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HELPING FAMILIES SAVE THEIR HOMES IN BANKRUPTCY ACT OF 2008

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

REPORT

together with

MINORITY VIEWS

[To accompany S. 2136]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2136), to address the treatment of primary mortgages in bankruptcy, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. Background and Purpose of the Helping Families Save Their Homes in Bankruptcy Act of 2008

As the number of foreclosures in the United States continues to rise to historic levels—threatening the economy overall and the families at risk in particular—further congressional action is required to help as many families as possible save their homes.

Risky lending practices in the subprime mortgage market have put nearly two million families in danger of losing their homes to foreclosure before the end of 2009.[1] These families are typically either trapped in "exploding" subprime loans they can no longer afford due to upward adjustments in mortgage interest rates, or are saddled with mortgage debts that far exceed the value of their homes due to rapidly declining housing markets.[2] The problem is expected to continue to worsen throughout 2008 and 2009; noted economist Robert Schiller, who pioneered the Case-Schiller housing index, has said that housing prices could fall further than the 30% reduction experienced during the Depression of the 1930s.[3]

The foreclosure crisis is threatening the overall economy at the same time that it strikes every neighborhood in which a foreclosure occurs. According to the International Monetary Fund, $565 billion will be lost on investments in U.S. home mortgages.[4] The IMF also predicts that the overall credit crisis, which was instigated by and continues to be fueled by the rising number of foreclosures, will cause $1 trillion in worldwide losses.[5] And in each neighborhood in which any foreclosures occur, homeowners who have never missed a mortgage payment will still lose $8,667 on average in the value of their homes; these 40.6 million homeowners who do *not* face foreclosure are expected to lose over $352 billion in value from their primary store of wealth.[6]

To respond to this crisis, it is imperative to craft policies that will avoid home foreclosures. Reducing the principal owed on mortgages to a level that the homeowners can afford to repay—without reducing the principal below what the homes are worth so that the lenders are not left with less collateral than the value of the debts owed on the underlying assets—represents one of the most effective ways to avert foreclosures. Federal Reserve Chairman Ben Bernanke has made this argument,[7] and 71 percent of economists

[1] See The Looming Foreclosure Crisis: How To Help Families Save Their Homes, Hearing before the S. Comm. on the Judiciary, 110th Cong. (December 5, 2007) (prepared statement of Mark Zandi, Chief Economist and Co-Founder, Moody's Economy.com) ("I expect approximately 2.8 million mortgage loan defaults (the first step in the foreclosure process) in 2008 and 2009. Of these, 1.9 million homeowners will go through the entire foreclosure process and ultimately lose their homes").

[2] See Edmund Andrews, Relief for Homeowners Is Given to a Relative Few, The New York Times, March 4, 2008 ("With housing prices falling, analysts estimate that about 30 percent of all subprime loans written in 2005 and 2006 are for more than the current sales value of the homes that secure them").

[3] John Christoffersen, U.S. Housing Slump May Exceed Depression: Shiller, Associated Press, April 22, 2008.

[4] Neil Irwin, IMF Puts Cost of Crisis Near $1 Trillion, The Washington Post, April 9, 2008.

[5] Id.

[6] Center for Responsible Lending Issue Brief, Updated Projections of Subprime Foreclosures in the United States and Their Impact on Home Values and Communities, August, 2008, available at *http://www.responsiblelending.org/pdfs/updated-foreclosure-and-spillover-brief-8-18.pdf*.

[7] Chairman Ben S. Bernanke, Chairman of the Board of Governors of the Federal Reserve System, Reducing Preventable Mortgage Foreclosures: Speech at the Independent Community Bankers of America Annual Convention, Orlando, Florida, March 4, 2008, available at *http://www.federalreserve.gov/newsevents/speech/bernanke20080304a.htm* ("* * * principal reductions that restore some equity for the homeowner may be a relatively more effective means of avoiding delinquency and foreclosure [than interest rate reductions])."

who responded to a Wall Street Journal poll agreed.[8] A National Association of Realtors analyst has said that for the homeowners this assistance "provides incentive not to walk away."[9]

Rather than advocating for proposals that would feature a reduction in principal where warranted, in response to the crisis the Bush Administration established the HOPE NOW program, through which mortgage servicers can volunteer to help distressed borrowers.[10] However, meaningful assistance from the HOPE NOW-affiliated banks has been the exception rather than the rule, and the scale of the crisis dwarfs the volume of the voluntary response. According to a HOPE NOW official, only a very small group of borrowers are likely to get their mortgage principal reduced outright[11] and, therefore, most of the homeowners who are in need of assistance will receive only minor changes to the mortgage rather than a restructuring that will help the homeowners continue to make timely payments over the long term. HOPE NOW refuses to provide detailed data on the number of loan modifications its servicers make by modification type; rather, it lumps loan workouts in which the principal is reduced with other types of workouts (which may only delay foreclosure rather than prevent it), such as interest rate changes, changes in the length of the loan, and so on.[12]

In part, this lack of meaningful loan assistance stems from the fact that the interests of loan servicers and mortgage investors are misaligned. As reported in Inside B&C Lending, "Servicers are generally disincented to do loan modifications because they don't get paid for them but they do get paid for foreclosures."[13] Moreover, according to a Citigroup managing director, many loan servicers are "scared to death" of being sued by investors for making loan modifications.[14] In addition, the holders of second liens ("piggyback mortgages") often refuse to consent to primary mortgage changes

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[8] Phil Izzo, Real Time Economics Blog: Housing Market Has Further to Fall, The Wall Street Journal, March 13, 2008, available at *http://blogs.wsj.com/economics/2008/03/13/housing-market-has-further-to-fall/* (referring to the then-latest Wall Street Journal forecasting survey and stating that "Last week, Federal Reserve Chairman Ben Bernanke suggested that lenders could aid struggling homeowners by reducing their principal—the sum of money they borrowed—to lessen the likelihood of foreclosure. Some 71 percent of respondents agreed with the suggestion"). See also The Looming Foreclosure Crisis: How To Help Families Save Their Homes, Hearing before the S. Comm. on the Judiciary, 110th Cong. (December 5, 2007) (prepared statement of Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys) ("Allowing homeowners to file chapter 13 plans that modify their mortgage debts and reduce their payments would utilize an existing, efficient, well-established, and predictable template to prevent foreclosures * * * No other legislative proposal has the potential to save nearly as many homes").

[9] Id., (citing Lawrence Yun of the National Association of Realtors).

[10] HOPE NOW press release, HOPE NOW Alliance Created to Help Distressed Homeowners, October 7, 2008, available at *http://www.hopenow.com/media/press_releases/Distressed_Homeowners.html.*

[11] David Cho and Renae Merle, Merits of New Mortgage Aid Are Debated, The Washington Post, March 8, 2008 (citing Bill Longbrake, "a veteran mortgage banker who helps run the program," as saying "Only a very small group of borrowers could get their mortgage principal reduced outright").

[12] HOPE NOW Press Release, Mortgage Servicers Set Monthly, Quarterly Records For Helping Homeowners Avoid Foreclosure, July 30, 2008, available at *http://www.hopenow.com/upload/press_release/files/June%202008%20Data%20Release.pdf* ("A modification occurs any time any term of the original loan contract is permanently altered. This can involve a reduction in the interest rate, forgiveness of a portion of principal or extension of the maturity date of the loan").

[13] Inside Mortgage Finance's Inside B&C Lending, Subprime Debt Outstanding Falls, Servicers Pushed on Loan Mods, November 16, 2007.

[14] ARM Workout Calls Trigger Fierce Debate, American Banker, October 9, 2007 (quoting Tim Bolger, a managing director of Citigroup, Inc.).

even in situations in which the servicer and the borrower agree to terms.[15]

Congress has taken meaningful steps to help ease this crisis, in particular by passing the Housing and Economic Recovery Act of 2008.[16] Among its many provisions is a program in which approximately 400,000 homeowners could refinance their mortgages through the Federal Housing Administration, provided that loan servicers volunteer to reduce the principal on the loans to 85 percent of the homes' current value. But given how rarely servicers have agreed voluntarily to reduce loan principals to date, it is unclear whether many families will be helped by this program. Regarding this bill, economist Mark Zandi has commented that "it's not enough, even in the best of circumstances."[17] As the housing crisis continues to deepen, reports have indicated that the Bush administration could take until 2009 to fully implement the new program, even though the legislation specifies that the program is effective October 1, 2008.[18]

The Helping Families Save Their Homes in Bankruptcy Act (S. 2136) would complement the Housing and Economic Recovery Act by providing servicers with much stronger incentives to write down mortgage principals and keep families in their homes, since servicers would know that if a loan workout is not completed then the homeowner could attempt to have the mortgage restructured by a bankruptcy judge. The Center for Responsible Lending estimates that the bill could help more than 600,000 financially troubled families keep their homes.[19]

To help families save their homes, S. 2136, as reported by the Committee, would take several steps, which are summarized below. The bill would:

- Eliminate a provision of the bankruptcy law that prohibits Chapter 13 plans from making modifications to mortgage loans on a debtor's principal residence, so that for homeowners who meet strict income and expense criteria, primary mortgages can be treated the same as vacation homes and family farms;
- extend the time frame debtors are allowed for repayment, to support long-term mortgage restructuring;
- waive the bankruptcy counseling requirement for families whose houses are already scheduled for foreclosure sale, so that precious time is not lost to futile counseling that cannot help families save their homes;
- reduce the possibility of future uncertainty in the mortgage market and avoid moral hazard by only allowing subprime and nontraditional mortgages originated as of the date of enactment to be modified;
- ensure that mortgage modification benefits lenders more than foreclosure by providing that bankruptcy judges cannot

[15] See William Launder, Second Liens Proving Hurdle on More Refis, American Banker, March 6, 2008.

[16] P.L. 110–289.

[17] Vikas Bajaj, As Housing Bill Evolves, Crisis Grows Deeper, The Washington Post, June 29, 2008.

[18] See Ron Scherer, Big Housing Bill: No Rescues Soon, The Christian Science Monitor, August 1, 2008.

[19] Center for Responsible Lending, Foreclosure Prevention Act of 2008 (S. 2636): Compromise Bill Permits Court-Supervised Modifications, Would Save 600,000 Homes, February 27, 2008, available at *http://www.responsiblelending.org/pdfs/senate-bankruptcy-support-brief-feb27.pdf* (referring to title IV of S. 2636, which is the same as the Committee-reported version of S. 2136).

reduce the principal on a primary mortgage below the fair market value of the home and cannot reduce interest rates below the prime interest rate plus a reasonable premium for risk; and

- ensure that lenders are treated equitably when homes are resold during the life of the bankruptcy plan by returning any positive difference between the sale price and the stripped-down mortgage principal to the lender.

The bill would take several additional steps to further help families get back on their feet financially as they go through bankruptcy proceedings. To summarize, the bill would:

- Ensure lenders provide proper notice when assessing fees on debtors in bankruptcy;
- require mortgage bankruptcy fees to be lawful and reasonable;
- allow bankruptcy judges to waive prepayment penalties;
- maintain debtors' legal claims against predatory lenders while in bankruptcy;
- confirm that bankruptcy judges can rule on core issues rather than defer to arbitration;
- enact a higher homestead floor for homeowners over the age of 55, to help older homeowners who are fighting to keep their homes as they go through bankruptcy but live in States with low homestead exemptions; and
- reinforce that consumer protection claims are still available in bankruptcy.

The bill would not rewrite the core tenets of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Rather, the prohibition on modifying primary mortgages that the bill would change dates back to 1978, when most mortgages were 30-year, fixed-rate loans that required a 20 percent down payment.[20] The bill also would not leave financial institutions with losses by letting families completely escape from their financial obligations, since the bill is structured to encourage families to pay their mortgages to the greatest extent that they are able.

The bill would ensure that mortgage holders receive at least the value they would obtain through foreclosure, since a foreclosure sale can only recover the market value of the home. Lenders would receive much more than foreclosures would generate when bankruptcy restructurings are successful and families are able to continue paying an interest-generating mortgage. Finally, since foreclosures are expensive to lenders, keeping the family in the home and paying what they can afford can provide substantial cost savings to the mortgage holder.

In contrast to other legislation that has been proposed to address the foreclosure crisis, S. 2136 would not cost the Federal Government or Federal taxpayers, and, according to the Congressional

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[20] As Judge Jacqueline Cox, Bankruptcy Judge for the United States Bankruptcy Court for the Northern District of Illinois, testified before the Committee, "[w]hatever justification there might have been in 1978 for granting special protection to mortgages on a debtor's principal residence has evaporated as the marketplace has produced a baffling array of loans based more on a lender's ability to sell than on a borrower's ability to repay." See The Looming Foreclosure Crisis: How To Help Families Save Their Homes, Hearing before the S. Comm. on the Judiciary, 110th Cong. (December 5, 2007) (prepared statement of Judge Jacqueline P. Cox).

Budget Office, would actually increase Federal revenues and decrease Federal spending.[21]

The bill would not raise the cost of credit to future borrowers. There is no credible evidence to support the assertion of the Mortgage Bankers Association that the mere possibility of a small subset of mortgages being changed in bankruptcy would somehow raise the cost of all mortgages by 1.5 to 2 percentage points.[22] To the contrary, an empirical study of previous changes to the treatment of primary mortgages in bankruptcy indicated that allowing mortgage modification "would have no or little impact on mortgage markets."[23] Moreover, since the bill as reported expressly excludes future mortgages from eligibility for modification in bankruptcy, there is no way credibly to claim that these same loans will be more expensive.

This bill enjoys the support of numerous organizations including the Credit Union National Association, the National Association of Federal Credit Unions, AARP, the Leadership Conference on Civil Rights, the National Association for the Advancement of Colored People, the National Council of La Raza, the Consumer Federation of America, the Center for Responsible Lending, ACORN, AFL–CIO, SEIU, UAW, the Central Illinois Organizing Project, Consumer Action, the Consumers Union, DEMOS, the National Association of Consumer Advocates, the National Association of Consumer Bankruptcy Attorneys, the National Community Reinvestment Coalition, the National Consumer Law Center, the National Fair Housing Alliance, National Neighborworks, the National Urban League, the National Women's Law Center, and the Opportunity Finance Network.

Several assertions made in the minority views require clarification.

While the minority argues that "cram down imposes an immediate loss on lenders that they cannot recover when home values later appreciate," this argument assumes that there would still be a mortgage left in the absence of modification. To the contrary, for the homeowners who would qualify for this bankruptcy provision,

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[21] See Section IV below ("CBO estimates that enacting S. 2136 would reduce direct spending by $13 million over the 2009–2018 period and increase revenues by $10 million over the same period").

[22] See e.g., Mortgage Bankers Association, Stop the Bankruptcy Cram Down Resource Center, available at *http://www.mortgagebankers.org/StopTheCramDown* ("If this bill should become law, MBA believes that mortgage rates would increase by at least one and a half points"). The basis for the MBA's prediction of a 1.5 to 2 percent cost increase is the difference in interest rates for mortgages on non-owner-occupied investment properties, and the rates for mortgages on owner-occupied primary residences. The MBA attributes this difference to the fact that the Bankruptcy Code currently permits courts to modify mortgages on investment properties. The MBA's calculation disregards the widely acknowledged fact that mortgages on non-owner-occupied investor properties are riskier for lenders than those on owner-occupied residences. This is simply because people are more willing to walk away from an investment property than from the home they live in, and an investor is subject to risk that the tenant does not pay or damages the property. People have to live somewhere, so they are more motivated to do what they can to save their home than they are their investments.

[23] Adam Levitin and Joshua Goodman, The Effect of Bankruptcy Strip-Down on Mortgage Interest Rates, Georgetown University Law Center Business, Economics and Regulatory Policy Working Paper Series Research Paper No 108781, February 6, 2008, available at *http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=adam_levitin*. From 1978 (when the current Bankruptcy Code was enacted) until 1993 (when the Supreme Court decided *Nobleman* v. *American Savings Bank*, 508 U.S. 324 (1993)), many courts across the country believed that bankruptcy judges had the authority to modify home mortgages (by treating them as secured up to the value of the property only). Lending experience during this 15-year period showed that those jurisdictions that permitted strip-downs experienced no adverse effects on the cost or availability of credit, either as compared with jurisdictions that did not permit strip-downs, or as compared with the period after 1993, when strip-downs were no longer permitted.

the alternatives are not either paying the existing mortgage or restructuring it in bankruptcy; the alternatives are modifying the mortgage or foreclosure. Lenders would be far better off in the long run with a modified mortgage from which income can be generated than no mortgage at all and a property that must be disposed of via a foreclosure sale.

The minority's claim that "a consensus exists among experts that allowing cram down in bankruptcy would increase the cost of borrowing for future homeowners" is simply false. Only one credible statistical analysis has been conducted on this question, and as cited in this committee report, that analysis concludes that "permitting bankruptcy modification of mortgages would have no or little impact on mortgage markets."

The Administration's proposal to stabilize the financial markets does indeed raise the stakes for this provision. Contrary to the minority's claims, however, allowing judges to modify mortgages complements the plan because it raises the value of the mortgage-backed assets that the government might purchase. If the government begins purchasing $700 billion in illiquid assets, most of which will be related to underlying mortgages, the government would be better off if the assets perform and contribute ongoing revenue, even if that revenue is slightly lower than the original mortgages might have provided. This is far better for taxpayers than mortgage failure and foreclosure, which renders that portion of the mortgage-backed security worthless.

This provision will also complement congressional efforts to respond to the current economic crisis because it will allow for a quicker assessment of the true value of these illiquid assets. As mortgages are modified they turn from nonperforming to performing and therefore clarify the value of the mortgage and the securities that are derived from it. Since the underlying logic to the bailout is to reinvigorate the mortgage and credit markets, anything that aids this price discovery process is a meaningful addition to the proposal.

The core of the current economic crisis is the record high level of foreclosures. Until the foreclosure crisis is addressed, our economy will not recover. The Helping Families Save Their Homes in Bankruptcy Act will alleviate our foreclosure crisis to the benefit of our homeowners, our communities, our economy and our nation.

II. History of the Bill and Committee Consideration

A. INTRODUCTION OF THE BILL

On October 3, 2007, Senator Durbin introduced the Helping Families Save Their Homes in Bankruptcy Act of 2007 as S. 2136. It was cosponsored by Senator Schumer (D–NY). After introduction, Senators Biden (D–DE), Boxer (D–CA), Brown (D–OH), Clinton (D–NY), Dodd (D–CT), Feinstein (D–CA), Harkin (D–IA), Kerry (D–MA), Menendez (D–NJ), Obama (D–IL), Reed (D–RI) and Whitehouse (D–RI) joined as cosponsors.

B. COMMITTEE CONSIDERATION

On December 5, 2007, the Senate Committee on the Judiciary held a hearing on the bill chaired by Senator Durbin. The hearing was titled "The Looming Foreclosure Crisis: How To Help Families

Save Their Homes." The hearing was attended by Senator Durbin, Ranking Member Specter, and Senator Sessions. The witnesses testifying at the hearing were Nettie McGee, a homeowner from Chicago, IL; Mark Zandi, Chief Economist of Moody's Economy.com, Inc.; Professor Joseph Mason of Drexel University; Professor Mark Scarberry, Professor of Law at Pepperdine School of Law and Resident Scholar of the American Bankruptcy Institute; The Honorable Jacqueline P. Cox, United States Bankruptcy Judge for the United States Bankruptcy Court for the Northern District of Illinois in Chicago, IL; The Honorable Thomas Bennett, United States Bankruptcy Judge for the United States Bankruptcy Court for the Northern District of Alabama in Birmingham, AL; and Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys.

The Senate Committee on the Judiciary, with a quorum present on March 6, 2008, began consideration of S. 2136. On that date, the Committee adopted without objection a substitute amendment offered by Senator Durbin. The substitute amendment modified the bill as introduced to provide that:

- Only loans originated prior to the date of the bill's enactment would be eligible for modification in bankruptcy;
- only subprime and nontraditional loans would be eligible for modification in bankruptcy;
- the maximum revised loan term would equal the longer of 30 years or the time remaining under the original mortgage;
- if the borrower were to sell the home during the life of the bankruptcy plan, the lender would receive any profit derived from the difference between the marked-down mortgage value and the appreciated sale price up to the original value of the mortgage; and
- no fees could be assessed within bankruptcy without proper notice by the creditor (this provision would no longer be contingent on the value of the home being greater than the principal debt outstanding).

The Committee did not complete consideration of S. 2136 on March 6. On April 3, 2008, the Committee reconvened and resumed debate on S. 2136, as amended by the Durbin substitute. The Committee considered an amendment offered by Senator Specter, which would have struck the text of S. 2136 and replaced it with the text of Senator Specter's bill, S. 2133. S. 2133 would have permitted modification in bankruptcy court of mortgages on primary residences, but with certain restrictive exclusions and conditions including the following:

- Families would not be eligible for mortgage modification in bankruptcy court if their income exceeded certain thresholds linked to state median income, meaning that families in high-cost of living areas in many states would likely be excluded from eligibility;
- only mortgages obtained prior to September 26, 2007 would be eligible for modification; and
- any modification ordered by the bankruptcy judge to the principal amount of the mortgage would have to be agreed upon in writing by the holder of the mortgage in order to become effective, meaning that lenders would have effective veto

power over any principal modification ordered by a bankruptcy judge.

Senator Specter's amendment was rejected on a roll call vote. The vote record is as follows:

TALLY: 9 YEAS, 10 NAYS

Yeas (9): Brownback (R–KS), Coburn (R–OK), Cornyn (R–TX), Graham (R–SC), Grassley (R–IA), Hatch (R–UT), Kyl (R–AZ), Sessions, (R–AL), Specter (R–PA).

Nays (10): Biden (D–DE), Cardin (D–MD), Durbin (D–IL), Feingold (D–WI), Feinstein (D–CA), Kennedy (D–MA), Kohl (D–WI), Leahy (D–VT), Schumer (D–NY), Whitehouse (D–RI).

The Committee then voted to report the Helping Families Save Their Homes in Bankruptcy Act, as amended, favorably to the Senate. The Committee proceeded by roll call vote as follows:

TALLY: 10 YEAS, 9 NAYS

Yeas (10): Biden (D–DE), Cardin (D–MD), Durbin (D–IL), Feingold (D–WI), Feinstein (D–CA), Kennedy (D–MA), Kohl (D–WI), Leahy (D–VT), Schumer (D–NY), Whitehouse (D–RI).

Nays (9): Brownback (R–KS), Coburn (R–OK), Cornyn (R–TX), Graham (R–SC), Grassley (R–IA), Hatch (R–UT), Kyl (R–AZ), Sessions, (R–AL), Specter (R–PA).

On April 3, 2008, with a quorum present, the Committee ratified without objection the vote to pass S. 2136, as amended.

III. Section-by-Section Summary of the Bill

Section 1. Short title

This section provides that the legislation may be cited as the Helping Families Save Their Homes in Bankruptcy Act of 2008.

TITLE I—MINIMIZING FORECLOSURES

Section 101

This section amends title 11, section 101 of the U.S. Code to provide definitions for the terms "nontraditional mortgage" and "subprime mortgage".

"Nontraditional mortgage" is defined as a security interest in the debtor's principal residence that secures a debt for a loan that at any period during the term of the loan provides for the deferral of payment of principal or interest through permitting periodic payments that do not cover the full amount of interest due or that cover only the interest due. The term is defined to exclude the following: (A) A loan that at any period during the term of the loan provides for the deferral of payment of principal through permitting periodic payments that cover only the interest due, if the creditor demonstrates that it determined in good faith at the time the loan was consummated, after undergoing a full underwriting process based on verified and documented information, that the debtor had a reasonable ability to repay at the full interest and principal payment amount (assuming an initial 30-year full amortization), and payments under the loan resulted in a debt-to-income ratio of the debtor in an amount equal to or less than that which would have been permitted under guidelines and directives established by

the Secretary of Housing and Urban Development pursuant to section 203.33 of title 24, Code of Federal Regulations, for loans subject to such section; (B) a home equity line of credit that is in a subordinate lien position; and (C) a reverse mortgage.

"Subprime mortgage" is defined as a security interest in the debtor's principal residence that secures a debt for a loan that has an annual percentage rate that is greater than: (A) the sum of 3 percent plus the yield on United States Treasury securities having comparable periods of maturity, if the loan is secured by a first mortgage or first deed of trust; or (B) the sum of 5 percent plus the yield on United States Treasury securities having comparable periods of maturity, if the loan is secured by a subordinate mortgage or subordinate deed of trust.

The definition of "subprime mortgage" also provides that regardless of whether such loan is subject to or reportable under the Home Mortgage Disclosure Act, the difference between the annual percentage rate of such loan and the yield on United States Treasury securities having comparable periods of maturity shall be determined using the procedures and calculation methods applicable to loans that are subject to the reporting requirements of such Act, except that such yield shall be determined as of the 15th day of the month preceding the month in which a completed application is submitted for such loan. The definition further states that if such loan provides for a fixed interest rate for an introductory period and then resets or adjusts to a variable interest rate, the determination of the annual percentage rate shall be based on the greater of the introductory rate and the fully indexed rate. For purposes of this definition, the term "fully indexed rate" is defined as the prevailing index rate on a residential mortgage loan at the time the loan is made plus the margin that will apply after the expiration of an introductory interest rate.

Section 102

This section amends title 11, section 1322(b) of the U.S. Code to create special rules for the modification of loans secured by primary residences.

Section 1322(b)(2) of the bankruptcy code provides an exception to the general bankruptcy principle that secured debts can be modified. Under 1322(b)(2), a bankruptcy plan may modify the rights of holders of secured claims "other than a claim secured only by a security interest in real property that is the debtor's principal residence". This 1322(b)(2) exception has prevented mortgages on principal residences from being treated like virtually all other secured debts.

Section 102(a) of S. 2136 would create a new 1322(b)(11) providing that notwithstanding § 1322(b)(2) and otherwise applicable nonbankruptcy law, a bankruptcy plan may modify an allowed secured claim for certain debts secured by a nontraditional mortgage or a subprime mortgage (or secured by a lien subordinate to such claims) on the debtor's principal residence. Such modification is permitted only for secured claims for debts that were incurred prior to the effective date of S. 2136, meaning that such modification would not be available for debts incurred after the effective date. Also, such modification is permitted only if the debtor's current monthly income (after subtracting the expenses permitted for debt-

ors under title 11, section 1325(b)(3), other than amounts contractually due to creditors holding such allowed secured claims and additional payments as are necessary to maintain possession of the residence) is insufficient to enable the debtor to retain possession of the principal residence by curing a default and maintaining payments while the case is pending. This means that only debtors who, after allowance for expenses permitted by the means test established by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, cannot afford to use the traditional bankruptcy cure remedy would be eligible for such modification.

Section 102(a) would permit reduction of the principal of subprime or nontraditional mortgage on primary residences only to the fair market value of the residence, by making that value the value of the secured portion of the allowed claim.

Section 102(a) would also permit Chapter 13 debtors to modify the length of subprime and nontraditional mortgages on primary residences. Specifically, 102(a) would permit a Chapter 13 bankruptcy plan to provide for the payment of a secured claim described in § 1322(b)(11) for a period that is the longer of 30 years (reduced by the period for which the loan has been outstanding) or the remaining term of the existing mortgage as of the date of the order for bankruptcy relief.

Section 102(a) would further provide that a Chapter 13 bankruptcy plan may provide for payment of a subprime or nontraditional mortgage on a primary residence at an interest rate equal to the interest rate for conventional mortgages plus a reasonable premium for risk. Specifically, § 102(a) would permit a Chapter 13 bankruptcy plan to provide for the payment of a secured claim described in § 1322(b)(11) at a rate of interest accruing after such date calculated at a fixed annual percentage rate in an amount to the Federal Reserve System's conventional mortgage rate plus a reasonable premium for risk.

Section 102(a) also would ensure that if a claim has been modified to an amount below the original principal of the loan and the debtor's principal residence is sold during the term of the plan, the creditor would be entitled to receive, in addition to the unpaid portion of the allowed secured claim, the net proceeds of the sale or the amount of the creditor's allowed unsecured claim, whichever is less.

Section 102(b) makes a conforming change to section 1325(a)(5).

Section 103

This section amends title 11, section 109(h) to waive the pre-bankruptcy credit counseling briefing requirement where a foreclosure sale has been scheduled against the debtor's principal residence. The requirement of a pre-bankruptcy credit counseling briefing often causes a delay that borrowers facing bankruptcy cannot afford, and because credit counseling can do nothing to prevent an impending foreclosure, the purpose of the requirement—to give debtors information on alternatives that might address their problems—simply does not apply. Since mortgages on primary residences could not be modified in bankruptcy when the credit counseling requirement was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, it is clear that the requirement was not intended to prohibit debtors from responding to im-

minent foreclosure. Debtors facing foreclosure would remain subject to the requirements of title 11, sections 727(a)(11) and 1328(g), which require that they complete an instructional course in personal financial management.

TITLE II—PROVIDING OTHER DEBTOR PROTECTIONS

Section 201

This section amends title 11, section 1322(c) to give bankruptcy judges greater flexibility in reviewing fees assessed by the creditor in connection with a claim secured by the debtor's principal residence. Mortgage companies frequently charge unauthorized or excessive fees to debtors before and during Chapter 13 filings, sometimes failing to disclose the fees until the debtor is no longer in bankruptcy after having successfully completed the Chapter 13 case, or until the debtor seeks to pay off the mortgage balance. These fees and charges further impede the debtor's effort to stabilize financially. The bill revises section 1322(c) to provide that with regard to bankruptcy fees, costs or charges that arise in connection with a claim secured by the debtor's principal residence, the debtor shall not be liable for such fees unless the creditor has filed notice of the fee with the court and served notice on the debtor and the trustee, and has done so before the earlier of either 1 year after the event that gives rise to the fee or 60 days before the closing of the case. The bill further requires that, in order for the debtor to be liable for such fees, the fees must be lawful, reasonable, and provided for in the agreement under which the claim or security interest arose. These provisions will enable debtors or trustees to object to fees in bankruptcy court if the fees are unlawful, undisclosed or unreasonable. It is anticipated that the Federal Rules of Bankruptcy Procedure would be amended to delay the closing of a Chapter 13 case until a time after the discharge that would permit a final notice of fees to be filed shortly after the discharge and then an opportunity to object to those fees.

This section also allows judges to waive prepayment penalties on claims secured by the principal residence of the debtor. Prepayment penalties exist in many subprime and other mortgage contracts, and restrict many lower-income families from completing a loan modification.

Section 202

This section amends title 11, section 554(e) to deal with the problem of consumers who are sometimes inadvertently deprived of the legal claims they have against predatory lenders or others because they are not aware that such claims are considered assets of the bankruptcy estate and therefore do not list them among their scheduled assets when the bankruptcy case is filed. The amendment protects the bankruptcy estate and creditors by affording the bankruptcy trustee an opportunity to request joinder or substitution as the real party in interest in an action with respect to a claim or defense asserted by an individual debtor. If the trustee does not request joinder or substitution, this section permits the debtor to proceed as the real party in interest in the action but prevents a defendant from using theories of judicial estoppel or standing to obtain a windfall defense to the claim.

Section 203

This section amends title 28, section 1334 to confirm the long-standing practice whereby bankruptcy judges can rule on core proceedings rather than referring them to arbitration, even when mortgage contracts contain mandatory arbitration clauses. Two recent court rulings had brought this practice into question, and so this addition to section 1334 in title 28 would reconfirm the normal practice.

Section 204

This section enacts a bankruptcy homestead exemption floor for homeowners 55 years of age or older by adding a new title 11, section 522(b)(3)(D) and amending title 11, section 522(d)(1). A significant number of debtors facing foreclosure are elderly and have non-exempt equity in their properties because of low homestead exemptions in some States. They cannot save their homes, which often represent their life savings, under Chapter 13 because current law requires paying the value of the nonexempt equity to unsecured creditors. They cannot get Chapter 7 relief because Chapter 7 would cause them to lose their homes. This amendment would create a modest homestead exemption floor of $75,000 for principal residences for all bankruptcy debtors over age 55.

Section 205

This section amends title 11, section 502(b) to reinforce and clarify the fact that all protections available under the Truth in Lending Act and other consumer protection laws are still available in bankruptcy.

IV. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 2136, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MAY 2, 2008.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2136, the Helping Families Save their Homes in Bankruptcy Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2136—Helping Families Save their Homes in Bankruptcy Act of 2008

Summary: S. 2136 would authorize bankruptcy courts to modify the terms of certain nontraditional and subprime mortgages during Chapter 13 bankruptcy proceedings. CBO estimates that enacting S. 2136 would reduce direct spending by $13 million over the 2009–

2018 period and increase revenues by $10 million over the same period. Although CBO estimates that the bill would add to court costs to adjudicate bankruptcies, we expect that such costs would not be significant and would be subject to the availability of appropriated funds.

S. 2136 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

S. 2136 would impose private-sector mandates, as defined in UMRA, on some creditors in bankruptcy proceedings. Because of uncertainty about the number of bankruptcy plans that would be modified and how those changes would affect holders of secured claims, CBO cannot determine whether the aggregate cost of complying with the mandates would exceed the annual threshold specified in UMRA ($136 million in 2008, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2136 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—											
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2009–2013	2009–2018
CHANGES IN DIRECT SPENDING												
Estimated Budget Authority	−2	−2	−2	−1	−1	−1	−1	−1	−1	−1	−8	−13
Estimated Outlays	−2	−2	−2	−1	−1	−1	−1	−1	−1	−1	−8	−13
CHANGES IN REVENUES												
Estimated Revenues	1	1	1	1	1	1	1	1	1	1	5	10

Basis of estimate: CBO assumes that S. 2136 will be enacted near the end of 2008.

Direct spending

S. 2136 would allow bankruptcy courts to modify the terms of certain nontraditional and subprime mortgages (as defined in the bill) for a primary residence during Chapter 13 bankruptcy proceedings. Generally, the bill would apply to debtors whose income, after several deductions, is insufficient to pay their mortgage and maintain all other debt payments. Under current law, bankruptcy courts can establish a payment plan for overdue mortgage payments but cannot change the amount, timing, or interest rate terms of mortgage payments. In 2007, around 310,000 individuals filed for bankruptcy under Chapter 13.

Information from the Administrative Office of the United States Courts (AOUSC) indicates that a significant portion of the individuals who are delinquent in their mortgage payments seek bankruptcy protection under Chapter 13. CBO expects this pattern to continue for individuals with all types of mortgages, including those that are subprime and nontraditional. We also expect that the bill could encourage some individuals to file for Chapter 13 bankruptcy who otherwise would not seek such protection, resulting in a small percentage increase (about 5 percent) in annual filings over the number expected under current law.

Fees collected for bankruptcy filings ($235 per Chapter 13 filing) are distributed among several government entities. About half of the amounts collected are used to cover the judiciary's and U.S. Trustees's costs, and thus have no net effect on federal spending. A portion of those filing fees, however, is recorded as an offsetting receipt (a credit against direct spending) in the federal budget and deposited into a special fund in the Treasury; those amounts are not available for spending unless provided in an appropriation act. CBO estimates that enacting the legislation would increase such offsetting receipts by $13 million over the 2009–2018 period. (In 2007, $135 million was collected from all bankruptcy filing fees.)

Revenues

Another portion of Chapter 13 filing fees is deposited into the general fund of the Treasury and recorded as revenues. CBO estimates that enacting S. 2136 would increase such revenues from additional Chapter 13 bankruptcy filing fees by $10 million over the 2009–2018 period.

Spending subject to appropriation

Based on information from the AOUSC, CBO expects that enacting the bill could increase the workload of court staff; spending for that purpose would be subject to the availability of appropriated sums, and we estimate that any increase in such spending would be insignificant. Similarly, the bill could increase the workload of the United States Trustees; CBO estimates that cost also would be insignificant.

Estimated impact on State, Local, and Tribal Governments: S. 2136 contains no intergovernmental mandates as defined in UMRA and would impose no costs on State, Local, or Tribal Governments.

Estimated impact on the private sector: S. 2136 would impose private-sector mandates, as defined in UMRA, on certain creditors in bankruptcy proceedings. The bill would allow bankruptcy judges to modify the rights of holders of certain claims on mortgage debt by making changes to the terms of home mortgage agreements during bankruptcy proceedings. The bill also would require such claimholders to give timely notice to both the debtor and the bankruptcy trustee before adding fees, costs, or charges while a bankruptcy case is pending. In addition, if a debtor is age 55 or older, the bill would exempt from the estate in bankruptcy up to $75,000 of the debtor's aggregate equity in his or her principal residence in states that allow such exemptions. This provision would impose a mandate on some creditors by limiting the amount of a debtor's assets available to creditors under bankruptcy.

The cost of those mandates would depend on the number of Chapter 13 bankruptcy plans that judges would choose to modify, how changes in home mortgage agreements would affect holders of secured claims, and the number of claims affected by the higher exemption. The amount recovered by a claimholder through a bankruptcy proceeding relative to the amount that can be recovered through foreclosure would vary depending on market conditions. In some cases, claimholders might not incur incremental costs compared with those under current law from changes that would aid debtors in preventing foreclosure on their homes. Because of those uncertainties, CBO cannot determine whether the aggregate cost of

complying with all of the mandates in the bill would exceed the annual threshold ($136 million in 2008, adjusted annually for inflation).

Previous CBO estimate: On February 5, 2008, CBO transmitted a cost estimate for H.R. 3609, the Emergency Home Ownership and Mortgage Equity Protection Act of 2007, as ordered reported by the House Committee on the Judiciary on December 12, 2007. The two bills are similar; however, the provision of S. 2136 that would allow bankruptcy judges to modify mortgages would be in effect indefinitely. (Under H.R. 3609, that provision would sunset seven years after enactment). CBO's cost estimate for S. 2136 reflects that difference.

CBO determined that H.R. 3609 contained new private-sector mandates but could not determine whether the costs would exceed the annual threshold. The two bills contain the same mandates regarding modifying the rights of claimholders by making changes to the terms of certain home mortgage agreements during bankruptcy proceedings and requiring claimholders to give timely notice to both the debtor and the bankruptcy trustee before adding fees.

Estimate prepared by: Federal Costs: Leigh Angres. Impact on State, Local, and Tribal Governments: Melissa Merrell. Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Statement

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2136.

VI. Conclusion

The foreclosure crisis our country faces threatens America's families, communities, financial institutions, and overall economic strength. As a result of the foreclosure crisis, our nation faces an economic crisis as severe as any we have seen since the Great Depression. Until the foreclosure crisis is addressed, our economy will not begin to recover.

In light of our nation's economic circumstances, the need to provide homeowners with means to effectively save their homes is urgent. The Helping Families Save Their Homes in Bankruptcy Act would help approximately 600,000 families save their homes from foreclosure, help neighboring homeowners and communities avoid massive economic losses, and help mortgage lenders avoid significant foreclosure-related costs and fees—all without imposing any burden on American taxpayers. The Committee-reported version of the bill would take a significant step toward alleviating the foreclosure crisis and its harmful impact on our Nation.

VII. MINORITY VIEWS

MINORITY VIEWS FROM SENATORS SPECTER, HATCH, GRASSLEY, KYL, BROWNBACK, CORNYN AND COBURN

In 1978, President Carter and a Congress under Democratic control enacted significant bankruptcy reforms. In doing so, the Congress allowed bankruptcy judges to modify certain secured claims in bankruptcy. However, Congress specifically retained a bar on bankruptcy judges modifying mortgages on principal residences. Congress did so to encourage home mortgage lending. Justice Stevens explained this in his concurrence in *Nobleman* v. *American Savings*,[1] a case in which the Supreme Court reaffirmed that Chapter 13 prohibited modification of mortgages on principal residences:

> At first blush it seems somewhat strange that the Bankruptcy code should provide less protection to an individual's interest in retaining possession of his or her home than of other assets. The anomaly is, however, explained by the legislative history indicating that favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market.[2]

Justice Stevens and the 95th Congress knew that giving bankruptcy judges free rein to re-write mortgages would only increase the risk that lenders take on when they issue mortgages. Lenders would respond to increased risk by insisting on higher rates of return. That would only make it more difficult for Americans who wished to become homeowners in the future. Although a multitude of factors affect interest rates, we would note that, in the years following the decision in Nobleman clarifying that bankruptcy judges could not modify mortgages on principal residences, interest rates declined.[3]

No one would deny that U.S. housing markets are in the midst of a crisis. The number of Americans who are past due on their mortgages is higher than it has been in a generation. Many homeowners who can no longer afford their mortgages—due in many cases to rapidly increasing monthly payments—face foreclosure. Some argue that the ability to securitize large numbers of mortgages led lenders to offer new types of loans to riskier borrowers. Pressure from Fannie Mae during the late 1990s to ease credit requirements on loans in order to help increase home ownership

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[1] 508 U.S. 324 (1993).

[2] *Id.* at 332 (citing *Grubbs* v. *Houston First American Sav. Ass'n*, 30 F.2d 236 (C.A.Tex., 1984)).

[3] Freddie Mac Primary Mortgage Market Survey, available at *http://www.freddiemac.com/pmms/pmms15.htm*.

rates among minorities and low-income consumers may also have led banks to issue such mortgages.[4] These new loans were often designed to keep monthly payments low or to make an expensive home affordable—at least in the short term. Frequently, lenders issued adjustable rate mortgages ("ARMs") with low introductory "teaser" interest rates that later increase substantially. Among these new types of loans were no-down-payment and interest-only mortgages, which also feature low initial payments that later increase. In at least some cases, lenders made inadequate disclosures warning borrowers that their monthly payments could increase.

In the face of this crisis, Congress should take, and has taken, affirmative steps to provide relief to distressed homeowners. However, S. 2136, the Helping Families Save Their Homes in Bankruptcy Act, takes a broad approach that will only further destabilize the housing market as well as the financial markets by reducing predictability and transparency. Most importantly, the bill would allow bankruptcy judges to reduce, or "cram down" the principal value of a mortgage. Cram down imposes an immediate loss on lenders that they cannot recover when home values later appreciate. And, historically speaking, home values generally have increased over time.[5] Obviously, this potential loss adds to the risk mortgage lenders face when considering whether to issue a mortgage. To account for such increased risk, mortgage lenders charge higher interest rates and issue mortgages on more restrictive terms.

A consensus exists among experts that allowing cram down in bankruptcy would increase the cost of borrowing for future homeowners. In a hearing before the Senate Judiciary Committee, Professor Joseph Mason of Drexel University testified that "it is straightforward to conclude" that cram downs will increase the cost of mortgage credit.[6] In its analysis of economic stimulus options earlier this year, the Congressional Budget Office noted that one of the costs of cram down proposals "could be higher mortgage interest rates."[7] Even the experts that have advocated in favor of the bill acknowledge that cram down will increase the cost of borrowing: In their paper, The Effect of Bankruptcy Strip-Down on Mortgage Interest Rates, Georgetown law professor Adam Levitin and Columbia University Ph.D. candidate Joshua Goodman acknowledged that permitting bankruptcy judges to cram down mortgage payments will increase mortgage interest rates. Even the Federal Reserve Chairman, who does not normally opine on legislation, has acknowledged that allowing bankruptcy judges to modify mortgages could restrict the credit available for mortgages.[8]

While the provision in S. 2136 allowing cram down would only apply to mortgages issued prior to the effective date, the prob-

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[4] Steven A. Holmes, Fannie Mae Eases Credit To Aid Mortgage Lending, N.Y. Times, Sept. 30, 1999.

[5] See Office of Federal Housing Oversight, House Price Index Quarterly Data (2008) accessed at *http://www.ofheo.gov/hpi__download.aspx* (select 2Q 2008 Manipulatable Data) (showing consistent increases in the sale price of single family homes over the last three decades).

[6] *The Looming Foreclosure Crisis: Hearing Before the S. Comm. On the Judiciary*, 110th Congress (2007) (statement of Joseph R. Mason, Associate Professor, Drexel University) accessed at *http://judiciary.senate.gov/hearings/testimony.cfm?id=3046&wit__id=6812*.

[7] Congressional Budget Office, Options for Responding to Short-Term Economic Weakness at 24 (2008).

[8] *The Economic Outlook: Hearing Before the Joint Economic Comm.*, 110th Cong. (In response to question posed by Sen. Brownback, Member, Joint Economic Comm.).

ability that Congress would eventually eliminate that limitation would be calculated into the price of every mortgage issued to future homebuyers. Furthermore, allowing cram down would only exacerbate instability in the broader financial markets. The credit markets that are the lifeblood of American businesses large and small have almost ceased functioning because lenders cannot place a value on the mortgage-backed securities they hold. Allowing cram down will only make it more difficult for the financial markets to assess their losses and begin extending credit again.

Furthermore, while allowing cram down would make it more difficult for homeowners and businessmen alike to get credit, it goes far beyond the core of the current problem. Of those homeowners threatened with foreclosure, most have an adjustable rate mortgage that has reset and which they can no longer afford. Delinquencies and foreclosures among homeowners with ARMs have risen dramatically. The percentage of homeowners with subprime ARMs who are seriously delinquent—those who are either more than 90 days past due or in foreclosure—more than quadrupled, from 6.5 percent in the second quarter of 2006 to 26.7 percent in the second quarter of 2008.[9] Among homeowners with prime ARMs, the percentage who are seriously delinquent has grown sevenfold.[10] As a result, while ARMs only represent about 20 percent of outstanding mortgages, they represent a majority of foreclosures.[11] Thus, the bulk of the foreclosure problem appears to be mortgages with increasing monthly payments. Allowing cram down goes far beyond that problem.

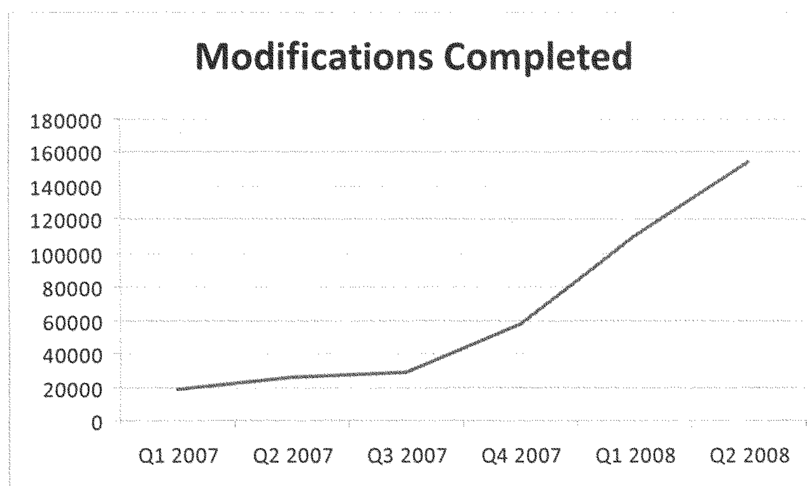
The current debate regarding the Administration's proposal—that the federal government acquire securities backed by distressed mortgages at taxpayer expense—raises the stakes even higher. If a bankruptcy judge crams down a mortgage, American taxpayers suffer an immediate loss in the value of the asset they have acquired. In addition, if the home recovers its value after a bankruptcy judge crams down a mortgage—which happens eventually in most cases—that appreciation inures to the benefit of the homeowner without any compensation to taxpayers. If the Administration's proposal moves forward, the federal government would appear to be in a better position than a bankruptcy judge to balance the interests of homeowners against those of taxpayers when making modifications.

Proponents of the bill have argued that primary residences should be crammed down in bankruptcy just as second homes, family farms and boats are. But there are good reasons why principal residences are treated differently. Interest rates and down payments for vacation homes are significantly higher than for primary homes—if we start treating primary homes the same as vacation homes, then interest rates will rise to the levels of those offered for mortgages on second homes. With respect to farms, cram down applies only to very small commercial farming and ranching operations, not all farms and ranches—there are very specific requirements that need to be met. Moreover, it took Congress over two

[9] Mortgage Bankers Association, *National Delinquency Survey: Second Quarter 2008* 11 (Sept. 2008).
[10] Id. at 10.
[11] Id. at 4–9.

decades to make Chapter 12 a permanent part of the Bankruptcy Code. Because people were concerned about possible negative consequences to allowing cram down for family farms, Chapter 12 was initially only enacted as a temporary provision.[12] Finally, cram down is allowed for boats because boats are like cars—their value diminishes rather than increases, which is very different than real property, where values are expected to rise in the long term.

The majority also argues that bankruptcy judges should have the power to modify mortgages, and particularly the power to reduce the principal value of a mortgage, because mortgage servicers have not provided meaningful assistance in the form of mortgage modifications. However, in cases where it makes sense, mortgage servicers are modifying mortgages and allowing homeowners to stay in their homes. In the second quarter of 2008 alone, mortgage servicers participating in the Administration's HOPE NOW program modified in excess of 155,000 mortgages.[13] As the chart below demonstrates, that number only continues to grow.



Modifications include a reduction in interest rate, forgiveness of a portion of principal or extension of the maturity date of the loan. All of these modifications permanently reduce the amount that homeowners pay each month on their mortgages. While the majority argues that the only meaningful modification is a reduction in principal, the results belie that argument. Since the inception of HOPE NOW, servicers have modified over 450,000 mortgages.[14] Taken together, modifications and repayment plans offered by

[12] For example, one study by the United States Department of Agriculture estimated that cram downs raise the interest rates on farm real estate loans by 25 basis points to 100 basis points. See "Do farmers Need a Separate Chapter in the Bankruptcy Code?" Issues in Agricultural and Rural Finance, United States Department of Agriculture, Economic Research Service, October 1997.

[13] Hope Now Alliance, July State Data 2008, *http://www.hopenow.com/site_tools/data.php* (select "July State Data 2008" hyperlink).

[14] Id.

servicers have saved over two million homeowners from foreclosure.[15]

Recent action by Congress will only increase the assistance provided to homeowners. Although the majority contends that loan servicers are "scared to death" of being sued by investors for making loan modifications, Congress has already taken action to eliminate this concern. On July 30, 2008, the President signed into law the Housing and Economic Recovery Act of 2008, which provides lenders that modify mortgages immunity from liability in suits brought by investors.[16] This new law should eliminate servicer concerns about liability to investors and increase the number of modifications, keeping even more homeowners in their homes.

In addition to these overly broad amendments to the bankruptcy code that would harm more borrowers than it helps, the bill would make harmful changes to other areas of the law as well. For example, the bill would vitiate existing agreements to arbitrate and instead allow a bankruptcy court to resolve any dispute involving a debtor's consumer debt. Under current law, most courts have concluded a bankruptcy court has no discretion to refuse to enforce an arbitration agreement unless arbitration would "seriously jeopardize" the objectives of the Bankruptcy Code.[17] The bill would permit bankruptcy courts to decide disputes involving consumer debt even when arbitration would not conflict with the purposes of the Bankruptcy Code. This provision represents yet another attempt by special interests in the plaintiffs bar to eliminate arbitration in a piecemeal manner and prevent private parties from entering into enforceable agreements to arbitrate. For over 80 years—since Congress enacted the Federal Arbitration Act in 1925—federal law has encouraged the use of arbitration as a fair, efficient, and effective alternative to our overburdened court system. There are significant benefits for individuals who just want a solution to their problems without spending months in bankruptcy court or thousands of dollars on attorneys' fees.

Another provision of the bill would increase the cost of borrowing for consumers by significantly increasing risk associated with lending, particularly home lending. In essence, the bill would wipe out any debt where the creditor has violated a state or federal consumer protection law and is subject to damages. Even where the violation is less serious and the damages are minimal, the lender would be prevented from asserting a claim in bankruptcy to recover the debt. And, this is despite the fact that consumer protection laws already provide significant penalties for violations.

In sum, S. 2136, as passed by the Committee, represents public policy that will exacerbate the current crisis in the housing and credit markets. As witnesses testifying before the Committee made clear, increased risk leads to increases in borrowing costs. This economic reality is ignored by proponents of the current legislation. This bill proposes the wrong solutions for the nation. The Committee should instead concentrate its efforts on measures that will

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[15] Press Release, Hope Now Alliance, Over 2 Million Foreclosures Prevented In Past Year By Hope Now Alliance Members (August 27, 2008) (*http://www.hopenow.com/media/press__release.php*, select "July 2008 Data Release" hyperlink).

[16] Pub. L. No. 110–140 § 1403.

[17] *Cooley* v. *Wells Fargo Financial* (*In re* Cooley), 362 B.R. 514, 519–20 (Bankr. N.D. Ala. 2007).

preserve access to credit for consumers and ensure that terms of such credit are fully and honestly disclosed.

ARLEN SPECTER.
ORRIN G. HATCH.
CHUCK GRASSLEY.
JON KYL.
SAM BROWNBACK.
JOHN CORNYN.
TOM COBURN.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2136, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 11—BANKRUPTCY

CHAPTER 1—GENERAL PROVISIONS

* * * * * * *

§ 101. Definitions

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(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

(40A) The term "nontraditional mortgage" means a security interest in the debtor's principal residence that secures a debt for a loan that at any period during the term of the loan provides for the deferral of payment of principal or interest through permitting periodic payments that do not cover the full amount of interest due or that cover only the interest due, except that such term excludes—

(A) a loan that at any period during the term of the loan provides for the deferral of payment of principal through permitting periodic payments that cover only the interest due, if the creditor demonstrates that it determined in good faith at the time the loan was consummated, after undergoing a full underwriting process based on verified and documented information, that the debtor had a reasonable ability to repay at the full interest and principal payment amount (assuming an initial 30 year full amortization), and payments under the loan resulted in a debt-to-income ratio of the debtor in an amount equal to or less than that which would have been permitted under guidelines and directives established by the Secretary of Housing and Urban Development pursuant to section 203.33 of title 24, Code of Federal Regulations, for loans subject to such section;

(B) a home equity line of credit that is in a subordinate lien position; and

(C) a reverse mortgage.

[(40A)] *(40B)* The term "patient" means any individual who obtains or receives services from a health care business.

[(40B)] *(40C)* 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.

* * * * * * *

(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) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities—

(i) for the account of others; or

(ii) with members of the general public, from or for such person’s own account.

(53B) The term “subprime mortgage” means a security interest in the debtor’s principal residence that secures a debt for a loan that has an annual percentage rate that is greater than—

(A) the sum of 3 percent plus the yield on United States Treasury securities having comparable periods of maturity, if the loan is secured by a first mortgage or first deed of trust; or

(B) the sum of 5 percent plus the yield on United States Treasury securities having comparable periods of maturity, if the loan is secured by a subordinate mortgage or subordinate deed of trust.

Without regard to whether such loan is subject to or reportable under the Home Mortgage Disclosure Act, the difference between the annual percentage rate of such loan and the yield on United States Treasury securities having comparable periods of maturity shall be determined using the procedures and calculation methods applicable to loans that are subject to the reporting requirements of such Act, except that such yield shall be determined as of the 15th day of the month preceding the month in which a completed application is submitted for such loan. If such loan provides for a fixed interest rate for an introductory period and then resets or adjusts to a variable interest rate, the determination of the annual percentage rate shall be based on the greater of the introductory rate and the fully indexed rate. For purposes of this paragraph, the term “fully indexed rate” means the prevailing index rate on a residential mortgage loan at the time at which the loan is made, plus the margin that will apply after the expiration of an introductory interest rate.

[(53B)] *(53C)* 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, precious metals, or other commodity 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, option, future, or forward agreement;

(IX) an emissions swap, option, future, or forward agreement; or

(X) an inflation swap, option, future, or forward agreement;

(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 or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, option or spot transaction 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 master 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 Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.

[(53C)**]** *(53D)* 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)**]** *(53E)* 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)**]** *(53F)* 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.

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§ 109. Who may be a debtor

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(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).

(5) Paragraph (1) shall not apply with respect to a debtor who files with the court a certification that a foreclosure sale of the debtor's principal residence has been scheduled.

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CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

Subchapter I—Creditors and Claims

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§ 502. Allowance of claims or interests

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(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) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; **[or]**

(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[.]*; or*

(10) the claim is subject to any remedy for damages or rescission due to failure to comply with any applicable requirement under the Truth in Lending Act (15 U.S.C. 1601 et seq.), or any other provision of applicable State or Federal consumer protection law that was in force when the noncompliance took place, notwithstanding the prior entry of a foreclosure judgment.

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Subchapter II—Debtor's Duties and Benefits

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§ 522. Exemptions

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(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (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 (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(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.

(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 730 days immediately preceding the date of the filing of the petition 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;

(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[.]*; and*

(D) if the debtor, as of the date of the filing of the petition, is 55 years or older, the debtor's aggregate interest, not to exceed

$75,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a principal residence, or in a cooperative that owns property that the debtor or a dependent of the debtor uses as a principal residence.

* * * * * * *

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, *or, if the debtor is 55 years of age or older, $75,000 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.

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Subchapter III—The Estate

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§ 554. Abandonment of property of the estate

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(e) In any action in State or Federal court with respect to a claim or defense asserted by an individual debtor in such action that was not scheduled under section 521(a)(1) of this title, the trustee shall be allowed a reasonable time to request joinder or substitution as the real party in interest. If the trustee does not request joinder or substitution in such action, the debtor may proceed as the real party in interest, and no such action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest or on the ground that the debtor's claims were not properly scheduled in a case under this title.

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CHAPTER 13—ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

Subchapter II—The Plan

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§ 1322. Contents of Plan

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(b) Subject to subsections (a) and (c) of this section, the plan may—

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(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**]**

(11) notwithstanding paragraph (2) and otherwise applicable nonbankruptcy law—

(A) modify an allowed secured claim for a debt incurred prior to the effective date of this paragraph secured by a nontraditional mortgage, or a subprime mortgage, and any lien subordinate to such claim, on the debtor's principal residence, as described in subparagraph (B), if, after deduction from the debtor's current monthly income of the expenses permitted for debtors described in section 1325(b)(3) of this title (other than amounts contractually due to creditors holding such allowed secured claims and additional payments necessary to maintain possession of that residence), the debtor has insufficient remaining income to retain possession of the residence by curing a default and maintaining payments while the case is pending, as provided under paragraph (5)

(B) provide for payment of such claim—

(i) in an amount equal to the amount of the allowed secured claim;

(ii) for a period that is the longer of 30 years (reduced by the period for which the loan has been outstanding) or the remaining term of such loan, beginning on the date of the order for relief under this chapter; and

(iii) at a rate of interest accruing after such date calculated at a fixed annual percentage rate, in an amount equal to the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as of the applicable time set forth in the rules of the Board, plus a reasonable premium for risk; and

(C) if a claim has been modified to an amount below the original principal of the loan pursuant to paragraph (B)(i) and the debtor's principal residence is sold during the term of the plan, the holder of the claim shall be entitled to receive, in addition to the unpaid portion of the allowed secured claim, the net proceeds of the sale, or the amount of the holder's allowed unsecured claim, whichever is less; and

[(11)**]** *(12)* include any other appropriate provision not inconsistent with this title.

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(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; **[**and**]**

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is

due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title[.]*;*

(3) the plan need not provide for the payment of, and the debtor, the debtor's property, and property of the estate shall not be liable for, any fee, cost, or charge, notwithstanding section 506(b), that arises in connection with a claim secured by the debtor's principal residence if the event that gives rise to such fee, cost, or charge occurs while the case is pending but before the discharge order, except to the extent that—

(A) notice of such fees, costs or charges is filed with the court, and served on the debtor and the trustee, before the expiration of the earlier of

(i) 1 year after the event that gives rise to such fee, cost, or charge occurs; or

(ii) 60 days before the closing of the case; and

(B) such fees, costs, or charges are lawful, reasonable, and provided for in the agreement under which such claim or security interest arose;

(4) the failure of a party to give notice described in paragraph (3) shall be deemed a waiver of any claim for fees, costs, or charges described in paragraph (3) for all purposes, and any attempt to collect such fees, costs, or charges shall constitute a violation of section 524(a)(2) of this title or, if the violation occurs before the date of discharge, of section 362(a) of this title; and

(5) a plan may provide for the waiver of any prepayment penalty on a claim secured by the principal residence of the debtor.

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§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

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(5) *except as otherwise provided in section 1322(b)(11) of this title,* with respect to each allowed secured claim provided for by the plan—

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—URISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) 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) 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.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain 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. 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—

(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.

Notwithstanding any agreement for arbitration that is subject to chapter 1 of title 9, in any core proceeding under section 157(b) of this title involving an individual debtor whose debts are primarily consumer debts, the court may hear and determine the proceeding, and enter appropriate orders and judgments, in lieu of referral to arbitration.

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