



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 28, 1998

THE DIRECTOR

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I write to provide the Administration's views on the House-passed and Senate-passed versions of H.R. 3150 -- the bankruptcy reform bill currently in conference.

The President shares the Congress' concern about the sharp increase in consumer bankruptcy filings -- an especially regrettable increase in the face of our extraordinarily strong economy. The President believes that bankruptcy reform should be both balanced and moderate -- addressing the abuses of creditors as well as debtors, making prudent and well conceived improvements to our bankruptcy system, and protecting and enhancing the collection of debtors' child support and alimony in the context of bankruptcy. There is evidence of abuse by both debtors and creditors, but many other factors also may be involved in the large number of bankruptcies. We should, therefore, avoid a bill that takes indiscriminate aim at debtors and fails to address some troubling practices of creditors.

The extraordinary bipartisan support for the Senate-passed version of H.R. 3150 was an endorsement of balance and moderation. As stated in the September 17, 1998, Statement of Administration Policy, the Administration encouraged Senate passage of S. 1301, but the Administration ultimately would support enactment of bankruptcy legislation only if the essential reforms incorporated by the Senate-managers' amendment are preserved and strengthened. Unfortunately, the House-passed version of H.R. 3150 fails to meet this standard. If the House-passed version of H.R. 3150 were presented to the President, his senior advisors would recommend that he veto the bill.

The Administration would strongly oppose a bill that includes a rigid and arbitrary approach to determining whether a debtor can use Chapter 7 or must establish a repayment plan under Chapter 13. We should deny access to Chapter 7 only to those who genuinely have the capacity to repay a portion of their debts successfully under a Chapter 13 plan. Thus, bankruptcy courts must have discretion to consider the specific circumstances of a debtor in bankruptcy, and the thresholds they consider should be high enough to ensure that only those with a strong likelihood of success are affected. If we deny access to Chapter 7 to the wrong debtors, and those debtors fail to complete required repayment plans, they will return to Chapter 7 with a diminished ability to repay their nondischarged debt -- including child support and alimony.

The Administration agrees that a creditor should be permitted to bring a motion under Section 707(b) to ask the court to determine whether a debtor has the capacity to repay, provided that protections against coercive reaffirmations are included in the bill. However, the Administration would strongly oppose a bill that invites unrestricted and abusive creditor motions based on traditional 707(b) allegations of abuse, which may be more subjective than a test for one's capacity to repay. Allowing these motions could make more unequal the balance of power and information between creditor and debtor, especially for lower-income debtors who would have the least power to defend themselves against unjustified motions.

The Administration also would strongly oppose legislation that creates new, nondischargeable debts that could pit post-bankruptcy, credit card debt against child support, alimony, educational loans, and taxes. For debt incurred to pay nondischargeable debt, the Senate-passed version of H.R. 3150 appropriately makes the debt nondischargeable only when a court finds that the debtor intended to avoid the debt through bankruptcy. For debt incurred within 90 days of bankruptcy, the Senate-passed version of H.R. 3150 makes the debt nondischargeable only if there is more than \$400 of debt to a single creditor for goods or services "not reasonably necessary for the support of the debtor or a dependent child." However, the Senate-passed version of H.R. 3150 is problematic in that there is no possible reason for excluding the elderly and other dependents. Also, the House-passed version of H.R. 3150 places a wholly inappropriate cap on necessities. Any provision should make dischargeable all debt without any cap, for such necessities, capping only those goods or services not reasonably acquired to support the debtor's household.

The Administration would strongly oppose legislation like the House bill that does not curb abuse by creditors as well as debtors, or that includes any measure that would lead to creditor intimidation of debtors. Credit card companies must give consumers more and better information so that they can understand and better manage their debts. Similarly, debtors should be protected against predatory creditor tactics to coerce inappropriate and unwise reaffirmations of unsecured debt and secured debts for personalty that are likely to have little resale value.

Finally, the Administration urges inclusion, in the final legislation, of the Senate-passed cap on state homestead exemptions to eliminate the opportunity for the rare, but most visible, cases of debtor abuse.

This letter sets forth the Administration's views on some of the central consumer bankruptcy issues in these bills. There are other concerns about the many provisions in these bills which will be forthcoming in letters from agencies.

We look forward to working with the Congress on this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Jacob J. Lew". The signature is fluid and cursive, with the first name "Jacob" being more prominent and stylized than the last name "Lew".

Jacob J. Lew
Director

Identical Letter Sent to The Honorable Orrin G. Hatch,
The Honorable Charles E. Grassley, The Honorable Jeff Sessions,
The Honorable Patrick J. Leahy, The Honorable Richard J. Durbin,
The Honorable Henry Hyde, The Honorable John Conyers,
The Honorable George W. Gekas, and The Honorable Jerrold Nadler

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 1, 1998

President William J. Clinton
The White House
Washington, D.C. 20502

Dear Mr. President:

We write to thank you for recent correspondence expressing the Administration's views on bankruptcy reform. As you know, last week, the Senate passed a bankruptcy reform measure with overwhelming, bipartisan support. The Senate measure was balanced and moderate, while the House version was not.

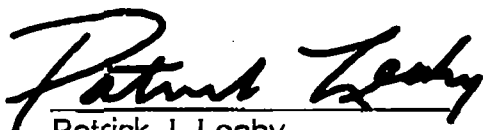
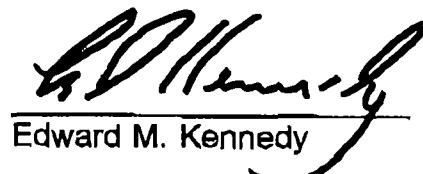
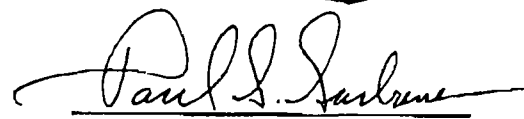
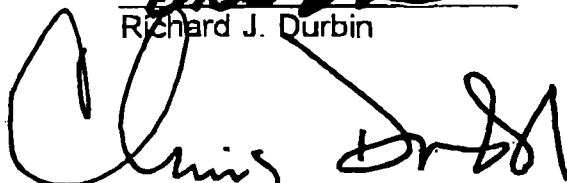
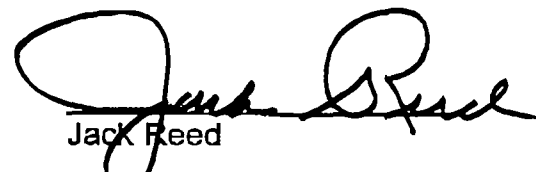
We fought hard to make sure that the Senate bill was fair and are the authors of many key provisions that were cited approvingly in the Administration's letter. Some of the important provisions we worked for include those requiring improved disclosure on credit card bills and solicitations and increased court supervision of reaffirmations. We worked to ensure that the categories of non-dischargeable debt in the bankruptcy code are justified on a public policy basis and will not harm other classes of creditors like women seeking to collect child support and alimony. We also did our best to protect the retirement and educational savings of people who file for bankruptcy. Finally, we ensured that any means testing in bankruptcy is flexible and reasonable.

But we did not work so hard to get near unanimity on the Senate floor for a balanced piece of legislation only to have that product stripped away by a conference strategy by some that seeks to revert to the House-passed legislation. That is unacceptable. Balance has always been the hallmark of bankruptcy reform legislation since the first bankruptcy laws were passed 100 years ago. Without this needed balance and shared responsibility by debtors and creditors alike, this legislation should not go forward, and should not receive your signature.

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By your words, we know you will stand with us to make sure that a fair and equitable result is obtained. We pledge to work with you during the conference to ensure passage of a fair, balanced bankruptcy bill — if not this Congress, then the next. Your leadership comes at a decisive point in the legislative process, and we thank you for your support.

Yours Sincerely,


Patrick J. Leahy
Edward M. Kennedy
Richard J. Durbin
Paul S. Sarbanes
Christopher J. Dodd
Jack Reed

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Fifth Congress

September 26, 1998

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As the House and Senate prepare for a conference on pending omnibus bankruptcy legislation [H.R. 3150, S.1301], we are writing to urge you to insist that the conference report contain certain basic protections for the rights of families, children and other creditors, as well as the right to a fresh start for honest debtors. Throughout this process, you, the First Lady, and the Department of Justice have spoken out about the need to enact balanced bankruptcy legislation which is fair to families, ensures that obligations to pay child support and to compensate victims of wrongdoing are protected, eliminates abuse of the bankruptcy system by both debtors and creditors, and does not tilt what is ultimately a fair and well run system to the unfair advantage of particular interest groups. We believe that without these basic protections, the conference report would merit a veto and that such veto would be sustained.

In your radio address, Statement of Administration Policy, and in the First Lady's column, you correctly have identified many of the myriad flaws in the House bill - flaws that would destroy families, undermine the rights of responsible lenders, deny reasonable relief to honest debtors, force many debtors into chapter 13 while making it unworkable, and allow reckless lenders to jump the line ahead of other responsible lenders. As the Congressional Budget Office has noted, the House bill was a budget buster for the federal government, and would impose unfunded mandates on private business, individuals, and state governments exceeding \$100 million per year for the first five years. It is a taxpayer-funded collection system for private debts that would violate the rights of many debtors and creditors alike, introduced and advanced at the urging of powerful special interest groups who have reportedly spent in excess of \$40 million lobbying the issue.

We are grateful for the leadership you have demonstrated in the crafting of a Senate bill which is a substantial improvement over the work of the House. We believe that the Senate bill must be taken as a starting point, but still requires some refinement to achieve the important balance of shared responsibility among debtors and creditors to ensure the integrity of the bankruptcy system, and the consumer lending industry.

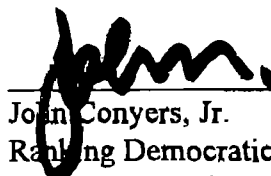
The President
September 26, 1998
Page Two

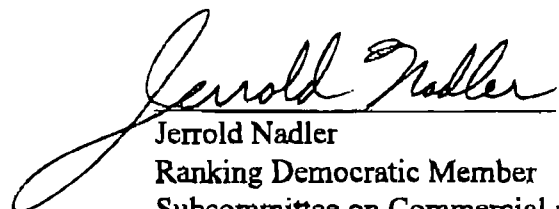
Now, as we approach conference, your leadership and your continued clear insistence on a balanced fair bill is essential. We urge you to indicate to the conferees that the House bill remains unacceptable to this administration, and that any retreat from the Senate, and the failure to remedy the remaining imbalances and unfair special interest provisions will draw a veto. We believe that under those circumstances this veto would be sustained.

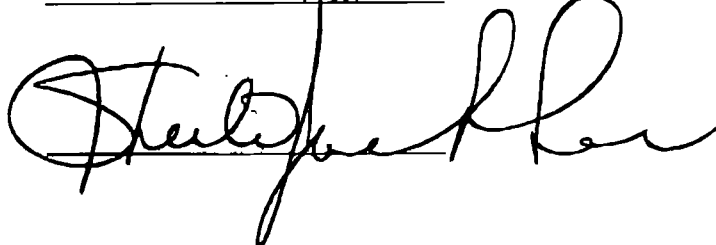
We are also concerned by statements by members of the majority, including Chairman Gekas, which indicate that their plans for conference may not include members of the minority. We believe that any attempt to backtrack on the progress made so far and present it to the minority and to the administration as a fait accompli would guarantee strong opposition to the legislation and support for a veto message insisting on a fair and balanced bill.

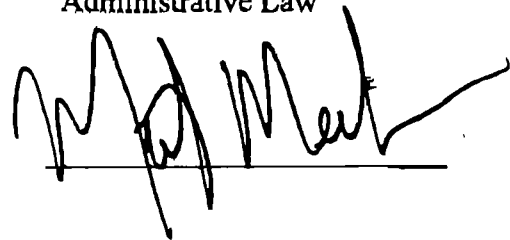
As we observe the centennial of the Bankruptcy Act, we must insist that Congress remain true to its constitutional mandate to enact fair and uniform bankruptcy laws. Historically, we have fulfilled this duty with careful and bipartisan action. We remain committed to that legacy. Working with you, and our colleagues in the Senate, we are confident that meaningful, balanced and fair bankruptcy reform can be achieved, if not in the waning hours of this Congress, then certainly in the next.

Sincerely,


John Conyers, Jr.
Ranking Democratic Member
Committee on the Judiciary


Jerrold Nadler
Ranking Democratic Member
Subcommittee on Commercial and
Administrative Law






September 17, 1998
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 1301 - Consumer Bankruptcy Reform Act of 1998 (Grassley (R) Iowa and Durbin (D) Illinois)

The Administration encourages Senate passage of S. 1301 as an important step toward balanced bankruptcy reform; however, the Administration ultimately would support enactment of bankruptcy legislation only if the essential reforms incorporated by the Senate managers' amendment are preserved and strengthened and the unbalanced and arbitrary elements of the current House bill are omitted.

The Administration supports bankruptcy reform that asks both debtors and creditors to act more responsibly. Debtors who genuinely have the ability to repay a portion of their debts should remain responsible for those debts. But creditors must also be responsible for treating debtors fairly, recognizing creditors' superior information and bargaining power.

As reported from Committee, S. 1301 focused heavily on perceived debtor abuse, with little to curtail abuses by creditors. However, if changes incorporated in the manager's amendment are adopted, the Senate bill will take significant steps to address abusive practices by both debtors and creditors. Essential changes included in the managers' amendments include: (1) new disclosure requirements to ensure that credit card companies provide consumers with the information about their accounts that they need to manage their budgets; (2) procedural protections to avoid inappropriate and unwise reaffirmations of unsecured and certain secured consumer debts; and (3) modifications made to the nondischargeability provisions in the bill so that the bill no longer inappropriately puts credit card debt in competition with child support, alimony, and other societal priorities like educational loans and taxes.

The Administration also strongly prefers the discretionary approach to limiting access to Chapter 7 used in S. 1301 over the rigid and arbitrary approach in the House bill. We support changes made by the Senate bill to ensure that those debtors denied access to Chapter 7 under Section 707(b) of the Bankruptcy Code are those that have a strong likelihood of successfully completing a Chapter 13 plan.

More can and should be done to produce a truly balanced bill. The bill must address the potentially coercive effect of allowing creditors to bring 707(b) motions based on any allegation of abuse and strengthen the protections against coercive reaffirmations.

The Administration also supports financial contract netting provisions in the bill, which are important to reducing systemic risk in our financial markets and are based on a proposal from the President's Working Group on Financial Markets.

The Administration supports Senate passage of the "Omnibus Patent Act of 1998" as an amendment to S. 1301 because that bill supports American innovation through needed patent law reforms. While the Administration is disappointed that the bill does not include all of the performance based organization reforms it proposed, the provision's inclusion of the annual performance agreement is welcome.

Finally, the Senate is expected to vote on an amendment to raise wages of 12 million Americans and help ensure that parents who work hard and play by the rules do not have to raise their children in poverty. Two years ago, the President signed into law a moderate increase in the minimum wage. The results of that action are clear: it raised the wages of the lowest paid workers and did not cost jobs. Now we must continue to take actions to ensure that all Americans are benefitting from our prospering economy. That is why the Administration strongly supports raising the minimum wage by \$1 over two years.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 9, 1998

THE DIRECTOR

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Leader:

As you know, the President supports responsible bankruptcy reform that is balanced, would reduce abuses of the bankruptcy system, and would require debtors and creditors alike to act responsibly. The Senate produced a bipartisan bill that meets the test. The Administration is disappointed that H.R. 3150, as agreed to by the Conference Committee, contains many flawed aspects of the House bill and fails the test of balance. If this version of the Conference Report is presented to the President, his senior advisors will recommend that he veto it.

On the central issue of means-testing, the Conference Report uses the Senate framework but would, like the House bill, use a rigid approach that denies bankruptcy judges adequate discretion to decide whether the debtor has the capacity to repay successfully a portion of debts under Chapter 13. Moreover, the Conference Report would require a moderate income debtor to demonstrate that each monthly expense for housing, clothing, transportation, and food that exceeds an IRS determined level is necessary due to "extraordinary circumstances" before that person could get their debts discharged under Chapter 7.

At the same time, H.R. 3150 produces a rigid system to ensure that moderate-income debtors repay their debts, it weakens meaningful limits on the homestead exemption -- the mechanism used by the wealthy to shield hundreds of thousands of dollars of wealth from their creditors.

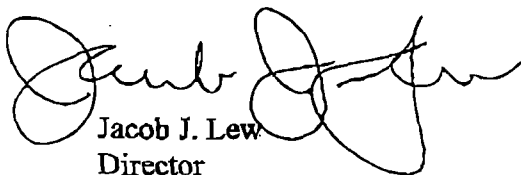
The Senate bill took laudable steps to enhance consumer protections from coercive and predatory behavior by creditors. The Conference Report, however, fails to limit adequately abusive creditor practices such as coercive affirmations and violations of the automatic stay, and rolls back consumer protections. The Conference Report also would deny consumers an effective means for remedying the harm from such practices -- class actions -- and, as to violations of the automatic stay, eliminate the current authorization for punitive damages against creditors for intentional violations of borrower rights.

Finally, the Conference Report includes provisions from the House bill that would render nondischargeable credit card debts that could compete with child support and alimony payments after a debtor has obtained a bankruptcy discharge. Specifically, the Conference Report would make nondischargeable any debt that was incurred within 90 days of bankruptcy to pay nondischargeable debt and for certain cash advances. This, in effect, puts debt owed to credit

card companies in competition with social priorities like child support and alimony, taxes, and educational loans. All too often, pressures from an aggressive creditor trying to collect a nondischargeable debt can keep a struggling debtor from making child support and alimony payments.

The overwhelming vote on the Senate floor for the bipartisan, balanced legislation that chamber produced demonstrates that reasonable and responsible bankruptcy reform is possible. Unfortunately, H.R. 3150 as developed by the Conference Committee, does not provide such reform. We stand ready to work with you and your colleagues to produce a Conference Report that would meet our concerns and the President could sign.

Sincerely,



Jacob J. Lew
Director

Identical Letter Sent to The Honorable Newt Gingrich,
The Honorable Thomas A. Daschle, and The Honorable Richard A. Gephardt

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MANUS COONEY, *Chief Counsel and Staff Director*
BRUCE A. CONEN, *Minority Chief Counsel*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 8, 1998

Dear Democratic Colleague:

We write to tell you how disappointed we are with the Bankruptcy Reform Conference Report that was filed yesterday and to urge you to join us in opposing it. Indeed, senior advisers to the Administration have indicated that the President will veto the measure, and we have attached a recent column written by the First Lady on this issue.

As you know, earlier this month, the Senate passed a bankruptcy reform measure with overwhelming, bipartisan support. The Senate measure was balanced and moderate, while the House version was not. Unfortunately the Conference Report is in every critical respect the House bill. It contains the House bill's most extreme and inflexible provisions while dropping the Senate's most laudable accomplishments.

We fought hard to make sure that the Senate bill was fair and are the authors of many of its key provisions. Some of the important provisions we worked for include those requiring improved disclosure on credit card bills and solicitations and increased court supervision of reaffirmations. We worked to ensure that the categories of non-dischargeable debt in the bankruptcy code are justified on a public policy basis and will not harm other classes of creditors like women seeking to collect child support and alimony. We also did our best to protect the educational savings of people who file for bankruptcy. Finally, we ensured that any means testing in bankruptcy is flexible and reasonable.

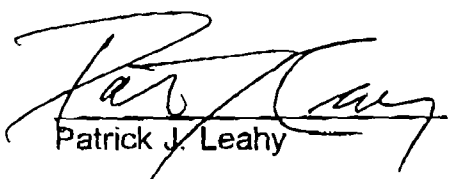
Every single one of these efforts was gutted by the Conference Report.

We did not work so hard to get near unanimity on the Senate floor for a balanced piece of legislation only to have that product stripped away by a conference strategy that reverted to the House-passed legislation. That is unacceptable. Balance has always been the hallmark of bankruptcy reform legislation since the first bankruptcy laws were passed 100 years ago. Without this needed balance and shared responsibility by debtors and creditors alike, this legislation should be rejected.

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We hope you will stand with us to make sure that a fair and equitable result is obtained. We are committed to bankruptcy reform legislation -- if not this Congress, then the next. But we are not so desperate for bankruptcy reform legislation that we will accept a product that ignores the work of Senate Democrats.

Yours Sincerely,



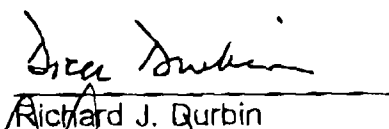
Patrick J. Leahy



Edward M. Kennedy



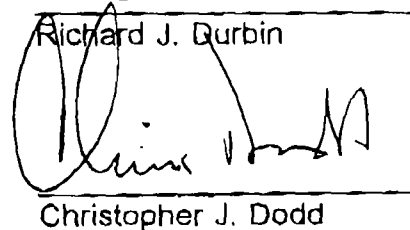
Russ Feingold



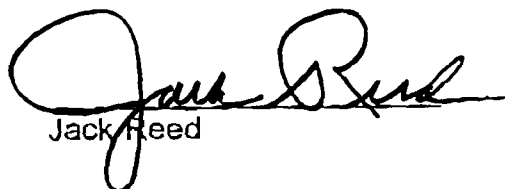
Richard J. Durbin



Paul S. Sarbanes



Christopher J. Dodd



Jack Reed



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 1998

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We understand the Senate Judiciary Committee will mark up S. 1301, the Consumer Bankruptcy Reform Act of 1997, on May 14, 1998. This letter provides the Administration's general views on the consumer bankruptcy reform proposals currently under consideration in the Congress, as well as the views of the Department of Justice on other provisions in S. 1301.

Consumer Provisions

Over the past two decades, consumer bankruptcy filings have risen sharply. While there are many competing theories on the cause of that increase, it is clear that there is no single explanation. Nonetheless, the growing number of filings, examples of abuse of Chapter 7 and state exemptions, and evidence of imprudent extensions of credit suggest some changes to the consumer bankruptcy laws are appropriate. The lack of definitive evidence about the reasons for the rise in bankruptcies means that we should show prudence and caution in designing new reforms. The Administration, therefore, has developed the following set of principles to guide its review of changes to the consumer bankruptcy laws.

1. Access to Chapter 7 should not be governed by an arbitrary means test; the court must have discretion to account fairly for the great variations in circumstances that bring debtors into bankruptcy (including medical expenses, unemployment, divorce, responsibility for the care of others, etc.). To promote more uniform application of bankruptcy standards, however, the determination whether a person is eligible for a Chapter 7 filing should take place within indicative or presumptive guidelines established by Congress that take into account factors such as the debtor's current and expected income and ability to repay a portion of the debt.

2. National bankruptcy policy can respect state variation in exemption levels without allowing state exemptions to be used to shield excessive assets from creditors.
3. It is appropriate to expect debtors who can afford to repay a portion of their debts (taking into account all relevant circumstances) to act responsibly; but the bankruptcy and the credit reporting and granting system should reward those who complete a Chapter 13 plan.
4. Child support and alimony payments should be carefully protected. We must ensure that reforms have no unintended adverse impact on debtors' ability to meet those, and other, priority payments.
5. Bankruptcy reform should not create opportunities for creditors to coerce debtors to forego bona fide rights in bankruptcy.
6. Bankruptcy rules should discourage bad-faith repeat filings and other attempts to abuse the privilege accorded by access to bankruptcy.
7. Bankruptcy data collection and data accuracy must be improved. Analysis and understanding of the forces affecting bankruptcy filings are impeded by the lack of high-quality, nationally uniform data. Better data collection and verification procedures should be incorporated into any reform proposals. Such data can be used to assess and monitor the impact of reform legislation.
8. Scrutiny must also be given to credit industry practices that have led some borrowers to overextend themselves. While some of these issues may fall outside of the Judiciary Committee's jurisdiction, the Congress and the Administration should consider proposals dealing with such issues as deceptive credit marketing and granting and enhancing disclosure of the implications of consumer credit agreements.

The Administration is open to responsible consumer bankruptcy reforms that meet these principles. The Administration has reluctantly concluded that it cannot support H.R. 3150 in its present form. The Administration looks forward to working with the Congress toward consumer bankruptcy legislation more similar to the approach embodied in S. 1301 -- with important modifications necessary to meet the principles articulated above.

The following are some additional comments regarding specific provisions in S. 1301:

Section 201. Allowance of Claims or Interests

Section 201 of S. 1301 would allow debtors to recover attorney's fees if the court reduces a proof of claim by more than 20 percent of the amount claimed. This proposal is unbalanced and unwise. It singles out creditors for penalty without providing any corresponding penalty on debtors when courts overrule debtor's unsuccessful objections to claims or erroneous listing of claims on schedules.

The proposal would have three serious detrimental effects on bankruptcy. First, it would inhibit creditors from filing valid claims for fear of incurring attorney's fees. Second, it would discourage creditors from stating specific amounts in their contingent, unliquidated proofs of claim for fear of being held liable for attorney's fees, which would have the effect of depriving debtor's of important information. Third, where amounts are specified, the proposal would force litigation, to conclusion, of any objections to the proofs of claim in order to avoid attorney's fees, thereby discouraging settlements. Indeed, the proposal here is so extreme that it would require payment of attorney's fees even where the creditor's position was substantially justified. There is no reason to depart from the usual rule in American courts on attorney's fees, including the application of Rule 11 sanctions for frivolous pleadings in appropriate cases.

Section 202. Exceptions to discharge.

Section 202 of S. 1301 would modify the discharge standard in section 523(a)(2)(A) of the Bankruptcy Code concerning debts obtained by false pretenses. In addition, if a creditor requests a determination that a given consumer debt is not discharged in bankruptcy and the debt is discharged, section 202 would authorize the award of reasonable attorney's fees and costs. And, if the court finds that the position of a creditor is "not substantially justified," the provision would also authorize the award to the debtor of "such damages as may be required by the equities of the case."

The Department opposes the damage provisions in this section because we are concerned that they could chill the bona fide exercise by creditors of their rights in valid cases. This might occur even where there is a genuine dispute over the construction of particular statutory terms in the Bankruptcy Code -- for example, a difference in the interpretation of what is a "contingent" debt. It is also unclear how this provision will interact with the waiver of sovereign immunity provisions in section 106 of the Bankruptcy Code, and with the restrictions on

the imposition of punitive damages against the government. The Equal Access to Justice Act (EAJA) already provides for costs and fees in suits involving the federal government. The EAJA provisions should be used in bankruptcy cases, as well, to provide a uniform standard for the federal government.

For similar reasons, we oppose the attorney fee and damage provisions contained in section 205 of S. 1301.

Section 203. Effect of Discharge.

Section 203 would amend section 524 of the Code to make failure of a creditor to credit correctly payments under a plan of reorganization, including a chapter 11 plan, a violation of the discharge injunction. A willful violation would be punishable by the greater of actual damages trebled or \$5,000. We are concerned about the impact of this proposal on the IRS and other government agencies. With the volume of payments processed by these agencies, mistakes in crediting payments are not uncommon. No purpose is served in treating such mistakes as violations of the discharge injunction unless a debtor has exhausted efforts to obtain relief administratively. The provision thus should be modified to incorporate such a limitation. We would be happy to work with the Committee to develop appropriate language.

Section 301. Notice of alternatives.

Section 301, in part, would amend section 342 of the Code to ensure that consumer debtors receive information about debt counseling services and their options before filing bankruptcy. The form of the notice is to be prescribed by the United States Trustee for the district and must contain a brief description of the bankruptcy chapters, the benefits and costs of each chapter and a brief description of services available from an independent nonprofit debt counseling service. The notice must also provide the name, address, and other identifying information of each nonprofit debt counseling service in the district. The Department does not oppose the concept underlying section 301, but question whether the notice will be effective when it is likely provided after the debtor has decided to file bankruptcy.

In addition, we oppose the requirement that the notice list the nonprofit debt counseling services in the district. S. 1301 provides no other parameters on what types of services should be listed, other than being non-profit, and we are concerned that the provision might put United States Trustees in the position of publicizing unscrupulous debt counselors. We recommend that this requirement be deleted from this provision, or at a minimum, be amended to provide that no listed nonprofit debt counseling service can charge the debtor a fee and to provide the United

States Trustee with the ability to petition the bankruptcy court to remove a debt counseling service from the notice list.

Section 302. Fair treatment of secured creditors under chapter 13.

Section 302 of S. 1301 would amend section 1325(a)(5)(B)(I) of the Bankruptcy Code to protect a secured creditor's lien from release under chapter 13 plan until the debt is "fully paid" by the plan.

This provision appears to have the same objective as section 125 of H.R. 3150, and we believe that the language in the House version is preferable. The wording of section 302, in fact, might be construed to lead to a result opposite of that which is seemingly intended. Section 1325(a)(5) applies to an "allowed secured claim," which means a claim whose amount is limited by the value of the collateral securing the claim. 11 U.S.C. § 506(a). Thus, the phrase "the debt that is the subject of the claim" could be construed to refer only to the "claim" as modified by section 506(a) of the Code. This construction would permit the lien to be discharged as soon as the plan payments for the secured portion are paid, rather than after all plan payments are made. Because debtors may allocate their plan payments preferentially to pay secured indebtedness sooner than unsecured debt, the result is a disincentive for debtors to finish their plans after paying enough to redeem the collateral. Such "front loading" of payments for secured debt accounts, in part, for the high percentage of chapter 13 plans that are uncompleted.

Section 303. Discouragement of bad faith repeat filings.

In cases of refiling within a year, section 303 of S. 1301 would provide a 30-day limit on the application of the automatic stay, unless, prior to termination and upon request of a party-in-interest, the court provides notice and a hearing to affected parties regarding the potential extension of the stay. Serial filings are a serious problem in many jurisdictions and, accordingly, we endorse the adoption of firm measures to address this issue. Repeat filings -- whether to obtain multiple discharges or to hold creditors at bay temporarily -- should not be encouraged. This provision would provide a welcome limitation to abuse of the automatic stay provision of the Code by serial filers who have no hope or intention of ever being granted a discharge in bankruptcy.

Section 304. Timely filing and confirmation of plans under chapter 13.

This provision would amend sections 1321 and 1324 of the Bankruptcy Code by establishing a 90 day deadline to file a chapter 13 plan, and allowing a maximum of 45 days after filing to hold a confirmation hearing. Both allow the court to extend the deadline.

These proposed deadlines, especially the 90-day deadline, are too protracted. To be effective and keep litigation to a minimum, creditors, especially secured creditors, must begin to receive their payments sooner than the 135 day process envisioned by this provision. Currently, a plan must be filed within 15 days after filing. Federal Rule of Bankruptcy Procedure 3015(b). We do not believe that extending that period is appropriate except to the extent necessary to accommodate the filing of delinquent tax returns, as recommended on page 10 of this letter.

Section 307. Audit procedures

Section 307 of S. 1301 would amend 28 U.S.C. § 586 to require the Attorney General to establish procedures for auditing a debtor's petition, schedules, statement of financial affairs and other similar information in all consumer chapter 7 and 13 cases. At least two percent of the consumer cases in each judicial district would be randomly chosen for audit, in addition to those cases where the debtor's income and expenses exceed the mean variance in the judicial district.

The Department supports the concept of debtor audits. The bankruptcy system is dependent upon the full and voluntary disclosure by debtors of accurate information regarding their assets, liabilities and financial affairs. A systematic program of random audits would serve to deter those who might otherwise be tempted to conceal assets and information from their creditors. We also believe assigning this responsibility to the Department is appropriate, given the central role of United States Trustees in ensuring the integrity of the bankruptcy system.

The Department, however, opposes section 307 in its current form because of its feasibility and cost. The proposal would require independent Certified Public Accountants (CPA) to conduct audits in accordance with "generally accepted auditing standards," a term of art within the accounting profession. It is questionable whether an audit conducted by an independent CPA, and in accordance with these principles, is feasible or desirable in most consumer cases given that a debtor's financial records are often nonexistent or in disarray.

Assuming that the practical problems associated with conducting an audit can be resolved, the provision, as drafted, would be costly. The Department estimates that implementing the audit program contemplated by this section could cost from \$91 million to more than \$348 million over five years. This cost is in large part a function of the number of debtors audited and the use of independent CPAs. The cost of the audits could easily exceed the total sum appropriated to fund the entire United States Trustee program in Fiscal Year 1998. Moreover, S. 1301 provides no funding mechanism to cover these costs other than an assessment upon those debtors chosen and able to pay. Given the fact that the debtors have filed bankruptcy and that the vast majority of chapter 7 filings involve "no asset" cases, it is unlikely that we will be able to collect a significant amount from debtors.

The use of the envisioned audit reports is left similarly vague by S. 1301. While copies of the audit reports are to be filed with the Court, it is uncertain if this is merely to provide access to the report for all parties in interest or the Court is expected to initiate, sua sponte, action based on the auditors' findings. The report of each audit is also to be filed with the United States Attorney, thereby burdening that office with storing and indexing this information. Absent notification from the United States Trustee that a material misstatement has been made in a case or that a criminal investigation is warranted, it is unclear what if any additional role the United States Attorney is to play in resolving audit deficiencies.

We recommend that the following changes be made to Section 307:

- ° Require the Attorney General to establish a system to audit consumer debtor cases on either a random or targeted basis, but without a minimal prescribed percentage;
- ° Eliminate the mandatory use of independent CPAs and generally accepted auditing standards, and grant the Attorney General the authority to determine the scope of the audits;
- ° Eliminate the requirement of filing the reports with the United States Attorney;
- ° Provide a civil sanction to ensure debtor's compliance with the audit and defer a section 727 discharge until the U.S. Trustee reports a satisfactory audit; and
- ° Provide a source to fund the audits other than assessments upon the affected debtors.

Given the size of the audit program and its cost, the Department also urges the committee to consider a pilot program for audits that would allow the costs and benefits of various approaches to be considered. In addition, consideration should be given to limiting random audits to chapter 7 debtors.

Section 308. Creditor representation at first meeting of creditors.

Section 308 of S. 1301 would amend 11 U.S.C. § 341 to allow non-attorney consumer creditor representatives to attend and participate in chapter 7 and chapter 13 creditor's meetings notwithstanding federal, state or local non-bankruptcy law to the contrary. The Department supports this provision, because it promotes the participation of creditors in the bankruptcy process. We strongly encourage further amendment to delete the phrase "holding a consumer debt" from the section to ensure the ability of all creditors, including governmental creditors, to participate.

Section 309. Fair notice for creditors in chapter 7 and 13 cases.

Section 309 of S. 1301 would amend section 342 of the Bankruptcy Code by requiring, in an individual bankruptcy case, that notices to creditors include any account number and be sent to the address that a creditor has specified. It also would require that a matrix of addresses prescribed by creditors for notices in a district be established. Further, unless actual notice is sent to the specified addresses and received by a responsible person or department of the creditor, notice would be ineffective.

We strongly support this provision's intent to insure that debtors know how to give effective notice and that the creditors, in fact, receive such notice. However, we would urge that section 309 be amended to include language, as is contained in section 405 of H.R. 3150, that explicitly further provides that a creditor could not be sanctioned for violating the automatic stay and turnover of property could not be enforced when effective notice is not given in the manner prescribed. We would be happy to work with the Committee to draft acceptable language.

Section 310. Stopping abusive conversions from chapter 13.

Section 310 of S. 1301 would amend section 348(f) of the Bankruptcy Code to reverse the bifurcation of a secured creditor's claim into secured and unsecured portions that currently occurs under chapter 13 if the case is converted to chapter 7. Section 310 would limit the debtor's ability to release the lien in chapter 7 under section 722 of the Bankruptcy Code.

We support this change. This provision deals with a different aspect of the same problem dealt with in section 302 of S. 1301. Both provisions concern a debtor who confirms a chapter 13 plan that reduces a creditor's lien to the value of the collateral. Both apply where the debtor, after making part of the payments of the secured portion of the claim, converts an unfinished 13 plan to chapter 7. In chapter 7, the debtor redeems the collateral by tendering the balance due on the "stripped down" lien after taking credit for the payments made under the chapter 13 plan. Unless this option is barred, debtors will have an incentive to convert to chapter 7, rather than finish their chapter 13 plans. Debtors should not realize the benefits of chapter 13 without fully satisfying their obligations under that chapter.

Section 312. Dismissal for failure to file schedules timely or provide required information.

Section 312 of S. 1301 would amend 11 U.S.C. § 707 to require the automatic dismissal of a case in which an individual debtor in chapter 7 or 13 fails to file all of the information required in 11 U.S.C. § 521, as amended. We do not oppose this provision, but note that it may engender confusion as drafted. On the one hand, new subsection (c)(1) states that dismissal is automatic. On the other hand, subsection (c)(2) states that a party in interest may request an order dismissing the case, raising a question as to whether the provision is self-executing. We suggest deleting (c)(2), and amending (c)(1) to read "the court shall dismiss" instead of "the case shall be automatically dismissed." In addition, the Committee may wish to consider adopting a similar amendment to 11 U.S.C. § 1307, to require dismissal of chapter 13 cases for failure to file schedules or provide information.

Section 322. Miscellaneous improvements.

Section 322, in part, amends 11 U.S.C. § 109 to provide that an individual cannot qualify for bankruptcy unless the individual has attempted an out of court workout through an approved credit counseling service. While increasing the number of debtors who attempt non-bankruptcy workouts before resorting to bankruptcy is a desirable goal, we oppose this provision as written. The use of credit counseling agencies as a gatekeeper will not work in all circumstances. These circumstances include those where a debtor's mortgage is delinquent, foreclosure is imminent and a petition must be filed to stay the foreclosure. In addition, creditor counseling may be futile when the debtor has insufficient income to make minimum payments or is unemployed. Some areas of the country may also not have ready access to such services. At a minimum, the Department recommends an amendment to provide an exception if the workout would be futile or if the credit counseling service is not readily available.

Section 410. Executory contracts and unexpired leases.

Section 410 of 'S. 1301 would amend section 365 of the Code to allow the debtor to reinstate a lease of real property under which the debtor is in default, if the default is not curable by paying money. In addition, the debtor would be allowed the same power for an executory contract with the additional requirement that the court find that the "equities" excuse the debtor's usual obligation to cure.

Though labeled a "technical" correction, the Department believes this provision would effect an ill-advised substantive departure from long-standing principles. Currently, section 365 of the Code allows a debtor to reinstate (or "assume" in bankruptcy parlance) an executory contract or an unexpired lease, notwithstanding a default that would normally cost the debtor its right to perform the contract or possess the property. To do so, the debtor must cure the default, compensate for any monetary loss, and assure adequately its future performance. 11 U.S.C. § 365(b)(1). Waiving the debtor's obligation to cure if the default is not curable by money ignores that many defaults going to the essence of the agreement are not curable by money. This change precludes the non-debtor from enforcing those standards and, therefore, deprives the non-debtor of the benefits of his bargain. The non-debtor party should not be forced to perform where deprived of the full benefit of the bargain.

The hallmark of a contract is mutuality of obligation. This proposal violates that long standing principle. The party whose contract is incurably breached should not lose its common law right to terminate. The proposed amendments in S. 1301 are indifferent to this loss and unfairly bind a non-debtor to a contract with no obligation for the debtor to make the non-debtor whole. If forced to continue doing business with the debtor and the debtor breaches again, the non-debtor will lose twice. This is particularly important in a bankruptcy context, where a debtor who has defaulted once may be more likely to default a second time.

To the extent proponents of this provision fear that "minor" contractual breaches could otherwise be an obstacle to the debtor's power to assume, that fear is misplaced. The common law has long distinguished between defaults which are minor (entitling only damages) and major (voiding the agreement). This proposal replaces this familiar concept with the wholly novel notion of "equities." Subsection (1)(F) provides no guidance to the judge or the parties as to what "equities" should be weighed. Lacking objective content, this language will acquire meaning only through litigation. That courts will adopt varying standards is inevitable. This embeds uncertainty into the system which breeds litigation and its attendant cost.

In addition to being flawed in concept, this provision is overly broad in its implementation. The proposal excuses the debtor from all obligations under section 365(b)(1), including the duty to compensate the creditor for pecuniary losses incurred as a result of the breach and to provide adequate assurance of future performance. No justification exists for giving a bankruptcy judge such authority.

Subsections (1)(E) and (1)(F) of this amendment will inflict significant damage upon contractual expectations. Under the proposed revisions to section 365, the parties' contractual rights in bankruptcy are rendered uncertain and, in the case of executory contracts, undeterminable without litigation. The practical effect of the changes could be to cause creditors who care about non-monetary performance to contract only with highly solvent companies. Financially troubled companies, small businesses and new businesses will be the losers. This provision thus could have the unintended effect of driving more companies into bankruptcy. We strongly oppose this provision.

Section 430. Extensions.

Section 430 would amend section 302(d)(3) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 to eliminate the deadline for including the judicial districts in the States of Alabama and North Carolina within the United States Trustee system. The Department strongly opposes the amendment because it creates two separate systems of bankruptcy administration within the country and may be vulnerable to constitutional attack under the Uniformity Clause.

When Congress made the United States Trustee Program (USTP) a nationwide program in 1986, the date the program was to commence varied in different judicial districts. Six federal judicial districts in the States of North Carolina and Alabama remain outside the program, and the date for the inclusion of these districts has been postponed until October 1, 2002 -- sixteen years after the USTP's nationwide expansion. Pub. L. No. 101-650, 317(a), (c), 104 Stat. 5115, 5116 (1992). In these six judicial districts, "Bankruptcy Administrators" and court clerks employed by the judicial branch perform many of the functions that are performed by United States Trustees in USTP districts.

This arrangement may not comply with Article I's mandate to "establish...uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art I., §8., cl.4. Supreme Court precedent on what "uniformity" means in this context is ambiguous. The leading case on the issue is Hanover National Bank v. Moyses, 186 U.S. 181 (1902), where the court rejected a challenge to the Bankruptcy Act of 1898, which recognized state exemptions instead of establishing a system of uniform federal exemptions. The opinion suggests that Congress

can account for differences in state law in the bankruptcy laws without violating the requirement of uniformity. More recently, in Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982), the Supreme Court struck down, as violative of Article I's uniformity requirement, a statute requiring employees of the bankrupt Rock Island and Pacific Railroad Co. estate to receive certain benefits if not rehired by other carriers. According to the Court, "to survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of creditors." Gibbons, 455 U.S. at 473.

Given the lack of clarity on Article I's uniformity requirement and the doubts raised about the justification for maintaining both the USTP and the Bankruptcy Administrator programs, additional challenges to the constitutionality of this dual system seem likely. See, e.g., Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1529-30 (9th Cir. 1994); Joelson v. United States, 86 F.2d 1413 (6th Cir. 1996). In any event, maintaining a special system of bankruptcy administration for just six of the nation's 94 judicial districts is imprudent. No articulated policy justifies maintaining the Bankruptcy Administrator program, and its continued existence not only threatens to inspire additional constitutional challenge, but is also contrary to the fair, effective and uniform administration of the bankruptcy laws.

Requirement to File Tax Returns to Confirm Chapter 13 Plans

Tax authorities are placed at a severe disadvantage in filing timely proofs of claim when a chapter 13 debtor is delinquent in filing prepetition tax returns. It is troubling that individuals who invoke the protections of government against their creditors defy their government in failing to discharge their tax return filing responsibilities. For this reason, the National Bankruptcy Review Commission endorsed the enactment of legislation requiring chapter 13 debtors to file all tax returns due for six years prior to the petition date, as a prerequisite for confirmation of a chapter 13 plan. Report of the National Bankruptcy Commission, Recommendation 4.2.22. We submit that S. 1301 should be modified to include a provision along the lines of section 517 of H.R. 3150, prohibiting the confirmation of chapter 13 plans of debtors who continue to disregard their tax return filing obligations.

We look forward to working with the Committee as it considers these and other issues raised by S. 1301. The Office of Management and Budget advises that it has no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,



Ann M. Harkins
Acting Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

The Honorable Charles E. Grassley
Chairman
Subcommittee on Administrative Oversight
and the Courts

The Honorable Richard J. Durbin
Ranking Minority Member
Subcommittee on Administrative Oversight
and the Courts



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 1998

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We understand the House Judiciary Committee will mark up H.R. 3150, the Bankruptcy Reform Act of 1998, on May 13, 1998. This letter provides the Administration's general views on the consumer bankruptcy reform proposals currently under consideration in the Congress, as well as the views of the Department of Justice on other provisions in H.R. 3150.

Consumer Provisions

Over the past two decades, consumer bankruptcy filings have risen sharply. While there are many competing theories on the cause of that increase, it is clear that there is no single explanation. Nonetheless, the growing number of filings, examples of abuse of Chapter 7 and state exemptions, and evidence of imprudent extensions of credit suggest some changes to the consumer bankruptcy laws are appropriate. The lack of definitive evidence about the reasons for the rise in bankruptcies means that we should show prudence and caution in designing new reforms. The Administration, therefore, has developed the following set of principles to guide its review of changes to the consumer bankruptcy laws.

1. Access to Chapter 7 should not be governed by an arbitrary means test; the court must have discretion to account fairly for the great variations in circumstances that bring debtors into bankruptcy (including medical expenses, unemployment, divorce, responsibility for the care of others, etc.). To promote more uniform application of bankruptcy standards, however, the determination whether a person is eligible for a Chapter 7 filing should take place within indicative or presumptive guidelines established by Congress that take into account factors such as the debtor's current and expected income and ability to repay a portion of the debt.

2. National bankruptcy policy can respect state variation in exemption levels without allowing state exemptions to be used to shield excessive assets from creditors.
3. It is appropriate to expect debtors who can afford to repay a portion of their debts (taking into account all relevant circumstances) to act responsibly; but the bankruptcy and the credit reporting and granting system should reward those who complete a Chapter 13 plan.
4. Child support and alimony payments should be carefully protected. We must ensure that reforms have no unintended adverse impact on debtors' ability to meet those, and other, priority payments.
5. Bankruptcy reform should not create opportunities for creditors to coerce debtors to forego bona fide rights in bankruptcy.
6. Bankruptcy rules should discourage bad-faith repeat filings and other attempts to abuse the privilege accorded by access to bankruptcy.
7. Bankruptcy data collection and data accuracy must be improved. Analysis and understanding of the forces affecting bankruptcy filings are impeded by the lack of high-quality, nationally uniform data. Better data collection and verification procedures should be incorporated into any reform proposals. Such data can be used to assess and monitor the impact of reform legislation.
8. Scrutiny must also be given to credit industry practices that have led some borrowers to overextend themselves. While some of these issues may fall outside of the Judiciary Committee's jurisdiction, the Congress and the Administration should consider proposals dealing with such issues as deceptive credit marketing and granting and enhancing disclosure of the implications of consumer credit agreements.

The Administration is open to responsible consumer bankruptcy reforms that meet these principles. The Administration has reluctantly concluded that it cannot support H.R. 3150 in its present form. The Administration looks forward to working with the Congress toward consumer bankruptcy legislation more similar to the approach embodied in S. 1301 -- with important modifications necessary to meet the principles articulated above.

The following are some additional comments regarding specific provisions in H.R. 3150:

Section 111. Notice of Alternatives.

Section 111 of H.R. 3150 would, in part, amend section 342 of the Bankruptcy Code ("the Code") to ensure that consumer debtors receive information about debt counseling services and their options before filing bankruptcy. The form of the notice would be prescribed by the United States Trustee for the district and would contain a brief description of the bankruptcy chapters, the benefits and costs of each chapter and services available from an independent nonprofit debt counseling service. The notice would also provide the name, address, and other identifying information of each nonprofit debt counseling service in the district. We support the concept of consumer education that underlies section 111, but question whether the notice will be effective when it is likely provided after the debtor has decided to file bankruptcy.

In addition, we oppose the requirement that the notice list the nonprofit debt counseling services in the district. H.R. 3150 provides no other parameters on what types of services should be listed, other than being non-profit, and we are concerned that the provision might put United States Trustees in the position of publicizing unscrupulous debt counselors. We recommend that this requirement be deleted from this provision, or at a minimum, be amended to provide that no listed nonprofit debt counseling service can charge the debtor a fee and to provide the United States Trustee with the ability to petition the bankruptcy court to remove a debt counseling service from the notice list where there is evidence indicating that the counseling service has engaged in unscrupulous behavior.

Section 112. Debtor Financial Management Test Program

Section 112 of H.R. 3150 would require the Executive Office for United States Trustees, in consultation with standing trustees, to develop a financial management training curriculum for debtor education in three pilot districts for a one year period. The materials would also be made available to individual debtors on request. The courts in the pilot districts would be authorized to make attendance at the debtor education program a condition of discharge. The Director of the Executive Office would also be required to evaluate the effectiveness of the pilots and existing debtor education programs and to submit a report of his findings to Congress.

The Department supports this test program as the best way to refine effective debtor education programs before they are extended nationwide. Subsection (b), however, only gives the Executive Office 60 days after enactment to develop the training

curriculum and materials. We recommend that this period be extended to 180 days to give the Executive Office adequate time to develop an effective curriculum.

Sections 113 to 116. Debt relief counseling agencies

Sections 113 through 116 of H.R. 3150 deal with debt relief counseling agencies ("counseling agencies"). Section 113 defines covered "counseling agencies." Section 114 would require such agencies to provide the person they are assisting with written notice of the requirements that all bankruptcy schedules must be accurate, that the information is subject to audit, and that the failure to provide accurate information may result in dismissal of the bankruptcy case, sanctions or criminal prosecution. Counseling agencies would be required to provide a separate notice advising the assisted person that the counseling agency is required, *inter alia*, to enter a written contract. Finally, counseling agencies would be required to inform assisted individuals on matters such as "how to determine what property is exempt and how to value exempt property at replacement value."

The Department opposes section 114, as currently drafted, because it would undercut the consumer protections currently contained in section 110 of the Code and state law, which impose penalties on persons who negligently or fraudulently prepare bankruptcy petitions. Because counseling agencies would be defined to include petition preparers and other non-attorneys, the advice required to be given by a counseling agency could constitute the unauthorized practice of law. To avoid this problem, section 114 of H.R. 3150 should be amended to exclude non-attorneys from the provisions of new section 526(c), and to add to the form notice in section 526(b) a notice that the debt relief counseling agency employee cannot provide legal advice if he or she is not an attorney.

Section 115 of H.R. 3150 would provide the assisted person certain substantive rights when using a debt relief counseling agency, including the right to a written contract that fully discloses all services and all charges. We do not oppose this provision, but believe that the standard of liability in the provisions should be changed. New section 115(b)(2) provides that a debt relief counseling agency shall not "make any statement . . . which is untrue or misleading or which upon the exercise of reasonable care, should be known by the debt relief counselling agency to be untrue or misleading." (emphasis added). The underlined disjunctive "or" would impose strict liability upon a debt relief counseling agency by imposing liability if the statement is untrue or misleading, even if the agency had no reason to know of the untruth or misleading nature of the statement. The Department suggests replacing the underlined "or" with "and" to establish a more appropriate standard of liability.

Finally, section 116 of H.R. 3150 would provide penalties and other remedies for the failure of a counseling agency to comply with the requirements of section 114 and 115; for providing bankruptcy assistance in a case which is dismissed (or converted to a chapter 13 in lieu of a dismissal) under section 707(b) of the Code; or for a failure to file bankruptcy papers. In such circumstances, counseling agencies would be required to refund or waive fees and, if the case has not been closed, a court could require the counseling agency to complete the services in the case without charge. In addition, the state Attorneys General could bring actions to enjoin such violations, and recover for their affected residents actual damages, including costs and attorney fees.

To provide additional protections against abusive practices, the Department urges that section 116 be strengthened to provide monetary penalties for intentional or repeat violations and to empower the United States Trustees to bring actions seeking such penalties and injunctions against offending counseling agencies and their principals. Section 116 should also be clarified to allow a debtor to bring an action for a violation. The experience of the United States Trustees in enforcing violations by petition preparers under section 110 of the Code is that the penalties must be severe and be able to address the enforcement problems posed by shell corporate entities. Finally, section 116 should be amended to clarify that the enforcement remedies of this section are in addition to Chapter 9 of Title 18 and section 110 of the Code. We would be happy to work with the Committee to draft appropriate language.

Section 121. Repeat Filings.

In cases of refile within a year, section 121 of H.R. 3150 would provide a 30-day limit on the application of the automatic stay of section 362 of the Code, unless, prior to termination and upon request of a party-in-interest, the court provides notice and a hearing to affected parties regarding the potential extension of the stay. Serial filings are a serious problem in many jurisdictions and, accordingly, we endorse the adoption of firm measures to address this issue. Repeat filings -- whether to obtain multiple discharges or to hold creditors at bay temporarily -- should not be encouraged. This provision would provide a welcome limitation to abuse of the automatic stay provision of the Code by serial filers who have no hope or intention of ever being granted a discharge in bankruptcy.

Section 125. Giving Secured Creditors Fair Treatment In Chapter 13.

Section 125 of H.R. 3150 would amend section 1325(a) (5) (B)(i) of the Bankruptcy Code to protect the lien of a secured creditor from release by a chapter 13 plan if the debtor fails to

complete the plan. This provision would resolve an issue on which the bankruptcy courts are split. The issue arises when the debtor confirms a chapter 13 plan that reduces a creditor's lien to the current value of the collateral (so-called "lien stripping") and then, after completing the payments due on the secured portion of the claim, but before the plan is completed, the debtor seeks to discharge the lien. Some courts hold that the collateral does not vest in the debtor until the entire plan is completed. See, e.g., In re Pruitt, 203 B.R. 134 (Bankr. N.D. Ind. 1996); In re Schieirl, 186 B.R. 498 (Bankr. D. Minn. 1995). Other courts have held that, upon payment of the secured portion of the creditor's claim, the collateral is released. See, e.g., In re Lee, 156 B.R. 628 (Bankr. D. Minn.), aff'd, 162 B.R. 217 (D. Minn. 1993); In re Nicewonger, 192 B.R. 886 (Bankr. N.D. Ohio 1996).

We support the limitations on lien stripping contained in section 125. A key advantage that chapter 13 offers debtors over chapter 7 is that a larger universe of property is subject to lien "strip down." Furthermore, in a chapter 13 plan, the debtor can redeem collateral with payment over time from future income. These advantages are often the debtor's chief reason for undertaking a chapter 13 plan. Because debtors may allocate their plan payments preferentially to pay secured indebtedness sooner than unsecured debt, the result can be a disincentive for debtors to finish their plans after paying enough to redeem the collateral. Such "front loading" of payments for secured debt accounts, in part, for the high percentage of chapter 13 plans that are uncompleted. Debtors should not be permitted to obtain the benefits of chapter 13 without bearing its burdens.

Section 127. Stopping Abusive Conversions From Chapter 13.

Section 127 of H.R. 3150 would amend section 348(f)(1) of the Code to reverse the bifurcation of a secured creditor's claim into secured and unsecured portions accomplished through a chapter 13 plan, if the case is converted to chapter 7. This provision thus would limit the debtor's ability to release the lien in a chapter 7 case under section 722 of the Code.

For the same reasons we support section 125 of H.R. 3150, we also support this change. This provision addresses a different aspect of the same problem dealt with in section 125 above. Both provisions concern a debtor who confirms a chapter 13 plan that reduces a creditor's lien to the value of the collateral. Unlike section 125, however, section 127 deals with the situation where, after paying part of the secured portion of the claim, the debtor converts his unfinished 13 plan into chapter 7 liquidation. In the chapter 7 case, the debtor then redeems the collateral by tendering the balance due on the "stripped down" lien after taking credit for the payments made under the chapter 13 plan. Unless this option is barred, debtors will have an incentive to

take the benefits conferred by chapter 11, and then convert to a chapter 7 without finishing their chapter 11 plans.

Section 201. Limitation Relating to the Use of Fee Examiners.

Section 201 of H.R. 3150 would prohibit a court's use of third-party examiners to review professional fee applications. We oppose this provision in its current form because it is overly broad and may be detrimental in large reorganization cases where fee applications are frequent, complex and voluminous. The use of a fee examiner by a bankruptcy judge is not an improper delegation of the court's duty to review and award compensation; even with a fee examiner, a court must rule on every professional fee application filed. The Department, however, would not oppose amendments to correct perceived abuses relating to compensating fee examiners based upon a percentage of fees successfully challenged and to prohibit the use of fee examiners in small business cases (where the expense of such examiners is likely unwarranted). We would be happy to work with the Committee to draft appropriate language.

Section 204. Meetings of Creditors and Equity Security Holders.

Section 204 of H.R. 3150 would amend section 341 of the Code to allow a court to direct the United States Trustee to dispense with the meeting of creditors in a case with a so-called "pre-packaged plan," i.e., a reorganization plan worked out with creditors in advance of the filing of a Chapter 11 petition. We oppose this provision, which would significantly hinder the ability of creditors and the United States Trustee to examine a debtor's affairs under oath. Dispensing with the meeting could also increase the possibility of fraud and collusion by a debtor and its major creditors.

Section 205. Creditor and Equity Security Holders Committees.

Section 205 of H.R. 3150 would amend section 1102 of the Code to allow a court to order changes in the membership of creditor and equity security holder committees. We strongly oppose this provision. Under section 1102 of the Code, United States Trustees are responsible for creating committees and appointing their members, while courts are called upon to resolve controversies arising from the committees. Section 205 of H.R. 3150 would upset this balance and improperly involve the court in the administration of cases. This could create an appearance of favoritism if a court were called upon to resolve a controversy involving a committee it had constituted. The proposal could also result in increased cost and delay because early litigation over committee membership would inevitably decrease the ability of committees to participate at the early, critical stages of cases.

Nevertheless, the Department recognizes the desirability of revising section 1102 to ensure that effective and representative committees are appointed. Accordingly, we would suggest that this section be amended to require that any request to create or alter the membership of a committee be first directed to the United States Trustee and to permit the court, upon a request of a party in interest after an adverse decision by the United States Trustee, to make the requisite findings and order the United States Trustee to alter a committee. Such an amendment should also reaffirm the United States Trustee's authority to alter a committee. We would be happy to work with the Committee to draft language to accomplish this objective.

Section 207. Preferences.

Section 207 of H.R. 3150 would amend section 547(c) of the Code, which deals with preferential transfers of property to creditors after the filing of a bankruptcy petition. Section 207 would eliminate the ability of a trustee to avoid such a transfer in a case filed by a debtor whose debts are not primarily consumer debts, where all the property that constitutes or is affected by the transfer is worth less than \$5,000.

We oppose this provision. Although this provision is apparently designed to protect the interests of smaller creditors, this section, without appropriate supervision, could lead to abuse and manipulation by debtors wishing to pay preferred creditors. For example, nothing in the provision would prohibit a debtor from breaking a larger payment into several smaller ones that each total less than \$5,000. If such preferential payments are not avoidable, the result could be a substantial diminution of the property available to pay priority claims.

Sections 232 and 233. Flexible Rules for Disclosure Statement and Plan; Standard Form Disclosure Statements and Plans.

Section 232 of H.R. 3150 would add a new section 1125(f) to the Code to allow the court to relax the plan confirmation procedures in small business bankruptcies. Specifically, for a small business case, the court would be empowered to: (i) waive the disclosure statement; (ii) use a form disclosure statement; (iii) allow plan solicitation based on a "conditionally approved" disclosure statement; or (iv) combine the confirmation and disclosure statement hearing. Section 233 of H.R. 3150 would require the Judicial Conference to adopt "standard form" disclosure statements and plans of reorganization that balance the need for "reasonably complete information" with "economy and simplicity."

These provisions would remove procedural barriers to early confirmation and, to the extent they encourage quicker confirmations, are advantageous to debtors and creditors alike. Care will be needed lest the execution of these provisions lead to confirmations without adequate disclosure to creditors and other affected parties. We believe, however, that this risk is manageable.

Section 234. Uniform National Reporting Requirements.

Section 234 of H.R. 3150 would add a new section 308 to the Code requiring a small business debtor to file periodic reports explaining: (i) its profitability; (ii) projected income and expenses; (iii) how prior projections compare with actuality; (iv) compliance with bankruptcy requirements; (v) whether taxes returns are timely filed; (vi) what taxes and other administrative claim are in default and when remedied; and (vii) "other matters" needed in the creditors' and the public's interest.

We support these disclosure requirements and the need for consistent financial reporting standards. By helping to identify faltering cases, financial reports prevent undue delay in the administration of chapter 11 cases. We further urge extending this section to all chapter 11 debtors, not just small business debtors.

Section 235. Uniform Reporting Rules and Forms.

Section 235 of H.R. 3150 would require the Attorney General to propose for adoption amended Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms to be used by small business debtors to comply with the provisions added by Section 234 of the bill. We support this provision, but suggest that it be amended to indicate that the Attorney General would also consult with the Small Business Administration in developing the rule and form proposals.

Section 236 through 239. Other Small Business Provisions

The Department is not taking a position on these provisions at this time, which are still under review.

Section 240. Duties of the United States Trustee and Bankruptcy Administrator.

Section 240 of H.R. 3150 would amend 28 U.S.C. § 586 to expand the United States Trustee's oversight of small business debtors. It would oblige the United States Trustee to interview the debtor before the first meeting of creditors, visit the debtor's premises, monitor the debtor's actions and, where grounds are found to do so, move to convert the case to a Chapter 7 or to dismiss the case altogether.

We support this provision, which would clarify and codify the United States Trustee's obligation to move hopeless cases out of chapter 11. This section reflects the current practice of the United States Trustees, except for the duty to visit the debtor's premises. We estimate that site visits would cost an additional \$9 million over 5 years.

Section 241. Scheduling Conferences.

Section 241 of H.R. 3150 would amend section 105(d) of the Code to require the courts to hold status conferences, and empower the courts to issue administrative orders to establish deadlines and relax the disclosure statement requirements. This provision would apply to all chapter 11 cases. To the extent it empowers the court to override requirements of the Code and Bankruptcy Rules, or to intrude into areas currently entrusted to the United States trustee, it goes too far. While bankruptcy procedures should be somewhat flexible, we believe that it is important that bankruptcy judges not be permitted to vary, essentially at will, from statutory and rule requirements, potentially depriving creditors and other parties in interest of key procedural protections. We believe that the standard incorporated in section 241 -- allowing the court to vary from the Code and the Bankruptcy Rules if "necessary to further the expeditious and economical resolution of the case" -- does not adequately preserve these procedural protections, and therefore oppose the provision.

Section 242. Serial Filer Provisions.

Section 242 of H.R. 3150 would amend section 362 of the Bankruptcy Code to disable the automatic stay for a small business filing, where: (i) the debtor is already in bankruptcy; (ii) had a case dismissed or a plan confirmed within two years prior to filing; or (iii) acquired the assets of a debtor in a proceeding covered by (i) or (ii), unless the debtor shows that its filing resulted from causes unforeseeable during the prior case and that a non-liquidating plan may be confirmed within a reasonable time.

Serial filings are a serious problem in many jurisdictions and we endorse the adoption of firm measures to address this issue. Repeat filings -- whether to obtain multiple discharges or to hold creditors at bay temporarily -- should not be permitted. Accordingly, we support section 242 of the bill. However, we believe that applying this restriction only to small business debtors is too limited and that this provision instead should apply to all debtors in chapter 11.

Section 243. Expanded Grounds For Dismissal or Conversion and Appointment of Trustee.

Section 243 of H.R. 3150 would amend section 1112 of the Code to require the conversion to chapter 7 or dismissal of any chapter 11 case where "cause" is shown. This requirement would not apply if the debtor could show that a plan may be confirmed within a reasonable time and, where the "cause" is a default, that the default is justified and will be cured promptly. "Cause" would be defined to include a variety of situations, including "gross mismanagement;" misuse of cash collateral; a violation of a court order; default of a filing or reporting requirement; the nonpayment of taxes or nonfiling a return; and not filing timely a disclosure statement or plan or confirming a plan.

We support this provision. This provision is one of several in the bill designed to move cases that cannot be confirmed out of chapter 11. Defining "cause" using more objective standards would foster uniformity and enhance efficiency. Shifting the burden to the debtor to justify defaults and prove satisfactory progress when cause is shown appropriately conditions the debtor's enjoyment of the benefits of bankruptcy on responsible actions.

Section 251. Single Asset Real Estate Defined

Section 251 of H.R. 3150 would amend section 101(51B) of the Code to remove the \$4 million debt cap from the current definition of "single asset real estate." Further, it would clarify that unimproved real estate qualifies for this designation. Finally, it would exclude from the definition property owned by a debtor who is part of a commonly controlled group consolidated in one bankruptcy if the group operates a business larger than the single property.

Currently, the mortgagee of Single Asset Real Estate ("SARE") secures relief from the bankruptcy stay 90 days after the debtor files unless, prior to the running of the 90 days, the debtor files a confirmable plan or commences interest payments based on the property's fair market value. 11 U.S.C. §362(d)(3). Removing the cap under section 251 of the bill would allow a larger set of mortgagees to benefit from section 362(d)(3). Many bankruptcies considered abusive by creditors have concerned SAREs. We strongly favor the proposed changes, which would benefit federal lenders and insurers, most notably the Department of Housing and Urban Development (HUD).

HUD, however, needs and deserves additional protection for its unique bankruptcy problems. HUD borrowers are usually limited partnerships that enjoy tax shelters for their investors, favorable interest rates, and, frequently, subsidies for their

tenants. Projects without sufficient income to service indebtedness also lack the income to manage and maintain the insured property. Deteriorating property not only diminishes property values but also can lead to unsafe and unsanitary conditions for the tenants, many of whom have low to moderate income. HUD's remedy for the owner's financial and regulatory defaults -- foreclosure -- is easily and completely frustrated by the filing of a bankruptcy and the attendant invocation of the automatic stay of section 362 of the Code.

When owners file for bankruptcy, debt service is usually reduced or withheld entirely. Some courts allow the rents to accumulate as a dollar for dollar reduction in HUD's secured claim; hence, in those courts, delay is rewarded because the longer the delay, the more the secured debt is paid down. Meanwhile, the owners continue to enjoy the tax advantages of ownership, such as depreciation deductions. While bankruptcy restrictions limit HUD's usual remedies and rights, HUD must continue to pay rent and other subsidy payments which inure to the benefit of the projects owners. Although the owner/partnership's only asset is the project that is wholly encumbered by HUD's mortgage, the owner often can stave off a motion by HUD seeking relief from the automatic stay by promising new investments to enable a successful reorganization. Such scenarios can force HUD to accept plans that reduce its mortgage and discharge unsecured debt, yet allow the debtors to retain their ownership interests through relatively small investments of new capital. Even where HUD is allowed to proceed with foreclosure, the result can be further deterioration of the mortgaged property, creating hazards for tenants, and reduced -- often sharply -- sale values.

HUD did not suffer these consequences until 1978 when Congress repealed a long-held exception to the automatic stay for multifamily projects insured under the National Housing Act. We recommend that exception be restored. Such a change could be accomplished by amending section 362(b)(8) of the Code to read:

(8) under subsection (a) of this section, of any act to foreclose a lien insured or held by the Secretary of Housing and Urban Development, or the Secretary of Agriculture pursuant to title V of the Housing Act of 1949, on property that has more than four living units; is a hospital or nursing home; or is a project for the elderly or persons with disabilities.

Section 252. Payment of Interest

Section 252 of H.R. 3150 would amend section 362(d)(3) of the Bankruptcy Code to limit the automatic stay in case of a SARE, where the debtor fails to file a plan or commence interest payments within 90 days of filing, to: (i) allow the payment to commence 30 days after the court determines that the debtor is a

SARE; (ii) allow the debtor to make the interests payments from post-petition rents of the SARE; and (iii) specify the non-default contract rate as the interest rate.

We oppose this change. Under current section 362(d)(3) of the Code, creditors of a SARE debtor may have the automatic stay lifted if the debtor has not filed a "feasible" reorganization plan within 90 days of filing or has not commenced monthly payments to secured creditors. Giving the debtor 30 days to comply after the court rules that the debtor is subject to section 362(d)(3) is unwise. The exception to the automatic stay in section 362(d)(3) takes its force from the 90 days time limit. That force is substantially diminished by relaxing that limit for debtors who claim, or who can find a pretext for claiming, that it does not apply. It is also unnecessary; the court currently can extend the 90 days for "cause."

Giving the debtor the "sole discretion" to override section 363(c)(2) and make interest payments out of post-petition rents is also ill-advised. First, the amendment does not require that the creditor receiving the rents be the same as the creditor whose rights are voided. Second, even if the creditor receiving the rents is being paid its own collateral, the amendment serves to limit that creditor's rights. Currently, this section works largely as a predicate to allow the secured creditor and the debtor to negotiate a consensual payment schedule. Giving the debtor the discretion to override the secured creditor's interests stands the purpose of the section on its head.

Finally, allowing the debtor to pay at the contract rate is inconsistent with paying a "stripped down" value in the case of an undersecured creditor. If the payment's principal is a function of market value, the interest rate should be calculated the same way. We oppose this change as well.

Section 401. Adequate Preparation Time For Creditors Before the First Meeting Of Creditors in Individual Cases.

Section 401 of H.R. 3150 would amend section 341 of the Code to provide that the first meeting of creditors in individual cases shall not be convened earlier than 60 days, nor longer than 90 days, after the Order for Relief, absent a court determination of unusual circumstances. This proposal is contrary to the expeditious administration of bankruptcy cases. Any delay in the meeting of creditors would impede the ability of trustees and the United States Trustee to intervene in problem cases, and impair the ability of trustees to obtain control of estate property and promptly investigate the debtor's financial affairs.

The Department would not oppose amendments allowing creditors additional time to protect their interests, such as amendments extending the time periods for objecting to the entry

of the debtor's discharge, seeking a determination that a particular debt is non-dischargeable, filing a motion to dismiss for substantial abuse under section 707(b) of the Code, and objecting the debtor's claimed exemptions. We would be happy to work with the Committee to draft acceptable language.

Section 402. Creditor Representation at the First Meeting of Creditors.

Section 402 of H.R. 3150 would amend section 341 of the Code to allow non-attorney consumer creditor representatives to attend and participate in chapter 7 and chapter 13 creditor's meetings notwithstanding federal, state or local non-bankruptcy law to the contrary. The Department supports this provision because it promotes the participation of creditors in the bankruptcy process. We strongly encourage further amendment to delete the phrase "holding a consumer debt" from the section to ensure the ability of all creditors, including non-lawyer representatives of governmental creditors, to participate in creditor meetings.

Section 404. Audit Procedures

Section 404 of H.R. 3150 would amend 28 U.S.C. § 586 to require the Attorney General to establish procedures for auditing of a debtor's petition, schedules, statement of financial affairs and other similar information in all consumer chapter 7 and 13 cases. At least one percent of the consumer cases in each judicial district would be randomly chosen for audit, in addition to those cases where the debtor's income and expenses exceed the mean variance in the judicial district.

The Department supports the concept of debtor audits. The bankruptcy system is dependent upon the full and voluntary disclosure by debtors of accurate information regarding their assets, liabilities and financial affairs. A systematic program of random audits would serve to deter those who might otherwise be tempted to conceal assets and information from their creditors. We also believe assigning this responsibility to the Department makes sense given the central role of United States Trustees in ensuring the integrity of the bankruptcy system.

The Department, however, opposes section 404 in its current form because of its feasibility and cost. The proposal requires independent Certified Public Accountants (CPAs) to conduct "audits" in accordance with "generally accepted auditing standards," a term of art within the accounting profession. It is questionable whether an audit conducted by an independent CPA and in accordance with these principles is feasible or desirable in most consumer cases given that a debtor's financial records are often nonexistent or in disarray.

Assuming that the practical problems associated with conducting an audit can be resolved, the provision as drafted would be costly. The Department has estimated that implementing the audit program contemplated by this section could cost from \$45 million to more than \$174 million over five years. This cost is in large part a function of the number audited and the use of independent CPAs. The cost of the audits could easily exceed the total sum appropriated to fund the entire United States Trustee program in Fiscal Year 1998. Moreover, the bill provides no funding mechanism to cover these costs.

The use of an audit report is left similarly vague. Copies of the audit reports are to be filed with the Court, but it is uncertain if this would be merely for the purpose of providing a public repository for the report accessible to all parties in interest, or if it is intended that the Court would, *sua sponte*, initiate action based on the auditors' findings. The report of each audit is also to be filed with the United States Attorney, thereby burdening that office with storing and indexing this information. However, absent notification from the United States Trustee that a material misstatement has been made in a case that warrant a criminal investigation, it is unclear what if any additional role the United States Attorney is to play in resolving audit deficiencies.

We recommend that the following changes be made to Section 404:

- Require the Attorney General to establish a system to audit consumer debtor cases on either a random or targeted basis, but without a minimal prescribed percentage;
- Eliminate the mandatory use of independent CPAs and generally accepted auditing standards, and grant the Attorney General the authority to determine and define the scope of the audits;
- Eliminate the requirement of filing the audit reports with the court and the United States Attorney;
- Provide a civil sanction to ensure debtor's compliance with the audit and defer a section 727 discharge until the U.S. Trustee reports a satisfactory audit; and
- Provide a source to fund the audits other than assessments upon the affected debtors.

Given the size of the audit program and its cost, the Department also urges the committee to consider a pilot program for audits that would allow the costs and benefits of various approaches to be considered. In addition, consideration should be given to limiting random audits to chapter 7 debtors.

Section 405. Giving Creditors Fair Notice in Chapter 7 and 13 Cases

Section 405 of H.R. 3150, which is similar to section 309 of S. 1301, would amend the notice provisions of section 342 of the Bankruptcy Code to require, in an individual bankruptcy case, that notices to creditors include any account number and be sent to the address that a creditor has specified. It also would require that a matrix of addresses prescribed by creditors for notices in a district be established. Further, unless actual notice is sent to the specified addresses and received by a responsible person or department at the creditor, notice would be ineffective, the creditor could not be sanctioned for violating the automatic stay and turnover of property could not be enforced.

While this section has some technical difficulties, we strongly support its intent to ensure that debtors know how to give effective notice and that the creditors, in fact, receive such notice. Indeed, we urge that this provision for fair notice apply to all bankruptcy chapters -- there is no reason to limit this provision only to chapter 7 and 13. We would be happy to work with the Committee to draft acceptable language.

Section 406. Debtor to Provide Tax Returns and Other Information

Section 406 of H.R. 3150 would, *inter alia*, require the debtor to provide the United States Trustees with copies of all Federal tax returns for the 3 most recent tax years, and copies of all returns filed during the pendency of the bankruptcy case. The United States Trustee would be required to maintain these records and to make them available to any party in interest for inspection and copying within 10 days of receiving a request.

The Department supports the requirements that tax records be provided by the debtor, but opposes the requirement that these documents be filed with the United States Trustees. Rather, we believe these records should be filed with the court as a repository of the public record. In particular, we believe that these tax documents should be public records, given the consequences that would flow under section 407 of the bill, which would lead to a case being automatically dismissed if the tax returns are not filed within 45 days following the petition. Alternatively, the records could be filed with the chapter 7 and chapter 13 trustees, who, both under existing law and the provisions of the bill, have an obligation to review the debtor's financial conditions.

Section 411. Jurisdiction of Courts of Appeals

Section 411 of H.R. 2150 would amend 28 U.S.C. § 1293 to allow a court of appeals to review: (i) final orders in core bankruptcy matters; (ii) all bankruptcy injunctions; and (iii) orders appointing a trustee or extending the period within which the debtor exclusively may file a plan. Further, it would allow a court of appeals to review all interlocutory bankruptcy orders in its discretion or upon certification by the issuing court.

We strongly oppose this change. In the 1978 Bankruptcy Reform Act, the Congress established bankruptcy courts that were independent of the district courts, but declined to confer Article III status on the bankruptcy judges. In Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), the Supreme Court found this 1978 grant of jurisdiction to bankruptcy judges unconstitutionally broad because it conferred Article III authority on judges who lacked the life tenure and salary security of Article III judges. Two years later, Congress responded by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), Pub. L. No. 98-353, 98 Stat. 333. BAFJA sought to remedy the constitutional deficiencies identified in Northern Pipeline by vesting jurisdiction over bankruptcy cases in the district courts and allowing the district courts to refer cases to the bankruptcy courts, which were expressly made units of the federal district courts. 28 U.S.C. §§ 151, 157, 1334. BAFJA specifies the so-called "core" matters as to which bankruptcy judges may issue final orders and reserves "non core" matters for final decision by the federal district court.¹ 28 U.S.C. § 157.

Currently, the district courts review most bankruptcy court rulings before final appeal may be taken to the courts of appeals. Section 412 would displace the district court from bankruptcy matters, except where it withdraws the reference or where it enters a final judgment in a non-core proceeding. This

¹ "Core" matters are generally those matters arising directly under the bankruptcy laws, such as the administration of the estate, the allowance or disallowance of claims and the estimation of claims or interest for the purposes of confirming a plan. "Non core" matters are proceedings merely "related to" a bankruptcy, for example, a suit not arising under the bankruptcy laws brought by a debtor against a third party who has not voluntarily entered the bankruptcy proceeding. In non core matters, a bankruptcy judge may enter only a recommended decision; the final order is entered by a district judge following de novo review of the bankruptcy judge's proposed findings.

would diminish substantially the district court's oversight of bankruptcy judges. That oversight is a key element of the constitutional cure enacted in BAFJA. The Supreme Court has yet to rule upon the BAFJA structure, and its constitutionality has been hotly debated. Until this constitutional question is resolved, we urge the Congress not to lessen district court review and remove this potentially significant basis for the constitutionality of the bankruptcy court's exercise of judicial power.

Sections 441 and 442. Data collection

Section 441 of H.R. 3150 would add 28 U.S.C. § 159 to require the Executive Office for United States Trustees to compile statistics regarding consumer bankruptcy filings and report annually to Congress. We support this provision as a necessary aid to tracking the health of the consumer bankruptcy system.

The Department opposes, however, provisions in section 441 that would require the collection of certain categories of data for several reasons. First, the report would be based largely on information derived from bankruptcy schedules filed by the debtors, and this information is often subject to questions about accuracy. Second, many of the requirements for data required in Section 441 would call for information that would not be routinely collected and analyzed by either the United States Trustees or the courts. Working with information on a day to day basis increases its integrity, and as errors are identified they are corrected. Information that is gathered for reporting purposes only, as is the case for many of the elements of Section 441, lacks this essential safeguard of data integrity.

Finally, the Department also opposes the provision directing the Administrative Office of the United States Courts ("Administrative Office") to prescribe the form of the statistics. We believe section 441 should be amended to provide the Executive Office of the United States Trustees, after consultation with the Administrative Office, with the discretion on what statistics to compile within certain broad categories. This approach would create a flexible tool in which to provide Congress with crucial and timely information about the bankruptcy system.

The Department supports the data collection provisions of section 442, which would add a new 28 U.S.C. § 589b. This provision would build upon data that will be readily ascertainable after amendment to the final and periodic report forms. We do note two problems with this provision. It conflicts with section 235, which requires the Administrative Office to create an official form for periodic reports in small business chapter 11 cases. Section 235 should be amended to reflect the role of the Attorney General in promulgating the form of these reports.

We also question the provision in section 442 requiring the Attorney General to maintain final reports in one or more central locations. Currently, all final reports are filed with the courts, and section 442 provides for electronic access through the Internet. We would be happy to work with the Committee to recommend appropriate changes to these provisions.

Section 501. Treatment of Certain Liens.

Section 501 of H.R. 3150 deals with subordination of tax liens under section 724(b) of the Code, and is identical to section 2 of S. 1149, the Investment in Education Act, a bill passed by the Senate on October 30, 1997. Under the proposed changes, ad valorem property taxes would generally be protected from subordination. Reversing current law, expenses of a failed chapter 11 proceeding would not be given preferential treatment over tax liens, with a limited exception. Exhaustion of unencumbered assets would be required before tax liens could be subordinated, and expenses of preserving or disposing of secured property must be recovered from the property (reducing the expenses to which a tax lien would be subordinated).

We support this provision. The public fisc should not be required to subsidize failed chapter 11 cases by having tax liens subordinated in order to pay administrative expenses of insolvent reorganization proceedings. Moreover, in chapter 7 cases, other unencumbered assets should be used to satisfy administrative expenses and any expenses properly allocable to secured claims should be recovered from the property.

Section 502. Effective Notice to Government

Section 502 of H.R. 3150 would amend section 342 of the Code to improve notice to the entities most frequently participating in the bankruptcy process -- governmental units. It would require identification of the agency through which the debtor is indebted; disclosure of identifying information concerning the claim (such as taxpayer identification numbers and real estate parcel designations); and creation of a matrix of addresses of governmental units. In addition, it would give incentives to debtors to use the designated addresses.

We support these provisions. They are in accord with Recommendation 4.2.1 of the National Bankruptcy Review Commission, which recommended redressing the current deficiencies in notifying governmental units. This provision would ensure reasonable identification of both the affected government agency and the debtor obligated on the debt. It would also create a mechanism for giving debtors accurate addresses to which notices should be sent. Finally, it would promote compliance with the mechanism by providing exceptions to bar dates and dischargeability when a debtor fails to comply with the prescribed

mechanism. We suggest, however, that the reference point in subsection (c) be corrected from notice of the bankruptcy "case" to notice of "the matter or proceeding in respect to which the notice was provided."

Section 503. Notice of Request for a Determination of Taxes.

Section 503 of H.R. 3150 would amend section 505(b) of the Code to provide that a request for prompt audit of a tax return should be sent to the office designated by the taxing authority. Thus, for example, a notice sent to the Secretary of the Treasury in Washington, rather than to the Special Procedures unit of the IRS District Director where the bankruptcy is pending, would not suffice. We support this proposal. However, we do not believe it necessary to introduce further complications by requiring that the designation must be made on a local court registry.

Section 504. Rate of Interest on Tax Claims.

Section 505 of H.R. 3150, as introduced provided that when a governmental unit is entitled to postpetition interest on a tax claim, the rate of interest would be the rate determined under section 6621(a)(2) of the Internal Revenue Code (26 U.S.C.). Under current law, the court must generally determine the "market rate" for such interest. As reported by the Subcommittee, Section 504 of H.R. 3150 provides that if the holder of an unsecured prepetition tax claim is entitled to interest on such claim, the minimum rate of interest will be the Federal short-term rate rounded to the nearest full percent, determined under section 1274(d) of the Internal Revenue Code for the calendar month in which the plan is confirmed, plus three percentage points.

We oppose this provision. We believe that the legislation should simply fix the interest rate for deferred tax payments at the applicable nonbankruptcy interest rate, i.e., the section 6621(a)(2) rate. Moreover, the legislation should address, as well, the interest rate for secured tax claims.

Section 505. Tolling of Priority of Tax Claims Time Periods.

Section 505 of H.R. 3150 would suspend the time periods under the Code pertaining to the priority and discharge of tax claims during the pendency of a prior bankruptcy for the period in which the government was prohibited from collecting the claim, plus six months. We support this proposal. The filing of successive bankruptcies should not disadvantage governmental units by reducing their opportunity to collect a tax, and should not result in a more expansive discharge of tax claims for debtors. Adding six months to the suspension period mirrors section 6503(h) of the Internal Revenue Code (26 U.S.C.), and is appropriate given the disruption to collection efforts caused by

the filing of a bankruptcy petition. The additional time is needed to get collection efforts back on track.

Section 507. Chapter 13 Discharge of Fraudulent and Other Taxes.

Section 507 of H.R. 3150 would generally conform the discharge of tax claims in chapter 13 cases to the discharge of such claims available in chapter 7 cases. We support this provision. Under current law, priority tax claims for which a proof of claim is filed must be paid in full pursuant to the plan, and if a proof of claim is not filed, such taxes may be discharged. Taxes attributable to fraud or unfiled returns can be discharged upon completion of all payments under the plan, but many jurisdictions permit plans providing for "zero payment" of taxes, or plans distributing payments covering only small percentages of such claims. Permitting taxes attributable to fraud, or for which returns have never been filed, to be discharged on the basis of a tax evader's commitment to make payments to his or her creditors for three or five years makes bankruptcy a tax haven. In our view, a debtor should be entitled to the same discharge in chapters 7 and 13, as proposed in section 507. Taxes attributable to fraud should be not discharged in a chapter 13 proceeding, and chapter 13 plans should not be confirmed unless prepetition tax returns are filed as proposed in section 516 of the H.R. 3150.

Section 508. Chapter 11 Discharge of Fraudulent Taxes.

Section 508 of H.R. 3150 would deny a discharge to a chapter 11 corporate debtor for taxes that arose because of fraudulent tax returns or an attempt to evade taxes. We support this proposal. Corporations that engage in tax fraud or otherwise attempt to evade taxes should not be entitled to a discharge vis-a-vis those taxes.

Section 509. The Stay of Proceedings in Tax Court.

Section 509 of H.R. 3150 would limit the automatic stay applicable to Tax Court proceedings to proceedings regarding a tax liability for a tax period ending before the order for relief, and would clarify that the automatic stay does not apply to an appeal of a decision determining a tax liability of the debtor. We support these proposals. No purpose is served in staying the commencement or continuation of a Tax Court proceeding for taxes incurred postpetition. Moreover, a court of appeals case regarding the liability of a taxpayer for a tax should be allowed to continue to a decision.

Section 510. Periodic Payment of Taxes in Chapter 11 Cases.

Section 510 of H.R. 3150 would require the payment of tax claims in installments over the course of the plan with the result that balloon payments would be proscribed. We support this prohibition on balloon payments.

In addition, section 510 would modify the deferral period for payment of prepetition tax claims in a chapter 11 plan by allowing payments to be made within six years of the petition date. Current law provides that payments are to be completed within six years of the assessment date of the taxes. We oppose the proposal to measure the deferral period from the date of the petition, rather than from the assessment date. The proposal would extend the payment of some prepetition taxes for a period extending beyond the statute of limitations on tax collection. This would not only raise questions as to the legality of accepting payments for which collection would otherwise be barred, but would also prevent the IRS from seeking to enforce collection in the event of a default.

Finally, we note the version of H.R. 3150 approved by the Subcommittee does not include a provision that was in the original bill that would have treated secured tax claims as priority claims for deferred payment purposes under section 1129(a)(9)(C) of the Code, where such claims would have had priority absent their secured status. We urge you to restore this provision to the bill. We believe that it is illogical for the Bankruptcy Code to treat tax claims that would be entitled to priority absent their secured status less favorably than unsecured priority claims.

Section 511. The Avoidance of Statutory Tax Liens Prohibited.

Section 511 of H.R. 3150 would resolve litigation over the interaction of section 545(2) of the Code, and the protection accorded certain purchasers of property under 26 U.S.C. §6323 even after a notice of tax lien has been filed. We support the proposal. The purpose of the special treatment for such purchasers is to facilitate the flow of these goods in commerce. Debtors would receive a windfall if section 545(2) of the Code applied to tax liens.

Section 514. Income Tax Returns Prepared by Tax Authorities.

Section 514 of H.R. 3150 would concern the exception from discharge for taxes relating to unfiled tax returns when substitute tax returns are prepared by taxing authorities. For tax purposes, a tax return prepared by the IRS is not considered a tax return, unless it is signed by the taxpayer. The proposal would confirm that a substitute return prepared by the IRS is not a return for discharge purposes, unless it is signed by the

taxpayer. This section further provides, however, that a written stipulation to a judgment entered in a nonbankruptcy court would be treated in the same manner and have the same effect as a signed tax return. We are uneasy at the prospect of having different definitions of "tax returns" for Internal Revenue Code and Bankruptcy Code purposes. Furthermore, stipulation to a judgment represents a level of cooperation much different in degree and kind than the signing under penalty of perjury of a return prepared by a taxing authority. Thus, we do not support the provision equating a stipulated judgment with a signed return.

Section 515. The Discharge of the Estate's Liability for Unpaid Taxes.

Section 515 of H.R. 3150 would absolve the debtor's estate of liability for administrative taxes after a request for a prompt audit is made in accordance with section 505(b) of the Code. Several courts have held that while a trustee, the debtor, and a successor to the debtor are discharged from liability for administrative period taxes after a prompt audit request is made, the estate remains liable for any taxes uncovered by a taxing authority in a subsequent audit. We oppose the proposal to extinguish the liability of the estate. Section 505(b) already protects the trustee, the debtor and the debtor's successors from liability, and extinguishing the liability of the estate for taxes that it should have reported on its return will result in an unjust windfall for other creditors.

Section 516. Requirement to File Tax Returns to Confirm Chapter 13 Plans.

Section 515 of H.R. 3150 would require chapter 13 debtors to file all tax returns due for six years prior to the petition date, and implements a proposal adopted by the National Bankruptcy Review Commission. Tax authorities are placed at a severe disadvantage in filing timely proofs of claim when a chapter 13 debtor is delinquent in filing prepetition tax returns. We support this proposal. It is ironic and troubling that individuals who invoke the protections of government against their creditors, defy their government in failing to discharge their tax return filing responsibilities. We submit that chapter 13 plans of debtors who continue to disregard their tax return filing obligations should not be confirmed.

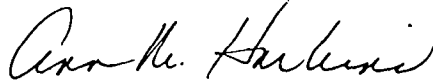
Section 518. Setoff of Tax Refunds.

Section 518 of H.R. 3150 would create an exception to the automatic stay allowing taxing authorities to set off prepetition tax refunds against prepetition tax claims. We support this proposal.

Even when consumer bankruptcy filings were a mere 300,000 cases a year, the cost to the government of filing lift stay motions for relief from the automatic stay in order to effect a setoff of tax refunds would have been significant. With consumer filings now surpassing 1.3 million cases a year, the cost of filing such lift stay motions would be prohibitive. Given the number of cases in which refund offset arise, the solution is to permit taxing authorities to use the administrative processes that apply outside of bankruptcy rather than dealing with the issue on a case-by-case basis using a litigation model.

We look forward to working with the Committee as it considers these and other issues raised by H.R. 3150. The Office of Management and Budget advises that it has no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in cursive script, reading "Ann M. Harkins".

Ann M. Harkins
Acting Assistant Attorney General

United States Senate

WASHINGTON, DC 20510-2101

June 5, 1998

First Lady Hillary Rodham Clinton
The White House
Washington, D.C.

Dear Hillary,

Congratulations on your *Washington Times* column on bankruptcy reform and the serious problems that the pending bill poses for parents trying to collect child support. It was excellent -- you hit the nail on the head!

The bankruptcy proposals before both the House and the Senate pose a real threat to women and children, as well as older Americans, small business owners, and working families. The changes made in the Senate Judiciary Committee were cosmetic or minor and, to date, nothing has been done to address the abuses committed by the credit card issuers.

I commend you and the President for making this issue a priority, and I look forward to working with you on these issues in the weeks ahead.

With warmest regards,

Sincerely,



Edward M. Kennedy

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

COMMITTEES.

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW

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SUBCOMMITTEE ON SPACE AND AERONAUTICS
SUBCOMMITTEE ON BASIC RESEARCH

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE:
410 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
202-225-3816

DISTRICT OFFICE
1919 SMITH STREET, SUITE 1180
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
713-655-0050

May 1, 1998

The First Lady
Hillary Rodham Clinton
Office of the First Lady
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mrs. Clinton:

It was a pleasure joining you at the Women's Conference which was hosted by my colleague Congressman Martin Meehan, at the University of Massachusetts at Lowell. I was particularly interested in your comments concerning keeping child support as "protected income" under the current bankruptcy bill, H.R. 3150, the "Bankruptcy Reform Act of 1998," that is currently being considered in the House and scheduled for mark-up before the Committee on the Judiciary during the week of May 11-15.

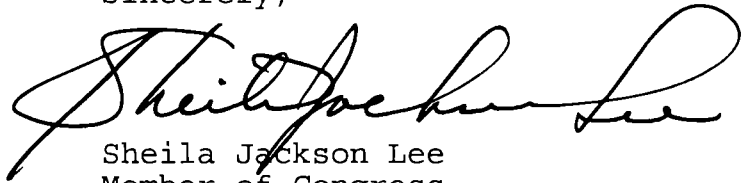
I sponsored an amendment to H.R. 3150 which was considered in the Subcommittee on Commercial and Administrative Law that would specify the payment or receipt of child support as a necessary expense and protected income under the criteria listed in the bill to determine a person's ability to repay their debts. Unfortunately, this amendment was defeated by the Republican majority on the committee, now I turn to you for assistance.

As the Chairwoman of the Congressional Children's Caucus, the safety and protection of our children is of paramount concern to me, as I know it is for you. This amendment does not allow or encourage debtors to evade their financial responsibilities, it merely allows parents who are facing bankruptcy to not be forced to abdicate the responsibility of caring for their children. If this amendment is not added to this bill, these funds will be left as prey to the many creditors seeking to take a significant portion of a debtor's available income.

Page 2

I am asking you to add your support to this upcoming battle by joining children's advocacy groups, and Members of Congress who are committed to children's issues to defend America's children by passing this amendment. Please feel free to contact me or Leon Buck of my staff at (202)225-3816 if I can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink, reading "Sheila Jackson Lee". The signature is fluid and cursive, with the first name "Sheila" being the most prominent.

Sheila Jackson Lee
Member of Congress

SJL:lcb

POSSIBLE PROPOSALS DEALING WITH REAFFIRMATIONS

Limit significantly the circumstances under which courts can approve a reaffirmation agreement. Currently, section 524(c) of the Bankruptcy Code imposes a host of limitations on reaffirmation agreements, including various disclosure requirements (e.g., a statement in the agreement that the agreement is not required by the bankruptcy code or by nonbankruptcy law). In addition, unless the debtor's agreement to the reaffirmation is evidenced by an affidavit of the debtor's attorney, section 524(c) requires the court to analyze reaffirmation agreements and approve only those agreements that do not impose an undue hardship on the debtor or a dependent of the debtor and are in the debtor's best interests. Notwithstanding these requirements, a recent Visa survey reported that 52% of debtors surveyed reported reaffirming one or more debts, often including unsecured debts. The National Bankruptcy Review Commission recommended that the requirements of section 524(c) be amended to provide that a reaffirmation agreement be permitted, with court approval, only if the amount of the debt that the debtor seeks to reaffirm: (i) does not exceed the allowed secured claim; (ii) the lien is not avoidable under the provisions of title 11; (iii) no attorney fees, costs or expenses have been added to the principal amount of the debt to be reaffirmed; and (iv) the motion for approval of the agreement is accompanied by underlying contractual documents and all related security agreements or liens, together with evidence of the lien perfection. This proposal would eliminate reaffirmation of unsecured debt -- this would not preclude debtors from seeking to maintain unsecured credit relationships, but rather would force debtors to go to chapter 13 to work out a repayment plan.

As an alternative to the Bankruptcy Review Commission's proposal, we could propose amendments that allow for the reaffirmation of unsecured debts but only where: (i) the reaffirmed debt, together with any other new debt incurred with respect to the same creditor, would be at an interest rate so that the payment of 2 percent of the debt per month would permit the full debt to be amortized in no more than 50 months; (ii) no attorney fees, costs or expenses have been added to the principal amount of the debt to be reaffirmed; and (iii) there is court approval (i.e., unsecured debts could not be reaffirmed independently by the debtor's attorney) and the motion for approval is accompanied by all underlying documents.

Penalize attempts by creditors to seek to enforce invalid reaffirmations. Sometimes creditors obtain debtor approval of reaffirmations, but do not meet the approval requirements of section 524(c). Often debtors make payments on such reaffirmations unaware that the agreements are unenforceable. The National Bankruptcy Review Commission recommended, and a bill by Congressman Nadler proposes, that a new section 524(k) be added to the Bankruptcy Code. This new subsection would allow an individual who has received a discharge to recover costs and attorneys fees, plus treble damages (at a minimum of \$5,000), from a creditor who threatens, files suit, or otherwise seeks to collect any debt that was discharged in bankruptcy and not the subject of a reaffirmation agreement in accordance with section 524.

High standard -
even more
heightened

ban -
unsecured -
add no
attorney's fees

presumption -
unless clear comp
benefit to debtor

see
unsec

- 2 -

Clarify the automatic stay to bar any threats that 707(b) motions will be filed and to bar creditors from soliciting reaffirmations of unsecured debt. Section 362(a)(6) of the Bankruptcy Code provides that the filing of a petition in bankruptcy operates as stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." While this provision unambiguously bars a creditors from seeking reaffirmations, some courts have ruled that creditors are free to solicit reaffirmations, as long as the solicitation does not contain "coercive" language. See In re Duke, 79 F.3d 43 (7th Cir. 1996). Other courts have gone so far as to allow solicitations that contain "mild warnings." See Brown v. Pennsylvania State Employees Credit Union, 851 F.3d 81 (3d Cir. 1988). Some of these courts might hold that letters indicating that the debtor is subject to a 707(b) motion are not violative of the automatic stay. To prevent creditors from using 707(b) motions and other devices coercively, section 362 could be modified to explicitly bar any threat by a creditor that a 707(b) motion will be filed and to bar creditors from soliciting reaffirmations of unsecured debt. Violations of this provision in the automatic stay could be punishable with liquidated damages or treble damages, plus attorney fees, similar to those discussed in the prior paragraph.

sec 8
unsec

GEORGE W. GEKAS
17TH DISTRICT, PENNSYLVANIA

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEES
CHAIRMAN—COMMERCIAL
AND ADMINISTRATIVE LAW
CRIME



*cc: Carol
Melanne
Nicole*

REPLY, IF ANY, TO

☒ 2410 HAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-3817
(202) 225-4315
FAX (202) 225-8440

☐ HARRISBURG DISTRICT OFFICE:
SECOND FLOOR
3605 VARTAN WAY
HARRISBURG, PA 17110-9335
(717) 541-5507
FAX (717) 541-5518

☐ LANCASTER COUNTY DISTRICT OFFICE:
SUITE 102-A
222 SOUTH MARKET STREET
ELIZABETHTOWN, PA 17022-2447
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☐ LEBANON DISTRICT OFFICE
108 B MUNICIPAL BUILDING
400 SOUTH 8TH STREET
LEBANON, PA 17042-6794
(717) 273-1451
FAX (717) 273-1673

Congress of the United States

House of Representatives

Washington, DC 20515-3817

May 7, 1998

Mrs. Hillary Rodham Clinton
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20502

Dear Mrs. Clinton,

As the author of the bankruptcy reform legislation currently making its way through the House of Representatives, I read with great interest your column ("Bankruptcy shouldn't let parents off the hook," May 7, 1998) this week. And, I am not surprised that you have the concerns that you do, considering the misinformation being circulated about the reform I am proposing. I can assure you, however, that my bill ensures that the welfare of our children does come first.

There seems to be some confusion as to the definitions of "non-dischargeable" and "priority" debts. You correctly note that some debts, such as taxes, student loans, alimony and child support are priority debts and are therefore non-dischargeable, meaning that these debts must be repaid. However, while priority debts are non-dischargeable, non-dischargeable debts are not necessarily a priority.

I believe that your confusion lies in a provision in my bill that makes credit card debt accrued 90 days prior to filing bankruptcy non-dischargeable. The current bankruptcy code makes credit card debt amassed 60 days prior to filing non-dischargeable. The extra 30 days were added as a result of a problem that I have witnessed with the present system (and one that many testified to during the course of our hearings). That is the charging up of debt in anticipation of filing for bankruptcy. In fact, much of the total debt figure that is attributed to credit cards is debt that is accrued in anticipation of filing for bankruptcy by people who max out their cards. The line of thought at play here is: "I can charge all I want and I will not have to pay it back."

My bill seeks to end this dishonest practice and keep people from taking of advantage the system. Let me see if I can explain this by way of your hypothetical family, Jan and Simon. Under the same scenario you lay out in your column, Simon, our divorced-injured-unemployed-father, who stopped paying child support and filed for bankruptcy, would in fact be responsible for any credit card debt he accrued days prior to filing for bankruptcy -- just as he is under current bankruptcy code.

At this point in your column you fall under the false impression that "child support payments and credit card obligations will be pitted against each other." Here again we must distinguish between "priority" and "non-dischargeable" debts. Child support and alimony remain priority debts under the Bankruptcy Reform Act, meaning that they will get paid back in full, 100 percent, before Simon pays off a single credit card -- including the cards he charged up just prior to filing for bankruptcy. While those last purchases will have to be paid off, since under my bill as it is under the current code they are non-dischargeable, child support and alimony will retain priority status

and must be paid back first.

Knowing that we share a common interest in the well being of our nation's children, you will be happy to learn that my bill, H.R. 3150, makes almost all marital obligations non-dischargeable in bankruptcy proceedings. For example, H.R. 3150 would enforce an agreement to pay a mortgage or sell the family home and pay the ex-spouse one-half of the sale price. H.R. 3150 also increases the ability of a spouse to collect back child support or alimony in a Chapter 13 plan by including these payments in the mandated needs-based test.

As you can see, the American family's best interests were in mind as I crafted this bill. The Republican Congress has worked too hard to improve child support collection to see it ever threatened. The past two Congresses have been unprecedented in cracking down on nonpaying parents and strengthening enforcement. Congress continues its commitment to children by protecting their interests in bankruptcy reform.

I hope that in the future we can discuss the impact of legislation on the American people so as to avoid the confusion experienced on bankruptcy. The bankruptcy lawyers who oppose reform, like so many in the past, lack any solid reason to stand against the bill and have resorted to scare tactics. Fortunately, now that you know the truth of the matter, we can enlist you in the battle to restore fairness and responsibility to the system and to beat down the propaganda that has even made it into the halls of the White House.

Very truly yours,

A handwritten signature in black ink, appearing to read "George W. Gekas", written over a horizontal line.

GEORGE W. GEKAS
Member of Congress

cc: The Washington Times
The Creators Syndicate



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 10, 1998
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 3150 - Bankruptcy Reform Act of 1998

(Gekas (R) PA and 75 cosponsors)

The Administration supports bankruptcy reform that requires responsibility of debtors who have the ability to repay a portion of their debts and prevents abuse of the bankruptcy system by all relevant parties. However, the Administration strongly opposes H.R. 3150 in its present form.

One provision of the bill would establish a rigid and arbitrary means test to determine whether a debtor could file for discharge of most debts under Chapter 7 or would be required to establish a repayment plan under Chapter 13 rules. The Administration does not oppose limiting access to Chapter 7 for debtors with the ability to repay a portion of their debts. However, the formulaic mechanism in H.R. 3150 will not always distinguish accurately those debtors who have the capacity to repay from those that do not have that capacity. A properly structured system would give bankruptcy courts greater discretion to consider the specific circumstances of a debtor in bankruptcy.

The formulaic approach in this bill, as currently written, could result in moving to Chapter 13 those debtors who are likely to fail to complete required repayment plans. These debtors would return to Chapter 7 with a diminished ability to repay their nondischarged debt -- including child support and alimony. There are other approaches to limiting access to Chapter 7 that would not have this result. If debtors truly have the ability to repay a portion of their debt, after taking into account all relevant factors including child support and alimony payments, a successful, supervised repayment plan under Chapter 13 rules could result in more reliable payment of child support and alimony than would the unsupervised situation after a Chapter 7 discharge.

H.R. 3150 also still would make nondischargeable certain credit card debt, although the manager's amendment makes a helpful change by eliminating one of three such provisions. The Bankruptcy Code generally makes debts nondischargeable only where there is an overriding public purpose, as with debts for child support and alimony payments, educational loans, tax obligations, or debts incurred by fraud. There has been no sufficient finding that current protections against fraud and debt run-up prior to bankruptcy are ineffective and that the additional debts made nondischargeable by this bill rise to that level of public priority. Moreover, by making these credit card debts nondischargeable, the bill puts them in competition with payments to a former spouse or custodial parent after the debtor leaves bankruptcy. This competition could diminish the ability of debtors to fulfill their child support and alimony obligations. Amendments made during the Judiciary Committee mark-up and in the manager's

amendment would make it easier to collect child support and alimony during bankruptcy, but do not sufficiently address the problems created by the bill's new nondischargeability provisions, particularly in the period following bankruptcy.

The Administration looks forward to working with the Congress on a balanced package of reforms that addresses these and other concerns and that requires responsibility on the part of both debtors and creditors.

October 6th, 1998

Mr. John M. Doe
Address Line 1
Address Line 2
City, State 20001-Zip

Dear /hrc/misc/col.brl2:

I am writing to share my column of last week in which I applaud the bipartisan and responsible approach to bankruptcy reform achieved by the Senate. I am deeply disappointed that, based on a preliminary review, the Administration appears to be unable to support the conference report which significantly differs from the Senate's balanced approach. I know you share my view that bankruptcy reform must be done right and I hope we can continue to count on your critical leadership in protecting America's families.

With warm regards, I am

Sincerely yours,

Hillary Rodham Clinton

THE WHITE HOUSE

October 9, 1998

Dear Tom,

I understand that the bankruptcy Conference Report strips essential, balancing provisions fought for by Senate Democrats. I know you will be playing a critical role in ensuring that the unfair, irresponsible bill gets the opposition it deserves.

As ever, I am grateful for your leadership.

Yours,

Hillary

Leg. Affairs advises that Sen. Daschle is the most critical member to bolster on this issue. However, since your last note on this issue went to him, this version isn't appropriate. If you're willing, I recommend that you pen a personal note to him thanking ~~him~~ for his

leadership and saying how important this issue is.

Something like:

"I understand that the bankruptcy reform conference report strips ~~the~~ essential, balancing provisions fought for by Senate Democrats. I know you will be playing a critical role in ensuring that ~~it~~ an unfair, irresponsible bill

gets the opposition it deserves, and, as ever, I am grateful for your leadership."

THE WHITE HOUSE
WASHINGTON

October 8, 1998

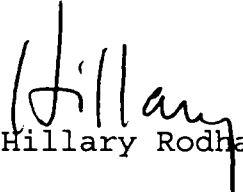
The Honorable Max Baucus
United States Senate
Washington, D.C. 20510-2602

Dear Senator Baucus:

I am writing to share my column of last week in which I applaud the bipartisan and responsible approach to bankruptcy reform achieved by the Senate. I am deeply disappointed that, based on a preliminary review, the Administration appears to be unable to support the conference report which significantly differs from the Senate's balanced approach. I know you share my view that bankruptcy reform must be done right and I hope we can continue to count on your critical leadership in protecting America's families.

With warm regards, I am

Sincerely yours,


Hillary Rodham Clinton

October 9, 1998

Mr. John M. Doe
Address Line 1
Address Line 2
City, State 20001-Zip

Dear /hrc/misc/col.brl:

Enclosed is a copy of my recent column which discusses the pending bankruptcy reform legislation and the important issues that are at stake. I believe that we share a common goal to achieve fair, responsible bankruptcy reform legislation - legislation of which we can all be proud and that will best serve the American people. You have my thanks for your leadership as you consider this important issue in the critical days ahead.

Sincerely yours,

Hillary Rodham Clinton

Nicole R. Rabner

10/08/98 10:37:58 AM

Record Type: Record

To: Alice J. Pushkar/WHO/EOP

cc:

Subject: list from Leg.

Baucus

Bingaman

Breaux

Bryan

Byrd

Conrad

Dorgan

Feinstein

Ford

Glenn

Graham

Hollings

Johnson

Kerrey

Lautenberg

Landrieu

Levin

Lieberman

Moynihan

Robb

Rockefeller

Torricelli

Wyden

italics = biggest concern

Nicole R. Rabner

09/28/98 06:17:51 PM

Record Type: Record

To: Alice J. Pushkar/WHO/EOP

cc:

Subject: MOC

The list is somewhat longer than I promised:

Senate:

Orrin Hatch (Chairman)

Charles Grassley

Jeff Sessions

Patrick Leahy

Richard Durbin

Christopher Dodd

Edward Kennedy

Paul Sarbanes

Dianne Feinstein

Thomas Daschle

House:

Henry Hyde (Chairman)

George Gekas

Sheila Jackson-Lee

Martin Meehan

Rick Boucher

Ed Bryant

Jerrold Nadler

John Conyers

William Delahunt

~~John McHugh~~ *McHugh*

Bob Goodlatte

Steve Chabot

HRC letter list.