defrauding their creditors, shelter millions of dollars.

II. THE BILL DOES NOT ADDRESS THE ASSET PROTECTION TRUST LOOPHOLE.

Although this legislation is exceedingly draconian with respect to low and middle income debtors, the sponsors have consistently resisted amendments that would close loopholes for the wealthiest debtors.

One such loophole is the so-called "asset protection trusts," which, under the law of five States, allows an individual to set up a trust account for which the person establishing the trust would also be the beneficiary.[17] Trusts, established under non-bankruptcy law, are not treated a property of the bankruptcy estate, and so are beyond the reach of creditors.[18] A debtor may, under the laws of these five States, establish such a trust, solely for the benefit of the debtor, and may be able to shield unlimited amounts of money from creditors. So long as the funds were not placed in the trust by means of a fraudulent transfer, the trustee might have no power to recover them for the benefit of the creditors.

Senator Schumer offered an amendment that would have limited the value of assets that could be shielded in these trusts to $125,000, if transferred within the ten years preceding the filing of the petition.[19] Rep. Delahunt offered a similar amendment during the Judiciary Committee's markup, limiting such trusts up to $125,000, while protecting conventional retirement funds currently exempt from federal taxation, charitable trusts, and educational trusts. The amendment was rejected with 10 ayes and 15 noes.

The rejection of these reasonable amendments by the Senate and by the House Judiciary Committee again demonstrate that, despite its lofty title, the bill does not target bankruptcy abuse by the wealthy and well connected.

Bankruptcy should provide a safety net for families truly in need of relief. This legislation, which imposes stringent new rules on financially distressed families, should not leave the most notorious loopholes for the very wealthy.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
MARTIN T. MEEHAN.
ANTHONY D. WEINER.
CHRIS VAN HOLLEN.

[17] Gretchen Morgenson, *Proposed Law on Bankruptcy Has Loophole,* N. Y. TIMES, Mar. 2, 2005, at C1.

[18] 11 U.S.C. 541(c)(2) (2004).

[19] 151 CONG. REC. S1981 (daily ed. March 2, 2005) (statement of Sen. Schumer). The amendment excludes from its coverage trusts not for the benefit of the debtor that would otherwise be excluded from the estate, and trusts established for retirement purposes under the new 11 U.S.C. 522(d)(12).

ADDITIONAL MINORITY VIEWS

While I agree with the Minority Views to S. 256, I want to submit additional views to explain my dissent.

Once again we are attempting to push through the Bankruptcy Abuse Prevention and Consumer Protection Act, which despite its name provides little meaningful protection for consumers. We all can agree that the system needs revision, but this legislation is not the answer.

Bankruptcy filings have risen slightly in recent years and while some who file for bankruptcy have not been financially responsible, the overwhelming majority of people who file for bankruptcy do so as the result of a divorce, major illness or job loss. Many people are just one paycheck, job loss or medical catastrophe away from bankruptcy. We know at the present time there are 1.6 million people who go into bankruptcy every year. Half of those people go into bankruptcy because of medical bills. About three-quarters of those individuals who go into bankruptcy because of medical bills have health insurance, but nonetheless, the explosion of costs in health care have added such a burden to these families that they have had to go into bankruptcy.

If the purpose of this legislation is to try to deal with spendthrifts and those who are abusers of credit, we ought to be able to distinguish them from hard-working Americans who unfortunately became ill, those who have had an unforeseen change in their employment, and those whose spouses experienced business failures. Unfortunately, this legislation does not make those distinctions.

I believe that any meaningful bankruptcy reform ought to ensure that individuals are afforded the protection of Chapter 7 bankruptcy and are exempt from dismissal or conversion if: (1) a substantial portion of the indebtedness is due to business losses incurred by a spouse who has died or deserted the debtor; (2) a substantial portion of the indebtedness was incurred as a result of illness of the debtor, a dependant of the debtor, or the debtor's spouse if not a dependant of the debtor; or (3) a substantial portion of the indebtedness was a result of unforeseen loss of employment through no fault of the debtor.

Another category of citizens who will be adversely impacted by this legislation are small business entrepreneurs who go into business considering a risk/benefit ratio that includes the possibility of making a lot of money but also includes the possibility of losing everything and ending up in bankruptcy. With the passage of this legislation, those entrepreneurs and their families risk not only losing everything, but also remaining destitute.

Finally, we should consider the impact on society of increasing the number of people who conclude that they have nothing left to lose. It is ironic that the last time we debated bankruptcy reform on the Floor of the House of Representatives, a farmer had driven his tractor into a pond near Washington's monuments, tying up traffic in D.C. for several days. He was quoted as saying, "I'm broke. I'm busted." He was also quoted as saying, "I've got the rest of my life to stay right here. I'm not going anywhere." People who feel they have nothing left to lose often lack any incentive to be a productive member of society, and this can also create a potential danger to society. Denying bankruptcy protection to people who need a fresh start will only increase this category of citizens. Instead we should be providing them with the assistance they need to get back on their feet.

While the bankruptcy code clearly could benefit from reform and modernization, this legislation does not differentiate between those who abuse the system and those who truly need the aid it provides.

ROBERT C. SCOTT.

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