Date: 03/17/99 Time: 09:20
Working Women's Gains Tied to Rise in Family Incomes in New England

By Diane E. Lewis, The Boston Globe
Knight Ridder/Tribune Business News

Mar. 17--Gains made by working women have fueled a dramatic growth in family income in New England, evidence that women have made significant strides in the labor force.

Between 1983 and 1997, the real earnings of married couples with college degrees in New England rose 45 percent, from $70,079 to $101,780, much of that gain because of the increased earning power of married women. Additionally, the real median income of middle-class New England families grew one-third faster than national family income.

Married women working today are better educated, are higher paid, hold better jobs, and are working more hours than ever before, according to a study released to the Globe yesterday.

"These are enormous increases in New England, and they are mostly due to the labor-force involvement of wives, whose educational attainment is rising," said economist Paul Harrington of Northeastern University's Center for Labor Market Studies, who wrote the study in conjunction with Thomas Kochan of the Work and Employment Institute at the Massachusetts Institute of Technology.

At the same time, mothers are now working an average of 1,600 more hours per year than they did in 1983.

Barbara Marx of Wellesley should know. A vice president at Fidelity Investments, she has always worked full time. And she has continued to do it with two children, putting in 12 hours at the office each day before factoring in the commute, and relying heavily on a "tremendous support system."

"I have been working since before my kids were born," said Marx. "I have worked forever."

As the second and third generation to enter the work force in large numbers, married women with children are now an integral part of the middle-class wage gains that have fueled New England's bustling economy.

Between 1983 and 1997, for example, the median earnings of married working mothers rose 77 percent, accounting for almost two-thirds of the real income gains of such dual-earner households.

By contrast, men in such households experienced an income gain of just 9.8 percent. In dollar amounts, however, the median pay for men continued to be twice as much as for women.

During the same period, married couples with some college or postsecondary training saw their incomes increase 22.3 percent, to $68,080 from $55,684.

Lisa Wood, 39, a senior partner at the law firm of Nutter, McClennen & Fish, acknowledged that if she stopped working today, her family's lifestyle would change substantially.

"But that being said, I would never do what I do, in terms of having a very demanding job, for the money," she said. "You have to have passion for your work."

MIT's Kochan, president of the Industrial Relations Research Association, said the percentage of married women entering New England's labor force has increased from just under 70 percent to nearly 80 percent over the study period. The study examined New England and the nation as a whole, but did not look at other regions.

New England's labor shortage, and the increased demand for workers in such fields as financial services and high technology, have helped professional women entering the market garner top-paying jobs.

At the same time, experts say, working mothers' increased hours and bigger job responsibilities are having a profound effect on family life.

"Women are getting better jobs and their income is now crucial to the family, but, by and large, the family has not restructured to support working women," said Joan K. Peters, author of "When Mothers Work: Loving Our Children without Sacrificing Ourselves."

"Those who can afford it are outsourcing some of their responsibilities to nannies, to cleaning people, to day care," said Peters, "but they are doing that because the woman's responsibilities at home are still not being shared equally between men and women."

Even when men and women are equal partners at home, both now face the demand of the 50- to 60-hour work week as well as the ongoing perception among employers that leaving early to pick up a child or attend a school conference is largely women's work. Peters calls this situation a hidden fault-line, and she said it has led to increased stress and anxiety among working women with children.

In releasing their report yesterday, both Harrington and Kochan said they are hoping to generate dialogue and solutions for working parents whose job responsibilities are preventing them from meeting their families' needs. Their paper, titled "Building a Family Centered Labor Market Policy," will be presented Monday at a Northeastern University conference.

Marx, who describes herself and her husband, an Internet consultant, as "equal partners," said they have managed by relying on a support system of service providers, friends, and family members.

"No matter what age your children are, if you are working full time it is difficult, and you need a tremendous support system," Marx said. "It definitely helps if your partner is oriented toward family, which my husband is. It also helps to have an army of people and baby sitters."

Nationally, about 5.5 percent of 54 million households of married couples currently rely on the wife to bring home the bulk of the family paycheck, federal statistics show. Among these dual-earner families, 22 percent of wives now earn more than their husbands, up from 18 percent in 1987 and 4.4 percent in 1970.

When New York-based Catalyst examined women's pay in a study of 461 female vice presidents or top executives at Fortune 1,000 companies two years ago, it found that 75 percent were primary earners and 64 percent were married with children.

Constance Armstrong, executive director of the Boston Club, has noticed the changes.

"Typically, a woman is in management for 10 years before she joins the Boston Club," she said. "Now, we are seeing women coming in at younger ages. That implies to us that women are achieving higher management positions at younger ages."

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

THE DIRECTOR

March 23, 1999

The Honorable John Conyers, Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Conyers:

Thank you for your letter of March 4, 1999, to the President regarding bankruptcy reform. He has asked me to respond on his behalf. The President appreciates your kind words about the role that he and the First Lady played during last year's debate on bankruptcy reform. He also appreciates your continued dedication to this issue.

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 President was disappointed that the last Congress failed to produce legislation that he could support. He remains hopeful that bipartisan consultation and compromise will result in legislation that he can enthusiastically sign this year.

Last year the Administration expressed its strong opposition to the House-passed version of H.R. 3150. We encouraged passage of the Senate bill "as an important step toward balanced bankruptcy reform," but noted that the Administration would support its enactment "only if the essential reforms incorporated by the Senate managers' amendment [were] preserved and strengthened and the unbalanced and arbitrary elements of the current House bill [were] omitted." Although we thought that the Senate bill could be further improved, we believed that the extraordinary bipartisan support for the Senate bill was an endorsement of balance and moderation. We were disappointed that the Conference Report failed to include key provisions of the Senate bill, thus failing the test of balance. In my letter to Congressional leadership dated October 9, 1998, I noted that the President's senior advisors recommended that the President veto the Conference Report. Our position from last year has not changed.

During this year's debate, the Administration will continue to encourage Congress to find an appropriate balance. Among the issues that must be addressed are:

- **Access to Chapter 7:** Any "means test" imposed 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 repayment plan. Thus, debtors affected by a means test must be given a meaningful opportunity to have their specific circumstances considered by bankruptcy courts with discretion to determine whether they genuinely have the capacity to repay a portion of their debts. In addition, the time periods and thresholds used in any means test should be set to ensure that only those debtors with a strong likelihood of success are denied access to Chapter 7.

- **Nondischargeable Debts:** It is generally inappropriate to make post-bankruptcy credit card debt a new category of nondischargeable debt. The Bankruptcy Code 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. We remain skeptical that the current protections against fraud and debt run-up prior to bankruptcy are ineffective and that the additional debts made nondischargeable by this bill meet the standard of an overriding public purpose. If new categories of nondischargeable debt are to be created, however, they should be narrowly tailored and limited to situations where the debtor is clearly abusing the system, such as when the debtor: (1) incurred the debt to pay nondischargeable debt with an intent to avoid the debt in bankruptcy; and/or (2) incurred the debt on the eve of bankruptcy for goods and services that are not reasonably acquired to support the debtor's household.

- **Coercive Creditor Practices:** Particularly if we are to provide new opportunities for creditors to challenge debtors' use of the bankruptcy system under the 707(b) abuse test, it is imperative that we adequately limit prevalent abusive creditor practices such as coercive reaffirmations and violations of the automatic stay. While the Senate bill initially took laudable steps in this direction, the Conference Report rolled back existing consumer protections by denying consumers an effective means for remedying the harm from such practices and eliminating the current authorization for penalties for intentional violations of debtor rights.

- **Consumer Information and Protection:** The challenge posed by the unprecedented level of bankruptcy filings requires us to ask greater responsibility of both debtors and creditors. Credit card companies must give consumers more and better information so that they can understand and better manage their debts.

- **Homestead Exemptions:** At the same time that we are creating a system that will deny certain moderate-income Americans access to the traditional "fresh start," we should also close the loopholes that allow the wealthy to shield hundreds of thousands of dollars of wealth from their creditors.

We look forward to working with you and your colleagues on both sides of the aisle to address these and other important concerns and to produce responsible, balanced bankruptcy reform.

Sincerely,

Jacob J. Lew
Director

Identical Letter Sent to the Honorable Jerrold Nadler

[DOJ: PLEASE COMPARE AGAINST DOJ WHITE PAPER FROM LAST YEAR AND MAKE SURE THAT THIS IS CONSISTENT.]

[OMB: IN CLEARANCE, PLEASE ADVISE AGENCIES NOT TO RELITIGATE ISSUES THAT WERE RESOLVED DURING LAST YEAR'S CLEARANCE OF EARLIER LETTERS.]

[SHOULDN'T LETTER ALSO REFERENCE THE PROVISIONS THAT VARIOUS AGENCIES ESPECIALLY WANT: TREASURY RE FINANCIAL CROSS-NETTING, INTERIOR RE MINERAL LEASES, AND HUD RE SINGLE ASSET BANKRUPTCY?]

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

Dear Mr. Chairman:

We understand that the House Judiciary Committee will mark up H.R. 833, the Bankruptcy Reform Act of 1999, on March 25, 1999. This letter provides the position of the Administration on consumer bankruptcy reform, and outlining the Justice Department's views on H.R. 833 as a whole.

General Administration Perspectives [CONFORM BELOW TO FINAL LETTER AS SENT]

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 President remains hopeful that bipartisan consultation and compromise will result in legislation that he can enthusiastically sign this year.

Last year the Administration expressed its strong opposition to the House-passed version of H.R. 3150. We encouraged passage of the Senate bill "as an important step toward balanced bankruptcy reform," but noted that the Administration would support its enactment "only if the essential reforms incorporated by the Senate managers' amendment [were] preserved and strengthened and the unbalanced and arbitrary elements of the current House bill [were] omitted." Although we thought that the Senate bill could be further improved, we believed that the extraordinary bipartisan support for the Senate bill was an endorsement of balance and moderation.

During this year's debate, the Administration will continue to encourage Congress to find an appropriate balance. Our concerns from last year have not changed. Among the issues that must be addressed are:

- **Access to Chapter 7:** Any "means test" imposed 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 repayment plan. Thus, debtors affected by a means test must be given a meaningful opportunity to have their specific circumstances considered by bankruptcy courts with discretion to determine whether they genuinely have the capacity to repay a portion of their debts. In addition, the time periods and thresholds used in any means test should be set to ensure that only those with a strong likelihood of success are affected.

- **Nondischargeable Debts:**

  It is generally inappropriate to make post-bankruptcy credit card debt a new category of nondischargeable debt. The Bankruptcy Code 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~~public purpose, as with debts for child support and alimony~~. We remain skeptical that the current protections against fraud and debt run-up prior to bankruptcy are ineffective and that the additional debts made nondischargeable by this bill rise to that level of public priority. If new categories of nondischargeable debt are to be created, they should be narrowly tailored and limited to situations where the debtor is clearly abusing the system. That is, such as when the debtor: (1) incurred the debt to pay nondischargeable debt with an intent to avoid the debt in bankruptcy; and/or (2) incurred the debt on the eve of bankruptcy for goods and services that are not reasonably acquired to support the debtor's household.

- **Coercive Creditor Practices:** Particularly if we are to provide new opportunities for creditors to challenge debtors' use of the bankruptcy system under the 707(b) abuse test, it is imperative that we adequately limit prevalent abusive creditor practices such as coercive reaffirmations and violations of the automatic stay. While ~~the~~ last year's Senate bill initially took laudable steps in this direction, ~~the~~ last year's Conference Report rolled back existing consumer protections by denying consumers an effective means for remedying the harm from such practices and eliminating the current authorization for penalties for intentional violations of debtor rights.

- **Consumer Information and Protection:** The challenge posed by the unprecedented level of bankruptcy filings requires us to ask greater responsibility of debtors and creditors both. Credit card companies must give consumers more and better information so that they can understand and better manage their debts.

- **Homestead Exemptions:** At the same time that we are creating a system that will deny certain moderate-income Americans access to the traditional "fresh start," we should also close the loopholes that allow the wealthy to shield hundreds of thousands of dollars of wealth from their creditors.

Justice Department Comments

TITLE I: CONSUMER BANKRUPTCY PROVISIONS

SUBTITLE A: NEEDS BASED BANKRUPTCY

Section 102. Dismissal or Conversion.

Section 102 of H.R. 833 amends section 707(b) of the Bankruptcy Code (the "Code"). Under this amendment, a chapter 7 case filed by an individual with primarily consumer debts may be dismissed for abuse upon the motion of any party in interest, with certain limitations. Abuse is presumed when the debtor is able to repay at least 25 percent of non-priority unsecured debts or $5000 over 60 months, applying IRS expense guidelines. The debtor may rebut the presumption of abuse by demonstrating extraordinary circumstances that require additional expenses or an adjustment of current monthly income. To establish extraordinary circumstances, the debtor must itemize each additional expense or adjustment of income and provide documentation and a detailed explaination of the extraordinary circumstances which make such expenses necessary and reasonable. In deciding whether a case is abusive, the court must also consider whether the case was filed in bad faith whether the "totality of the circumstances" demonstrates abuse.

The Department supports strengthening the provisions of section 707 to ensure that ~~abusive~~ debtors with the capacity to succeed under a Chapter 13 repayment plan do not obtain a chapter 7 discharge. However, the proposed amendments raise a number of concerns, and for these reasons, we oppose section 102, as currently drafted.

First, we are concerned that the thresholds are too low, and will have the effect of denying some debtors Chapter 7 relief who in fact have no significant ability to repay their debts. In addition, we believe that these thresholds unnecessarily saddle the bankruptcy system with extra costs, such as reviewing the income and expenses of low income debtors who are not able to repay their debts. We believe that changes should be made to minimize the costs to the bankruptcy system.~~, such as eliminating the 25% threshold for low income debtors.~~ For example, while only judges and trustees can file abuse motions against debtors with below-median income, the presumption of abuse based on the income and expense formula applies to all debtors. Thus, the courts will be compelled to bring and review motions for abuse and deny access to Chapter 7 to many low-income debtors, even thought the likelihood of success under a repayment plan for those debtors is low. [DO I READ THIS RIGHT?] And, this section does not make clear whether the ability-to-repay standards apply only to an individual debtor, or also to joint debtors.

[WHAT IS THE POINT OF THE ARGUMENT THAT FOLLOWS? COULD ARGUE THAT WE SHOULD USE IRS GUIDELINES BUT BE GIVEN ABILITY TO LOOK TO DEBTOR CIRCUMSTANCES IN SAME WAY THAT IRS IS TOLD TO BE FLEXIBLE IN APPLYING THESE. COULD ARGUE THAT THESE WEREN'T MEANT FOR BANKRUPTCY PURPOSE SO WALK INTO SENATE PLAN TO HAVE DOJ DEVELOP OWN GUIDELINES. WHAT DO WE WANT OUTCOME TO BE? DO WE WANT ACTUAL EXPENSES TO BE THE TEST? IF NOT, WHAT IS OUR POLICY GOAL. NEED TO DISCUSS ASAP.] Second, the use of the Internal Revenue Standards for allowable expenses is inappropriate because those standards were not intended for these purposes. The IRS standards were meant to provide <u>guidelines</u> for determining appropriate expenses. Last year during its consideration of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, Congress criticized the inflexible application of those guidelines and directed the IRS to also consider the taxpayer's facts and circumstances. The Joint Committee on Taxation explained the attitude of Congress regarding the guidelines in the following terms:

> The Act requires the IRS to develop and publish schedules of national and local allowances that will provide taxpayers entering into an offer-in-compromise **with adequate means to provide for basic living expenses.** [IS THIS THE STANDARD WE WANT FOR BANKRUPTCY? IF NOT, WHAT?] The IRS is also required to consider the facts and circumstances of a

> particular taxpayer's case in determining whether the national and local schedules are adequate for that particular taxpayer. If the facts indicate that use of scheduled allowances would be inadequate under the circumstances, the taxpayer is not limited by the national or local allowances.

See General Explanation of Tax Legislation Enacted in 1998 at 107 (1998). [cite ?]

Third, the multiple hurdles for rebutting the presumption of abuse -- "only" if the debtor can demonstrate "extraordinary circumstances" that make additional expenses or adjustments of income "necessary" and reasonable -- are conflicting and so strict as to effectively preclude the debtor from proving the existence of reasonable expenses that are not included within the IRS standards. We believe that the words "only", "extraordinary" and "necessary" should be deleted from proposed section 707(b)(2)(B) and the word "require" should be changed to "warrant". Under this formulation, the debtor still would be required to prove to the court that additional expenses [or adjustments to income] are both warranted and reasonable. This language is also flawed in that, after establishing two bases for rebutting the presumption (additional expense or adjustment to income), the language deals only with additional expenses and does not allow for adjustment to income. Finally, this language fails to give the court discretion to find that the debtor does not have the capacity to repay for a reason other than adjustment to income or expenses. We believe that the court should be able to use this discretion only if the court makes a special showing that a compelling case has been made that the debtor does not have the capacity to repay. However, some such discretion is desireable.

Fourth, ~~and importantly,~~ the procedures set forth in Section 102 would impose a substantial burden on the courts and the trustees by . . . .**(awaiting examples from the USTP)** This threatens to significantly clog the formal bankruptcy processes. We stand ready to work with you to craft proposals that minimize the costs to the bankruptcy system. [CAREFUL -- OUR OWN PROPOSALS, COULD DO WORSE, NO? FOR EXAMPLE IN REAFFIRMATIONS REQUIRING JUDICIAL REVIEW. OR LOOKING TO ACTUAL EXPENSES.]

Fifth, we do not think it appropriate for Section 102 to impose a higher duty on debtor's counsel than that set forth in Rule 9011. We believe that the standards in Rule 9011 are appropriate and we are concerned that the formulation set forth in Section 102 adds unnecessary complexity and confusion to the Bankruptcy Code. [SHOULD WE POINT TO SPECIFIC LANGUAGE THAT IS PROBLEMMATIC AND WHY. ROADMAP TO FIX?]

Sixth, we do not believe it is appropriate to remove the risk of sanctions from all creditors who bring unjustified Rule 707(b) motions just because those creditors' claims may be less than $1000. If the goal is to encourage small business creditors to bring appropriate Rule 707(b) motions, then the legislation should be drafted more narrowly. For example, . . . Otherwise the bill will serve to protect large creditors with sub-$1000 claims who clearly do not need this protection [EXPLAIN WHY NOT] and who could use this protection to coerce debtors to reaffirm debts.

Seventh, section 102 also amends section 704 to require the trustee to file a statement with the court 10 days before the meeting of creditors, stating whether the debtor's case should be presumed abusive based upon ability to repay, and file a motion to dismiss within 30 days of filing the statement. It is impractical to require the trustee to file such a statement before the meeting of creditors especially when section 604 of this bill gives debtors up to 45 days to complete their schedules, and liberal amendments to schedules are permitted. The necessity of such a statement is also doubtful insofar as section 102 requires the debtor to file a statement containing the necessary ability to repay calculations. However, we recognize the importance of making the system self-executing, lowering the transaction costs to the system (creditors and debtors) of determining whether or not Chapter 7 is appropriate. We would like to work with the Committee to find ways to address these concerns.

Section 103. Notice of Alternatives.

Section 103 of H.R. 833 would, in part, 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 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 a credit counseling service approved by the United States Trustee for that district. We support the concept of consumer education that underlies section 103. We would be pleased to work with you to craft proposals that would aid consumers in selecting reputable counseling services. [WHAT DON'T WE LIKE ABOUT THIS. THIS REFERENCE IS CRYPTIC. I THOUGHT WE WANTED TO GIVE US TRUSTEES ABILITY TO ESTABLISH STANDARDS FOR QUALIFIED CREDIT COUNSELORS AS A WAY OF IMPROVING STANDARDS ACROSS INDUSTRY. I THOUGHT DOJ DETERMINED THAT, AS WRITTEN, THIS SECTION WOULD GIVE THEM THE ABILITY TO ESTABLISH SUCH STANDARDS. SO WHAT IS WRONG?]

Section 104. Debtor Financial Management Test Program

Section 104 of H.R. 833 would require the Executive Office for United States Trustees, in consultation with experts, 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.

Provided that adequate resources are appropriated for the test program, the Department supports this ~~test program~~ approach as the best way to refine effective debtor education programs before they are extended nationwide~~ provided that adequate resources are appropriated~~. However, H.R. 833 creates confusion as to whether debtor education is to be a test or a permanent program. Section 302(b) and (c) of H.R. 833 condition the debtor's discharge upon completion of "an instructional course concerning personal financial management described in section 111." This language suggests a permanent program. Moreover, section 111 does not address such courses. We believe these provisions may have been carried over inadvertently from an earlier draft, and suggest they be deleted.

SUBTITLE B: CONSUMER BANKRUPTCY PROTECTIONS

Sections 105 to 108. Disclosures (Debt relief agencies)

Sections 105 to 108 of H.R. 833 deal with debt relief agencies. Section 105 defines covered debt relief agencies. Section 106 would require such agencies to provide the person they are assisting in filing bankruptcy 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. Debt relief agencies would be required to provide a separate notice advising the assisted person that the debt relief agency is required, *inter alia*, to enter a written contract. Finally, debt relief 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 106, 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 debt relief 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 106 of H.R. 833 should be amended to exclude non-attorneys from the provisions of new section 526(c), and to add to the form notice outlined in section 526(b) a statement that the debt relief counseling agency employee cannot provide legal advice if he or she is not an attorney.

Section 107 of H.R. 833 would provide the assisted person certain substantive rights when using a debt relief agency, including the right to a written contract that fully discloses all services and all charges. We do not oppose this concept ~~provision~~, but believe that the standard of liability in the provisions should be changed. Section 107(b)(2) provides that a debt relief agency shall not "make any statement . . . which is untrue and misleading or which upon the exercise of reasonable care, should be known by the debt relief agency to be untrue or misleading~~.~~" (emphasis added). The underlined disjunctive "or" would impose strict liability upon a debt relief agency by imposing liability if the statement is untrue and 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 108 of H.R. 833 would provide penalties and other remedies for the failure of a debt relief agency to comply with the requirements of section 106 and 107, or for providing bankruptcy assistance in a case which is dismissed or converted for a failure to file bankruptcy papers. Section 108 should be clarified to allow a debtor, as well as the trustee, to bring an action for a violation and to clarify that the remedies are in addition to any remedies provided in section 110 of the Code.

Section 110. Discouraging Abus[ive] Reaffirmation Practices

Section 110 addresses a problem of great significance; unscrupulous creditor practices designed to coerce debtors into reaffirming debts, particularly unsecured debts, even when doing so clearly is not in the best interests of the debtor. Currently, section 524(c) of the Code imposes a number of limitations on reaffirmation agreements, but the extant evidence suggests that abusive reaffirmation practices continue. The National Bankruptcy Review Commission recommended even stricter rules regarding reaffirmation of secured debt, and the complete elimination of reaffirmations of unsecured debt.

Section 110 attempts to address this problem by requiring that creditors who seek reaffirmation of wholly unsecured consumer debt provide a disclosure that the debtor is entitled to a hearing. The debtor also can waive his right to a hearing if represented by counsel.

We believe that a far more effective approach would (1) require disclosure of the component amounts of any debt to be reaffirmed; (2) require court review for reaffirmations of unsecured debt or relatively small amounts where the creditor claims a purchase money security interest ~~or for unsecured debt~~; and (3) prohibit the addition of costs and attorneys fees [on at least these smaller claims] [why are we conceding attorneys fees on larger reaffirmations? This is a change from last year.]. As few of these reaffirmations are economically rationale for the debtor, judicial review will allow the court to ensure that the debtor is making an informed decision. Moreover, judicial review of small secured claims is necessary to prevent creditors from taking security interests in items with little resale value in order to avoid the stricter rules for reaffirmation of unsecured debt. ~~Such an approach would effectively reach harassing reaffirmations of minor household goods and items, and address those situations where retailers are attempting to take security interests in items of negligible value such as household goods.~~ We would be happy to work with the Committee to develop stronger, more effective rules to discourage abusive reaffirmation practices.

Section 111. Promoting Alternative Dispute Resolution.

Section 111 would create an incentive for the parties to use alternative dispute resolution prior to the filing of a petition. We wholeheartedly support efforts to encourage the use of alternative dispute resolution in this context, but believe Section 111 is too limited because it applies only in limited circumstances. Under this section, alternative dispute resolution would be encouraged by imposing a penalty in cases where a creditor who unreasonably refused to negotiate an alternative repayment schedule proposed by an approved credit counseling agency. The penalty applies only if the debtor's offer was made at least 60 days prior to the filing of the petition; and the offer provided a specified percentage payment (60% over a specified time). A more effective approach would be to encourage parties to use any appropriate neutral, and give them leeway to determine when it is appropriate to settle and for what amount. [NEED TO EXPLAIN WHY THE 60% NUMBER IS TOO RIGID. WON'T APPLY IN MOST CASES. DOES TREASURY HAVE ANY NUMBERS?] We would be happy to work with the Committee to draft a more effective rule.

Sections 116 to 117. Effect of Discharge; Automatic Stay.

Section 116 addresses several issues. First, it states that the willful failure of a creditor to credit payments received under a confirmed plan shall constitute a violation of a discharge injunction under subsection 524(a)(2) of the Code. We support this provision but suggest two modifications. First, the court should be given discretionary, rather than mandatory, authority to grant sanctions, so as to allow the court to consider situations where the creditor had a good faith basis to believe the debt was not discharged. Second, we suggest the provision be amended to require the debtor first to exhaust efforts to obtain administrative relief, to account for those situations where the federal government, particularly the IRS, may make an occasional innocent mistake resulting from the volume of payments processed. [UGH!!! MUST WE? NO SUCH THING IN CONGRESS' MIND AS "OCCASIONAL INNOCENT MISTAKE" BY IRS. AT MINIMUM, DROP THE EXAMPLE.]

Next, section 116 bars debtors who are injured by the failure of a creditor to comply with the law regarding reaffirmation agreements or the crediting of plan payments from bringing a class action suit. In addition, the provision would limit recovery to actual damages or $1000, whichever is greater, plus costs and attorneys' fees. This provision is an outrageous retreat from existing protections for consumers against abusive creditor practices. Its insertion belies any claim that the bill is intended to require responsibility of both debtors and creditors, as it eliminates the only effective means of enforcement against abusive creditor practices. ~~We oppose this provision.~~ Recent litigation has demonstrated that these kinds of violations ~~are~~ do in fact occur, at times, on a class-wide basis in circumstances where individual damages may be too small to encourage a debtor to bring a claim. Moreover, we believe that treble damages would be a more effective incentive to debtors to bring these claims. Accordingly, we strongly oppose this provision.

Section 117 bars class actions for violations of the automatic stay, and limits debtor recover to actual damages and reasonable costs, including attorneys fees. Once again, we strongly oppose the limitation on class actions, and support a treble damages provision as a more effective incentive to obtain compliance with the provisions of the automatic stay rules. [DOJ -- PLEASE REVIEW. I RECALL THAT EITHER 116 OR 117 WAS NOT AS BIG A CHANGE FROM CURRENT LAW AS THE OTHER. PUT THE INFLAMATORY LANGUAGE ABOVE WITH THE SECTION THAT IS THE MOST DRAMATIC CHANGE. THANKS.]

Section 119. Discouraging Bad Faith Repeat Filings.

In cases of refiling within a year, section 119 would provide a 30-day limit on the application of the automatic stay of section 362 of the Code. This section would not apply if, 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 or abided. 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 123. Giving Secured Creditors Fair Treatment In Chapter 13.

Section 123 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 discharge contained in section 123. A key advantage that chapter 13 offers debtors over chapter 7 is that a larger universe of property is subject to lien "strip down." [DOJ -- IS THIS STILL TRUE UNDER PROVISIONS OF THIS BILL.] 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. But 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.~~ [TRUE BUT UNDERCUTS OUR ARGUMENT ABOUT WHICH DEBTORS ARE MOST LIKELY TO SUCCEED UNDER A 13 SO OMIT.] Debtors should not be permitted to obtain the benefits of chapter 13 without bearing its burdens.

Section 124. Restraining Abusive Purchases on Secured Credit.

Section 124 amends Section 506 of the Code in individual cases by barring the stripping of liens for personal property acquired by the debtor within 5 years of filing the bankruptcy petition. Currently, the debtor's power to strip liens in plans under chapters 11, 12 and 13 to the value of the collateral is not limited by the time lapsed since purchase.

Expanding the "look back" to 5 years changes its character, and creates a significant limitation on the attractiveness of reorganizations for debtors, especially under chapter 13. A key advantage of chapter 13 for debtors is the expanded ability it affords to retain property subject to liens. Not only can debtors reduce the payments down to the value of the collateral, but they can also pay the liens off over time from the plan payments. Many courts allow debtors to "front load" the payments for their secured debt; in such cases, debtors who retire their secured debts under their plans may have no incentive to finish their plans, and may default without making substantial payments to their unsecured creditors. (The latter result is addressed by section 123, which precludes a strip down where the debtor fails to complete the plan; we support this provision.) This provision therefore may reduce substantially the number of debtors who voluntarily file chapter 13. This change benefits lenders who take personal property, such as cars, as collateral at the expense of other unsecured creditors. The lack of strip down means that debtors must devote a greater percentage of their limited assets to secured creditors.

Although this modification may generally benefit the federal government, we believe a more balanced approach would be to return to the 180 day look back that was considered in the last year's legislative proposals.

Section 126. Exemptions.

Section 126 would amend section 522(b)(2)(A) of the Code to permit the use of state exemptions only if the debtor has been domiciled in the respective state for at least two years before filing. We strongly support the goal of this provision, which is to limit the ability of debtors to relocate their domicile in order to shield assets in bankruptcy. However, there is a technical problem. As written, this amendment could deny a debtor who has not resided in a state for at least two years, but is otherwise a resident of that state, the use of any state's exemption because many states prohibit the use of federal exemption law under so-called "opt out" laws. To prevent this situation from resulting in the debtor being unable to claim any homestead, the opt-out language of section 522 should also be modified, or this provision should be amended to permit the use of a state's exemption law where the debtor domicile has been located for the last two years, or for a longer portion of the last two years than in any other place.

Moreover, we believe that national bankruptcy policy can respect state variation in exemption levels without allowing state exemptions to be used to shield excessive assets from creditors. Especially at a time when we are requiring moderate income debtors to repay a portion of their debts if they can, we should not continue loopholes that allow wealthier debtors to shield their assets. We urge that the homestead exemption be limited uniformly to $100,000.~~, to prevent abuse of that exemption in those states where state law allows an unlimited homestead exemptoin~~.

Section 129. Discharge under Chapter 13.

Section 129 governs the scope of discharge in Chapter 13 cases. Section 129 would limit the dischargeability of certain kinds of debt that cannot be discharged under section 523 of the code. We support this limitation. However, section 129 omits section 523(a)(3)(A) of the Code from its list of non-dischargeable debt, while it includes section 523(a)(3)(B). We see no basis for this bifurcation and suggest that entire section 523(a)(3) be included. Both subsections deal with a debtor's failure to schedule known debts. Subsection A deals with the unnotified creditor's ability to file a proof of claim. Subsection B deals with the unnotified creditor's ability to object to discharge on various grounds. As a matter of due process, the claims of such creditors who had no opportunity to participate in the bankruptcy should not be discharged. [NOT SURE WHAT THIS DOES. WHAT DID WE SAY LAST YEAR?]

Section 135. Limitations on Luxury Goods.

Section 135 would amend Section 523(a)(2)(C) of the Code to change the non-dischargeability rules for certain so-called luxury goods. First, it defines "luxury goods or services" so as to exclude those "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor." "Reasonably necessary" is internally inconsistent. We prefer the current law definition of "reasonably acquired." Moreover, by including "necessary" the burden inappropriately shifts to the debtor to demonstrate that they "needed" the items expended. [DOJ -- IS THAT RIGHT?] Second, it would establish a cap on dischargeable luxury goods or services of $250, or cash advances of $250, incurred within 90 days of filing the petition. We oppose the limitation. This would be a substantial change from the current law, which sets forth limits of $1075 during the preceding 60 day period. ~~We would support limits of $1000 during the past 90 days as more reasonable.~~ Moreover, it is important to bear in mind that cash advances are not always obtained for frivolous expenses; debtors sometimes use cash advances to buy absolute necessities such as groceries. [RECALL THAT LAST YEAR, WE WERE LIVING TO LIVE WITH AN ABSOLUTE BAR ON LUXURIES PROVIDED THAT NECESSITIES WERE NOT CAPPED. I WOULD JUST FOCUS ON THE CASH ADVANCES.]

Sections 141 to 147. Domestic Support Obligation.

Sections 141 defines domestic support obligations, and Section 142 establishes domestic support obligation as the first priority. We generally support this recognition of the critical societal importance of ensuring that domestic support obligations are not unduly reduced as a result of a debtor's bankruptcy. Without payments from domestic support obligations, the recipients of those payments may become destitute; it is therefore appropriate to give them a high priority. However, if an appropriate mechanism for funding the administrative costs of bankruptcy is not provided, too many debtors will go unrepresented. We would like to work with the Committee to ensure that there are no unintended consequences of this priority for domestic support obligations. ~~; recognizing also that it is important to ensure the adequate funding and support of the entire bankruptcy system, domestic support obligations should be given priority after administrative expenses rather than relegating administrative expenses to the second priority.~~

Sections 143 to 147 establish other special rules in the domestic support obligation context. Sections 143 and 144 establish special rules regarding confirmation and discharge, and exceptions to the automatic stay, in cases involving domestic support obligations. Section 145 makes certain domestic support obligations non-dischargeable. We support these provisions for the reasons stated above.

Section 149. Nondischargeable Debts.

Section 149 amends Section 523(a) of the Code in two ways. First, it would make non-dischargeable any debt that was incurred to pay an otherwise non-dischargeable debt with the intent to discharge the newly acquired debt. We support this change.

Second, Section 149 would also make non-dischargeable all debts incurred to pay non-dischargeable debts, without regard to intent, if incurred within 90 days of the petition. ~~We do not support this provision.~~ Proponents of this provision argue that one can presume that the debtor had the intent to avoid the debt in bankruptcy, if they paid the nondischargeable debt with a dischargeable debt within 90 days of bankruptcy. Unfortunately, that is not a fair assumption. In the final months before filing bankruptcy, a debtor may be struggling to retain a house or a car or feed a family so may put debts, like student loans or taxes, on their credit card in a last ditch attempt to stay above water. A review of the debtor's intent (for example by looking at whether the debtor had yet consulted with bankruptcy counsel or had previously filed bankruptcy and was familiar with the rules) could uncover whether the payment was abusive or not. By failing to weigh the intent of the debtor, this rule is overbroad and we strongly oppose its inclusion.

TITLE II: DISCOURAGING BANKRUPTCY ABUSE

Section 201. Reenactment of Chapter 12.

Section 201 reenacts Chapter 12 of the Code, pertaining to family farmers. We support this provision. However, Chapter 12 is scheduled to expire on March 30, 1999. We do not believe that these noncontroversial provisions, so important to America's family farmers, should be held hostage to the broader debate about consumer bankruptcy. We urge the immediate passage of permanent extension of Chapter 12.

Section 202. Meetings of Creditors and Equity Security Holders.

Section 202 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. We suggest this provision be deleted.

Section 203. Protection of Retirement Savings in Bankruptcy.

[I AM VERY UNCOMFORTABLE WITH US INVOKING THE IMPORTANCE OF TAX PAYMENTS ABOVE OTHER CREDITOR CLAIMS. IT LOOKS LIKE WE WANT TO HAVE IT BOTH WAYS. JOEL -- DO YOU RECALL HISTORY OF THIS AMENDMENT? IS THIS A DODD AMENDMENT? IF SO, SHOULD WE BE BASHING? WE DIDN'T LAST YEAR. IF WE WANT TO RAISE QUESTIONS, WE NEED TO DO IT WITHOUT SEPARATING OUT TAX CLAIMS AND BY SOFTER LANGUAGE, E.G.: ▒The Administration has made encouraging adequate retirement savings a singular priority. We recognize that a fresh start is not meaningful if it requires the debtor to accept an impoverished retirement. However, a debtor should not be able to shield abundant assets from creditors, including other taxpayers, in the form of retirement savings. We look forward to working with the Committee to find the appropriate balance of these considerations.▒]

Section 203 exempts from the bankruptcy estate a qualified retirement fund, pursuant to certain standards set forth in this section. The effect of the amendments would be to enhance debtors' ability to prevent their interests in retirement accounts and funds, including Individual Retirement Accounts, from being used to satisfy their debts. Whatever the merits of this amendment as applied to other claims, the expanded protection of retirement interests should not be available with respect to tax claims. A debtor should not be able to fund his or her retirement with unpaid taxes. Indeed, the generally applicable anti-alienation restrictions regarding interests in tax-qualified retirement funds do not preclude enforcement of a federal tax levy or collection by assessment. See Treas. Reg. 1.401(a)-13(a)(2) (26 C.F.R.). Debtors should not be encouraged to seek bankruptcy relief in order to prevent taxes from being paid out of retirement accounts and funds that would be subject to enforced collection outside of bankruptcy.

Section 205. Executory Contracts and Unexpired Leases.

This section requires a debtor to assume an unexpired lease of non-residential real property within 180 days after filing the petition or the lease is deemed rejected. We support this provision.

Section 206. Creditor and Equity Security Holders Committees.

Section 206 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 206 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 209. Amendment to Section 330(a)

Section 209 would provide that in determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission based on the results achieved. We oppose this provision, which could lead to abuses. [EXPLAIN HOW.] We prefer the current multifactor analysis set forth in section 330(a)(3) of the Code.

Section 211. Preferences.

Section 211 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.

Section 215 (second instance; listed in table of contents as section 216). Defaults Based on Nonmonetary Obligations.

Section 215 amends Section 365 of the Bankruptcy 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 is 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. We oppose this provision for the reasons outlined below, and suggest that it be deleted.

Currently, Section 365 of the Code allows a debtor to resume performance of (or "assume") an executory contract or an unexpired lease, notwithstanding a default that would normally cost the debtor that right. To do so, the debtor must cure the default, compensate for the monetary loss, and assure adequately its future performance. 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. The non-debtor party should not be forced to perform where deprived of the full benefit of the bargain.

If section 215 is intended to address the problem that minor contractual breaches could otherwise be an obstacle to the debtor's power to assume, then this fear is misplaced. The common law has long distinguished between defaults that are minor (entitling only damages) and major (voiding the agreement). This proposal replaces, in the case of executory contracts, this familiar concept with the wholly novel notion of "equities." This gives no guidance to the judge or parties as to what factors should be weighed, and will therefore generate confusion and litigation.

TITLE III: GENERAL BUSINESS BANKRUPTCY PROVISIONS

Section 302. Miscellaneous Improvements.

Section 302 bars any debtor from filing a petition unless they have sought the assistance of credit counseling during the 90-day period prior to the filing of the petition. This provision does not apply in certain circumstances, such as filings due to exigent circumstances. Section 302 also requires debtors to attend educational courses prior to discharge in Chapter 7 and 13 cases. Section 302 requires the clerk of the court to maintain a list of credit counseling services and educational courses that have been approved by the U.S. Trustee.

We support the concept of credit counseling but question whether the utility of making it mandatory in chapter 13 where individuals will already be seeking to repay their creditors through a debt repayment plan. We also have concern about the requirement for United States Trustees to approve credit counseling agencies because it is a large, unstructured and regulated segment of the financial services industry. [AS DISCUSSED ABOVE IN SECTION 103, I THOUGHT WE WANTED THE TRUSTEES TO DO THIS.] The list of approved agencies will serve as a Federal guide for would-be debtors, and we expect it will attract applicants of varying degrees of character and quality. It is important that the United States Trustees have sufficient tools and discretion to address the problems that will undoubtedly emerge. With one exception discussed below, the provision appears adequate, but sufficient resources must also be made available. We might also suggest, as an alternative, that a pilot program be created first in several districts to test the usefulness of credit counseling and its impact on filings.

One issue appears to have been overlooked and should be addressed. There is no automatic dismissal to enforce this provision if a debtor fails to file a certificate from a counselor pre or post-petition. Assuming the petition gets filed without a certificate, a party would then have to move to dismiss the case under 707(a), 1112(b), 1208(c), or 1307(c) based on the debtor's ineligibility.

Section 302(b)-(c) provides that a chapter 7 and a chapter 13 discharge are conditioned upon the debtor's completion of a post-filing instructional course. As noted above in comments to section 104, H.R. 833 appears to contain provisions for a pilot program, but this provision seems to assume a permanent program. There is a need to dispel the confusion. A pilot program is preferable.

Section 303. Extensions

Section 303 of H.R. 833 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~~ would retain 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 United States Trustee Program's nationwide expansion. Pub. L. No. 101-650, 317(a), (c), 104 Stat. 5115, 5116 (1992). In these six 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 <u>Hanover National Bank v. Moyses</u>, 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 Bankruptcy 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 Bankruptcy Administrator programs, additional challenges to the constitutionality of this dual system seem likely. See, e.g., St. Angelo v. Victoria Farms, Inc. 38 F.3d 1525, 1532 (1994); Joelson v. United States, 179 B.R. 857, 864 (N.D. Ohio 1995). 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 justified 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.

Finally, we note that section 303 is not referenced in the table of contents set out in section 1 of H.R. 833.

TITLE IV: SMALL BUSINESS BANKRUPTCY PROVISIONS

Sections 401 and 403. Flexible Rules for Disclosure Statement and Plan; Standard Form Disclosure Statements and Plans.

Section 401 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 403 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. Accordingly, we support this provision.

Section 402. Definition of Small Business Debtor.

Section 402(a) defines the terms "small business debtor" and "small business case." The definition of small business case is apparently missing some words, but it appears that the definition excepts cases where a creditors' committee is formed and the court determines that it is "sufficiently active and representative to provide effective oversight of the debtor." This apparent exception defeats the purpose of the small business provisions to minimize the time a case remains in bankruptcy because it could lead to litigation over the exception. See section 407. The exception should be eliminated so that there is certainty at the commencement of the case whether it involves a small business or debtor.

Section 402(b), concerning penalties for violation of the discharge injunction, is unrelated to small business cases and is identical to section 116. It should be eliminated as duplicative.

Section 404. Uniform National Reporting Requirements.

Section 404 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 claims 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 405. Uniform Reporting Rules and Forms.

Section 405 would require the Judicial Conference of the United States 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 404 of the bill. We support this provision, with one exception: it should be amended to indicate that the Attorney General will promulgate the report forms. This is consistent with section 702 under which the Attorney General is to propose these forms and to collect data based on the information reported. It is essential that these two functions be merged under the same authority.

Section 408. Plan confirmation deadline.

Section 408 of H.R. 833 requires that small business chapter 11 cases be confirmed within 150 days of filing. This time period may be enlarged only if the debtor demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable time.

The Department encourages the prompt disposition of cases but the 150-days cutoff may be too short. Currently only 4% of chapter 11 confirmations occur within 150 days of filing. Although substantial improvements in processing times have occurred during the last decade, the majority of confirmations still occur more than one year after filing. Additionally, over 60% of dismissals and conversions to chapter 7 occur more than 150 days after filing. Although section 408 would allow enlargement of this time period, our statistics show that only about 30% of chapter 11 cases result in confirmation. Furthermore, based solely on when a case is filed, there is no age at which a chapter 11 cases has a 50% or better chance of being confirmed. [WHAT DOES DOJ PROPOSE INSTEAD?]

Section 410. Duties of the United States Trustee.

Section 410 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 $10 million over 5 years.

Section 411. Scheduling Conferences.

Section 411 would amend section 105(d) of the Code to require the courts to hold status conferences "as necessary." 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 411 does not adequately preserve these procedural protections, and we therefore oppose the provision. In addition, it would allow the courts to vary from the Code and the Bankruptcy Rules if "necessary to further the expeditious and economical resolution of the case".

Section 412. Serial Filer Provisions.

Section 412 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 412 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 413. Expanded Grounds For Dismissal or Conversion and Appointment of Trustee.

Section 413 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 of a return; and not filing timely a disclosure statement or plan or confirming a plan.

We support this provision. It 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 415. Payment of Interest

Section 415 would amend section 362(d)(3) of the Bankruptcy Code to limit the automatic stay in a single asset real estate (SARE) case, 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.

TITLE VI: STREAMLINING THE BANKRUPTCY SYSTEM

Section 601. Creditor Representation at First Meeting of Creditors.

Section 601 would amend section 341 of the Code to allow non-attorney consumer creditor representatives to attend and participate in chapter 7 and chapter 13 creditors' 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 602. Audit Procedures

Section 602 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 out of every 250 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 602 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 $18.6 million to more than $59 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 consume a significant portion of 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.

We recommend that the following changes be made to Section 602:

- 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;

- Eliminate the requirement of filing the audit reports with the court;

- 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 instead of placing the burden on the U.S. Trustee to file a complaint to bar the debtor's discharge in the case of noncompliance; 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 603. Giving Creditors Fair Notice in Chapter 7 and 13 Cases

Section 603 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 the intent of this section 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 correct any technical problems.

Section 604. Dismissal for Failure to Timely File Schedules or Required Information.

Section 604 provides that in voluntary cases under chapters 7 or 13, a case shall automatically be dismissed if the debtor fails to file all required information within 45 after filing the petition. The Department does not oppose this provision, so long as dismissal is without prejudice, and we suggest an appropriate clarification.

Section 605: Adequate Time to Prepare for Hearing on Confirmation of the Plan.

Section 605 of H.R. 833, *inter alia*, would give a chapter 13 debtor up to 90 days after the order for relief to file a chapter 13 plan. Under current law, a debtor must file a plan within 15 days from entry of the order of relief. Fed. R. Bankr. P. 3015(b). The Department opposes this enlargement of time as contrary to the principles of expeditious case administration. Due to other provisions in H.R. 833 requiring the debtor to file certain information and documents with the petition, both the chapter 13 debtor and debtor's counsel should be well prepared to propose a plan within the current 15-day window.

Section 608. Elimination of Certain Fees Payable in Chapter 11 Bankruptcy Cases.

Section 608 of H.R. 833 would amend section 1930(a)(6) of title 28, United States Code, to except all debtors whose quarterly disbursements are less than $300,000 from paying post-confirmation quarterly fees. The Department opposes this provision because it would eliminate one of the most effective tools to encourage the prompt administration and closing of chapter 11 cases. This section would also result in a revenue loss to the United States Trustee Program of at least $9 million annually and would require a new source of funding to replace that loss, since the Program is a fully fee funded agency. [[OMB TO CONFIRM ESTIMATE -- can we reference omb as source??]]

Section 609. Prompt Relief from Stay in Individual Cases.

Section 609 provides that, in any individual case under chapters 7, 11 or 13, the automatic stay shall terminate 60 days after so requested by a party unless the court makes a final decision, the parties agree to an extension, or the court finds good cause supporting an extension. We support this provision.

Section 610. Stopping Abusive Conversions From Chapter 13.

Section 610 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 that we support section 123, we also support this change. This provision addresses a different aspect of the same problem dealt with in section 123 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 123, however, section 610 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 13, and then convert to a chapter 7 without finishing their chapter 13 plans.

TITLE VII: BANKRUPTCY DATA

Section 702. Uniform rules for the collection of bankruptcy data

Section 702 requires the Attorney General to issue rules prescribing uniform reporting forms for final and periodic reports. The Department supports this provision, but note two problems. It conflicts with section 405, which requires the Judicial Conference to create an official form for periodic reports in small business chapter 11 cases. Section 405 should be amended to reflect the role of the Attorney General in promulgating the form of these reports. We also question the provision in this section 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 702 provides for electronic access through the Internet. We would be happy to work with the committee to recommend appropriate changes to these provisions.

TITLE VIII: BANKRUPTCY TAX PROVISIONS

Section 801. Treatment of Certain Liens.

Section 801 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 802. Effective Notice to Government

Section 802 of 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 urged redress of 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 discharge-ability 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 803. Notice of Request for a Determination of Taxes.

Section 803 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. [WHAT IS PENALTY UNDER THIS PROVISION FOR SENDING TO WRONG OFFICE. CAN'T BE FATAL TO PETITION. DEBTORS MAY NOT KNOW WHAT THE RIGHT PLACE IS.]

Section 804. Rate of Interest on Tax Claims.

Section 804 would enact as Section 511 of the Code a new provision relating to the interest rate on, or determining the present value, of a tax claim. Under current law, the court must generally determine the market rate under such circumstances. Section 511 would provide 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. The section 6621(a)(2) rate is also based on the Federal short-term rate, plus three percentage points, but is fixed on a quarterly basis at the rate for the first month of a quarter rather than redetermined monthly. In the case of secured tax claims and administrative tax claims, the applicable nonbankruptcy rate would apply with respect to federal taxes, i.e., the section 6621(a)(2) rate.

We would prefer that the legislation simply fix the interest rate for all deferred tax payments at the applicable nonbankruptcy interest rate. On the other hand, the rate for unsecured taxes under section 804 of H.R. 833 is merely a minimum rate and does not preclude a taxing authority from insisting on a higher rate. Thus, we would not oppose this provision.

Section 805. Tolling of Priority of Tax Claims Time Periods.

Section 805 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, but suggest several modifications, outlined below. 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.

As noted above, we would suggest several modifications to this provision. First, the time periods applicable to employment and excise taxes should be suspended during the pendency of a prior bankruptcy case. Second, this section should be modified to suspend time periods in which collection was stayed under the terms of a confirmed plan under chapters 11, 12 or 14, plus six months. Third, the Internal Revenue Service Restructuring and Reform Act of 1998 gave taxpayers new rights to appeal collection actions that, when invoked, have the effect of staying collection. Thus, the time periods should also be suspended while the IRS is prohibited from collecting as a result of an appeal of a collection action taken under applicable nonbankruptcy law.

Section 807. Chapter 13 Discharge of Fraudulent and Other Taxes.

Section 807 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.

Section 808. Chapter 11 Discharge of Fraudulent Taxes.

Section 808 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 809. Stay of Tax Proceedings.

Section 809 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 810. Periodic Payment of Taxes in Chapter 11 Cases.

Section 810 would amend section 1129(a)(9)(c) of the Code to provide that deferred payments of tax claims under a chapter 11 plan must be made in installments with the result that balloon payments would be proscribed. In lieu of the current five-year payment period measured from the date of assessment, such payments would end on the earlier of five years after the petition date or on the last date on which payments are to be made to unsecured creditors under the plan. In addition, secured tax claims would be treated as priority claims for deferred tax purposes, where such claims would have had priority absent their secured status. We support this provision.

Section 811. The Avoidance of Statutory Tax Liens Prohibited.

Section 811 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 814. Income Tax Returns Prepared by Tax Authorities.

Section 814 would confirm 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. It would also be helpful to clarify that the term "equivalent report or notice" applies only to the extent that state or local tax law provides for the filing of an equivalent report or notice, and has no application for federal income tax reporting purposes.

Section 815. The Discharge of the Estate's Liability for Unpaid Taxes.

Section 815 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 816. Requirement to File Tax Returns to Confirm Chapter 13 Plans.

Section 816 would require chapter 13 debtors to file tax returns due for three years prior to the petition date. Tax authorities are placed at a severe disadvantage in preparing and filing timely proofs of claim when a chapter 13 debtor has ignored his or her tax return filing obligations. Outside of bankruptcy, the IRS will typically ask a delinquent debtor to file tax returns for the prior six tax years. We submit that the Code should similarly require the filing of delinquent tax returns for six years rather than for three years, and we therefore urge that this provision be modified accordingly.

Section 818. Setoff of Tax Refunds.

Section 818 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 arises, 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 urge addition of a new provision in this title: **Tax Year that Straddles the Petition Date.**

H.R. 833 should be amended to include an additional tax-related proposal to clarify the bankruptcy treatment of a tax year that straddles the petition date. The position of the Government is that an income tax is incurred on the last day of the tax year inasmuch as a taxpayer's liability for tax cannot be calculated until all income has been accrued or collected, and all deductions have been accrued or paid. Moreover, until the debtor reports its income tax liability, a taxing authority is not in any position to prepare and file a proof of claim. Nonetheless, several courts have held that a tax year straddling the petition date should be treated as partially a prepetition year and partially a postpetition year. In re O'Neill Shoe Co., 64 F.3d 1146 (8th Cir. 1995); In re Pacific-Atlantic Trading Co., 64 F.3d 1292 (9th Cir. 1995); and In re Hillsborough Holding Corp., 115 F.3d 1391 (11th Cir. 1997). Under these decisions, the prepetition portion of the year is treated as a priority tax, while the balance is treated as an administrative tax. These decisions create the opportunity for considerable mischief, particularly if the time for filing a proof of claim will run prior to the due date of the return in question. Furthermore, to the extent that straddle years are treated as prepetition tax years, debtors can stretch out the payment period for the related tax liability for five years under chapter 11 instead of paying the tax in full in cash on the effective date of the plan.

We submit that the Code should be amended to clarify that an income tax liability is incurred on the due date of the date return for purposes of determining whether a tax is entitled to administrative expense or priority treatment. Clarification is needed because bankruptcy petitions are rarely filed immediately after the due date of the return so that this issue can potentially arise in virtually any case.

TITLE IX: ANCILLARY AND OTHER CROSS-BORDER CASES

Section 901. Amendment to Add Chapter 15 to Title 11.

Section 901 adds a new chapter to the Code to be codified as Chapter 15. This chapter would address insolvencies which cut across international borders. We generally support these provisions, with the following exceptions.

Proposed section 1507 allows the court to provide the representative of a foreign insolvency "additional assistance" based upon standards that are vague and duplicative of section 304 of the Code. This approach is inconsistent with the purpose of the cross-border chapter; namely, to create new and better treatment for international bankruptcies.

We also oppose proposed sections 1519 and 1521 to the extent they grant the court open-ended authority to enjoin anything needed to protect assets and creditors. As written, the sections are overbroad.

[TREASURY OKAY?]

TITLE XI: TECHNICAL CORRECTIONS

Section 1130. Trustees.

Section 1130 of H.R. 833 would amend section 586 of title 28, United States Code, to establish procedures for judicial review of decisions by a United States Trustee to either terminate or suspend from a panel of trustees or as a standing trustee, and decisions to deny an expense request by standing trustees.

As an initial matter, the Department supports clarifying and improving the judicial review already available trustees who are aggrieved by the actions of the United States Trustee Program. Historically, a decision to terminate or suspend a trustee from the panel of trustees was not subject to judicial review. E.g., Joelson v. United States, 86 F.3d 1413 (6th Cir. 1996). In response to concerns about a lack of judicial review, the Department promulgated an administrative rule giving private trustees the ability to seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 552 *et seq.* of any action by the Department to suspend or remove a trustee from future case assignments. 28 C.F.R. § 58.6. The Department believes that standing trustee budget disputes are already subject to judicial review under the APA. In addition, the United States Trustee Program has implemented procedures for mediating standing trustee budget disputes. Notwithstanding its position that review is available under the APA, the Department engaged in good faith negotiations with the affected parties and Congressional staff and after much effort, a compromise was reached. Unfortunately, Section 1130 does not reflect the compromise.

Unless further revisions are made, the Department must oppose section 1130. Section 1130(b) sets forth the standard of review for standing trustee expense requests. This standard, unlike the proposed standard for review of trustee termination and suspension, is whether the decision is "unreasonable **or** without cause." This is unacceptable. The standard of review should be revised to "unreasonable **and** without cause" in keeping with the compromise.

* * * *

Finally, as noted in our comments above, many of the provisions set forth in this bill would impose substantial burdens on the United States Trustee Program. Currently, the Trustees program is fully self-funded through fees. However, to implement the requirements of this bill, the Trustees would be required to expend tens of millions of dollars that will diminish their ability to fulfill their other responsibilities, and this, in turn, will diminish the efficiency of the bankruptcy system. We therefore request that a special appropriation be authorized for each provision that imposes a new burden on the United States Trustee Program.

We look forward to working with the Committee as it considers these and other issues raised by H.R. 833. 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,

Dennis Burke
Acting Assistant Attorney General

Bankruptcy ~~Rb~~ Working Group 3/17/99

Jennifer Leach — 1 hr

Senate will not be marked up next wk — not till after recess

Means Test prop:

below some income level, v. cursory review — income (tax forms)

income choices: median income

learner 24 k, 2K — nothing — in 7 — below 75% of mi — can't repay

natl 35k — limited review; income & debt & IRS expense — 75 — 150 % of mi — a few 6-7% % have capacity

~~data~~ ct discretion — above 150% of mi — a ~~f~~ not sig (c 20%)

if meet test — detailed review

↓ cost of detailed review

only a fraction of reviews.

Reaff:

problem — only look at if it's in the debtors best interest

any debtor w/o counsel — judicial review

if rep by counsel — counsel has to sign on — "due diligence"

debtor's counsel penalties — potential for balance

MARCH 17, 03:16 EST

Democrats Assail Bankruptcy Bill

By MARCY GORDON
AP Business Writer

WASHINGTON (AP) — Some Democratic lawmakers, including the head of a House caucus on children's issues, are assailing bipartisan legislation that would make it tougher for people to erase their debts in bankruptcy court.

The Democrats' assault Tuesday reignited a debate over the welfare of single mothers and their children, in which Hillary Rodham Clinton played a key role last year.

The White House threatened in 1998 to veto a House-passed bankruptcy overhaul bill and the Senate adjourned without voting on the measure. Mrs. Clinton, along with consumer groups and some Democrats, complained that the bill would make single mothers and children who are owed support by bankrupt fathers take a back seat to credit card companies in collecting debts.

The new House bill would have ``a devastating impact on the thousands of women who turn to bankruptcy courts to collect alimony and child support from former husbands" who have sought bankruptcy protection, Rep. Sheila Jackson Lee, D-Texas, testified Tuesday at a House Judiciary subcommittee hearing.

Ms. Jackson Lee is chairwoman of a congressional caucus on children's issues.

She was joined by other Democrats opposed to the bill, as the commercial and administrative law subcommitee opened hearings on the legislation, which is backed by credit card companies and retail businesses.

The bill's sponsors, led by Rep. George Gekas, R-Pa., say it gives highest priority among debts to child support and alimony payments, putting them ahead of credit card debt and other obligations. But Democratic opponents maintain that the bill, by barring certain credit card debts from being erased in bankruptcy, would force single mothers to compete with big credit card companies for payment.

Sen. Charles Grassley, R-Iowa, meanwhile, said the Clinton administration's position on bankruptcy legislation ``is a really big question mark."

Grassley said White House aides recently told him they want such legislation and are willing to negotiate, but they can't promise anything because Clinton might veto it.

White House spokesman Barry Toiv said recently that the administration, which supports overhauling the bankruptcy laws, needed to examine this year's legislation to determine whether it strikes a balance between the legitimate needs of debtors and creditors.

Grassley, with Democratic Sens. Joseph Biden of Delaware and Robert Torricelli of New Jersey, on Tuesday proposed a new version of legislation to rewrite the bankruptcy laws.

Both the House and Senate bills would allow federal bankruptcy judges to determine a debtor's ability to repay. They would use an IRS standard to estimate living expenses and calculate whether the payback could be 25 percent or more of the total debt within three years. If so, the debtor could be forced into a Chapter 13 reorganization plan.

Under Chapter 13 of the U.S. Bankruptcy Code, people must repay their debts according to a court-ordered plan. Credit card companies complain that too many people take shelter under the more lenient Chapter 7, which erases debts, when they could afford to restructure debts under Chapter 13.

March 17, 1999

Senator Introduces Bipartisan Bankruptcy Reform Bill

Sen. Charles E. Grassley (R-Iowa) introduced legislation on Tuesday that would overhaul the Bankruptcy Code. The bill, S. 625, generally tracks the language in last year's Conference Report (H.R. 3150), which has been reintroduced in the House as H.R. 833. In his statement, Grassley, who chairs the Senate Subcommittee on Administrative Oversight and the Courts, said the "point of bankruptcy reform is to limit chapter 7--which provides for a no-questions asked complete discharge of debts--to people who don't have the ability to repay any of their debts. People who can repay some or all of their debts should be required to do so in a chapter 13 repayment plan." S. 625, is cosponsored by Democratic Sens. Robert Torricelli (N.J.), the ranking member of the subcommittee, and Joseph Biden (Del.) and Sen. Jeff Sessions (R-Ala.).

The Senate bill adopts a more relaxed means test than the House version, allowing more discretion to the bankruptcy judge in considering whether to transfer a debtor from chapter 7 to chapter 13. The bill also raises the minimum dollar amount under the means test from $5,000 to $15,000 before a debtor would be transferred to chapter 13. The bill contains several consumer protections not found in the House bill, and drops one controversial provision which would have barred class action lawsuits for reaffirmation violations. It shortens the time during which purchases and cash advances are presumed non-dischargeable from 90 days (as in the House bill) to 70 days. Like the House bill, the new Senate bill also limits lienstripping of secured loans in chapter 13, preventing this practice for auto loans within five years of the filing. Other secured loans could be subject to lienstripping if more than six months from the time of filing. S. 625 could be on a fast rack, with a very limited hearing schedule. There is also a chance that the committee will not hold hearings at all on the bill.

Democrats assail bankruptcy bill as
tough on children

By MARCY GORDON
AP Business Writer

March 16, 1999
Web posted at: 6:02 p.m. EST (2302 GMT)

WASHINGTON (AP) -- Several Democratic lawmakers on Tuesday assailed House legislation that would make it tougher for people to erase their debts in bankruptcy, reigniting a debate over the welfare of single mothers and their children.

Hillary Rodham Clinton played a leading role in the debate last year, when the White House threatened to veto a House-passed bankruptcy overhaul bill and the Senate adjourned without voting on it. Mrs. Clinton, along with consumer groups and some Democrats, complained that the bill would make single mothers and children who are owed support by bankrupt fathers take a back seat to credit card companies in collecting debts.

The House bill being considered this year would have "a devastating impact on the thousands of women who turn to bankruptcy courts to collect alimony and child support from former husbands" who have sought bankruptcy protection, Rep. Sheila Jackson Lee, D-Texas, testified Tuesday at a House Judiciary subcommittee hearing.

She was joined by Rep. Louise Slaughter, D-N.Y., and other Democrats opposed to the bipartisan bill, as the commercial and administrative law subcommittee opened three days of hearings on the legislation, which is backed by credit card companies and retail businesses.

The bill's sponsors, led by Rep. George Gekas, R-Pa., say it gives highest priority among debts to child support and alimony payments, putting them ahead of credit card debt and other obligations. But Democratic opponents maintain that the bill, by barring certain credit card debts from being erased in bankruptcy, would force single mothers to compete for payments with big credit card companies.

Sen. Charles Grassley, R-Iowa, meanwhile, said the Clinton administration's position on bankruptcy legislation "is a really big question mark."

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White House spokesman Barry Toiv said recently that the administration, which supports overhauling the bankruptcy laws, needed to examine this year's legislation to determine whether it strikes a balance between the legitimate needs of debtors and creditors.

Grassley, with Democratic Sens. Joseph Biden of Delaware and Robert Torricelli of New Jersey, on Tuesday proposed a new version of legislation to rewrite the bankruptcy laws.

"Real reform should address a number of factors, such as irresponsible (consumer spending), lax bankruptcy laws and lawyer-run bankruptcy mills," Grassley said.

National Journal

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MONDAY **TUESDAY** WEDNESDAY THURSDAY FRIDAY
MARCH 16, 1999

Breaux Plan Unlikely To Garner Commission's Blessing

HEALTH

THE MEDICARE REFORM proposal released Monday by **Sen. John Breaux**, D-La., would immediately subsidize prescription drugs for beneficiaries below 135 percent of the poverty line and save $100 billion over the next 10 years. But after weeks of haggling over the details, it appears unlikely Breaux has made enough changes for the National Bipartisan Commission on the Future of Medicare to approve a formal recommendation to Congress when the panel meets late today.

At a news conference Monday afternoon, neither Breaux nor **House Ways and Means Health Subcommittee Chairman Bill Thomas**, R-Calif., would directly concede that they do not have the 11 votes needed from the 17-member commission to make a formal recommendation. However, Thomas claimed 10 votes was still a "supermajority" that would give the plan momentum as he and Breaux introduce it in legislative form in the coming weeks. "This will become the basis for policy discussions in the House and Senate," Thomas said.

Breaux said he was still "hopeful," and planned to make an 11th-hour attempt to persuade President Clinton to support the proposal. Breaux has been negotiating with Laura D'Andrea Tyson and Stuart Altman, both Clinton appointees to the commission, to win their support.

But Tyson and Altman want 15 per- *continued on page 8*

Grassley Floats Bankruptcy Offer

JUDICIARY

AIDES TO SENATE **Judiciary Administrative Oversight and the Courts Subcommittee Chairman Charles Grassley**, R-Iowa, are kicking around a new plan designed to defuse one of the more politically salient arguments advanced by opponents of bankruptcy reform legislation, a committee source said Monday.

Specifically, Grassley's staff is said to be considering advancing a proposal that would exempt debtors with child support and alimony payment obligations from new "nondischargeability" requirements to be contained in comprehensive bankruptcy reform legislation being crafted in concert with **subcommittee ranking member Robert Torricelli**, D-N.J.

That bill is slated for release sometime this week, and is expected to see floor action soon after the Senate returns from its April recess.

New nondischargeable requirements contained in the Grassley bill — meaning debts that cannot be erased in the event of a bankruptcy filing — include new categories of credit card debt incurred within a given time period prior to a declaration of bankruptcy.

The exact time frame to be included as the standard in the Senate bill still is the subject of discussion between Grassley and Torricelli, although Grassley is said to favor a 70-day window.

As envisioned, the new proposal would not exempt debtors with child support and alimony obligations from paying debts already considered under current law to be nondischargeable, such as student loans.

A Grassley spokeswoman confirmed the plan is under discussion, characterizing it as a proposal to "carve out a niche for those two debts."

It is unclear what Torricelli's stance would be on the plan. His office was unable to provide comment by presstime, but the plan apparently was the subject of discussion at a bipartisan Senate staff meeting Friday.

By all accounts, Torricelli is enjoying a far more cordial working relationship with *continued on page 9*

TODAY'S HIGHLIGHTS

Floor Schedule

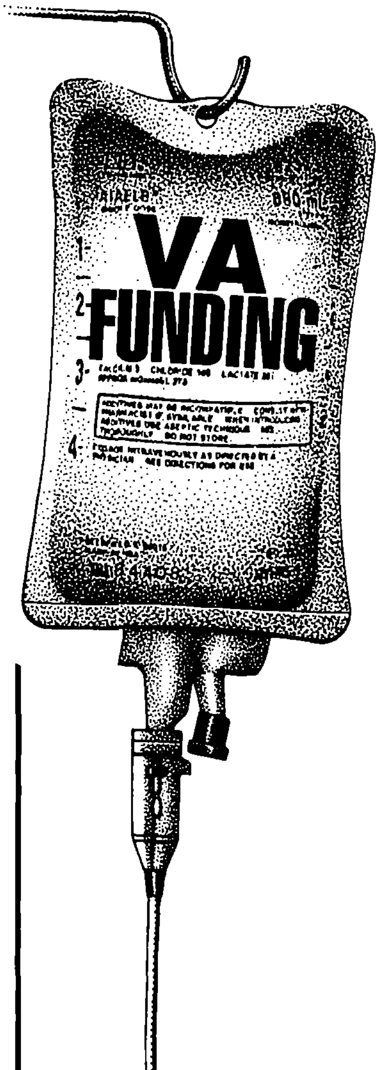
Senate

Convenes at 10:30 a.m. to consider a resolution commending **Sen. Bob Kerrey**, D-Neb., on the 30th anniversary of the events leading to his receipt of the Medal of Honor. The Senate also is expected to consider missile defense legislation.

House

Convenes at 9:30 a.m. for morning business. The House will reconvene at 11 a.m. to consider four bills under suspension of the rules: the Women's Business Center Amendments Act; the D.C. Court Employees Protection Act: a resolution honoring Joe DiMaggio; and a bill to express congressional opposition to the unilateral declaration of a Palestinian state. The House will also consider the Federal Maritime Commission Authorization Act.

(Committee schedules begin on page 10.)



Veterans Health-care Emergency Declared:

The Administration's severely inadequate flat-lined FY 2000 budget has created a crisis for the health-care system that the sick and disabled veterans in your state rely upon. Congress must resolve this crisis by lifting the budget caps and providing the Department of Veterans Affairs (VA) fiscal relief.

In short, without additional funding from Congress, sick and disabled veterans will be placed in jeopardy of being denied life-saving VA health care.

With a shortfall estimated to be as much as $3 billion, the VA health-care system is preparing now—not next year—to lay off thousands of health-care workers and severely cut back or eliminate programs, services, and medical facilities.

Don't take our word for it. The VA Under Secretary for Health, Dr. Kenneth W. Kizer, has called the situation "serious and precarious." Last month, the impact of this disastrous budget prompted him to write Secretary of Veterans Affairs Togo D. West, Jr., about preparing for "mandatory employee furloughs, severe curtailment of services or elimination of programs, and possible unnecessary facility closures."

The only way VA can get relief is for Congress to lift the budget caps.

Congress must save VA and allow it to continue to save the lives of America's veterans.

Congress Must Lift The Budget Caps!

AMVETS **Disabled American Veterans**
Paralyzed Veterans of America **Veterans of Foreign Wars of the United States**

Bankruptcy

Continued from page 1

Grassley than did Torricelli's predecessor as subcommittee ranking member, **Sen. Richard Durbin**, D-Ill., who was instrumental in running down the clock last fall on a House-Senate bankruptcy conference report that Grassley brokered with **House Judiciary Commercial and Administrative Law Subcommittee Chairman George Gekas**, R-Pa.

Reform legislation patterned after that conference report is the subject of a hearing today in Gekas' subcommittee.

But, with respect to any additional debtor carve-outs along the lines of what is under consideration by Grassley's staff, Gekas did not appear especially receptive.

"We feel like we've [already] given child support major consideration in this bill, and any differences between this bill and whatever is in the Senate bill will be worked out in conference," a Gekas spokeswoman said Monday.

Still, Grassley's plan, if implemented, could go a long way toward deflating what has proven to be one of the more visceral arguments advanced by opponents of current bankruptcy reform proposals — including the White House. The opponents claim expanding the types of credit card debt considered nondischargeable under the law would force alimony and child support payments to take a back seat to credit card companies and their collection strategies.

At the same time, however, sources close to the bankruptcy debate expressed doubt that the Grassley proposal would succeed in placating those who seek to oppose the bill on any grounds, but who appear to have latched onto the child support issue as a means of attacking credit card companies.

One House Democratic staffer took issue with that argument, however, saying the child support and alimony issue is just a small part of a larger problem with current bankruptcy reform efforts, which this staffer characterized as "completely tip[ping] the scales" in favor of creditors. "There has never been only one issue," the staffer insisted.

— *By Pamela Barnett*

Shalala Presses GOP To Drop Hutchison's Tobacco Plan

HEALTH

Ratcheting up the pressure on Senate Republicans to delete tobacco-related legislation affixed last week to the emergency supplemental spending bill, HHS Secretary Shalala Monday fired off a letter to **Appropriations Chairman Stevens** expressing opposition to the amendment — although she stopped short of a veto threat.

The amendment, offered by **Sen. Kay Bailey Hutchison**, R-Texas, would allow states to keep and spend as they see fit funds collected under the recent settlement of suits against the tobacco industry negotiated by state attorneys general.

Democrats, the administration and some Republicans want a guarantee that a portion of the state's take will be devoted to anti-smoking, health and education-related initiatives. In return, the federal government would relinquish its claim to a share.

The administration is claiming part of the money because some of the state suits were based on Medicaid payments to treat smoking-related illnesses, and the federal government bears a portion of state Medicaid costs.

"I am writing to express the administration's strong opposition to the provision," Shalala wrote.

Shalala indicated that the Hutchison measure would effectively bar federal recoupment under Medicaid — since the settlement precludes further action by the states, and the federal government must rely on the states to act as plaintiff in Medicaid recoupment cases.

Senate Democrats Monday pressed ahead with another avenue of attack, drawing up various anti-smoking amendments they are likely to offer should the Hutchison provision remain on the supplemental spending bill, according to a senior Senate Democratic aide.

House Republicans last week did not attach a Hutchison amendment look-alike — a provision authored by **House Commerce Health and Environment Subcommittee Chairman Michael Bilirakis**, R-Fla., — to the House version of the supplemental.

Sources indicated **House Appropriations Chairman Young** would seek to keep the Bilirakis measure off the bill when the supplemental hits the floor.

"I've heard the leadership and Young are disinclined to muddy the supplemental," said one senior administration official. A House GOP aide agreed, calling Young "determined" to keep the bill "clean."

The Shalala missive landed on Capitol Hill at midday during a hearing of the Senate Labor-HHS Appropriations Subcommittee. At the hearing, **Subcommittee Chairman Arlen Specter**, R-Pa., indicated some sympathy for the administration position.

"I am not prepared to turn over all the money *carte blanche* to the states," Specter said.

The hearing featured testimony by several state attorneys general and by Kentucky Gov. Paul Patton demanding state control over the funding. But a couple of the witnesses, conceding that the federal government could tie up the funds by taking its claim to court, said they hoped for a quick deal.

Health Care Financing Administration Deputy Administrator Michael Hash, who also testified, indicated to *CongressDaily* that a deal could be in the works.

Hutchison "is amenable to having further discussions," he said. "I think everyone is saying they are willing to talk about this further."

— *By Keith Koffler*

Congress This Week

Today

Senate Committees

Appropriations

Agriculture

Agriculture Subcommittee hearing on FY2000 Agriculture appropriations, focusing on food safety programs, the Agriculture and HHS Departments, and on the president's Food Safety Initiative. 138 DSOB. 9:30 a.m.

Bioterrorism

Labor-HHS-Education Subcommittee and Senate Veterans' Affairs Committee joint hearing on FY2000 appropriations for programs under its jurisdiction, focusing on bioterrorism. 106 DSOB. 9:30 a.m.

Energy

Energy and Water Development Subcommittee hearing on FY2000 appropriations for the Energy Department. 116 DSOB. 9:30 a.m. **(Postponed.)**

Navy Construction

Military Construction Subcommittee hearing on Navy/Defense agencies FY2000 budget overview. 192 DSOB. 9 a.m.

Various Agencies

Commerce-Justice-State-Judiciary Subcommittee hearing on FY2000 appropriations for the Immigration and Naturalization Service. 628 DSOB. 10 a.m. **(Revised.)**

Various Institutions

Interior Subcommittee hearing on FY2000 appropriations for the Kennedy Center for the Performing Arts, the National Gallery of Art, the Smithsonian Institution, and the Woodrow Wilson International Center for Scholars. 124 DSOB. 9:30 a.m.

Armed Services

Emerging Threats

Emerging Threats and Capabilities Subcommittee hearing on information warfare and critical infrastructure protection. ***Witness:*** Robert Marsh, chairman, President's Commission on Critical Infrastructure. 222 RSOB. 3:30 p.m.

Banking

Export Controls

International Trade and Finance Subcommittee hearing on national security aspects of export controls, focusing on the reinstatement of the Export Administration Act, which expired in 1994. 538 DSOB. 9:30 a.m.

Budget

Budget

Full committee markup of the concurrent resolution on the budget for FY2000. 608 DSOB. 2:30 p.m. **(Revised.)**

Energy and Natural Resources

Chinese Spying

Full committee and Senate Armed Services Committee joint briefing on Chinese espionage at Energy Department laboratories, followed by joint hearing on the same topic. Briefing, S-407 Capitol. Hearing, 216 HSOB. 9:30 a.m.

Agriculture

Forests and Public Land Management Subcommittee hearing on the president's FY2000 budget for the Forest Service and the Agriculture Department. 366 DSOB. 2 p.m.

Environment and Public Works

Risk Management

Clean Air, Wetlands, Private Property and Nuclear Safety Subcommittee hearing on the Risk Management Program of the EPA under the Clean Air Act. 406 DSOB. 9:30 a.m.

Finance

Retirement

Full committee hearing on personal retirement accounts. ***Witness:*** U.S. Comptroller General David Walker. 215 DSOB. 10 a.m.

Health, Education, Labor and Pensions

Disadvantaged Education

Full committee hearing on educating the disadvantaged. 430 DSOB. 9:30 a.m.

Small Business

SBA

Full committee hearing on the FY2000 budget for the Small Business Administration. 428-A RSOB. 10 a.m.

House Committees

Appropriations

Agriculture

Agriculture Subcommittee hearing on FY2000 appropriations for food, nutrition and consumer services. 2362-A RHOB. 1 p.m.

Coast Guard

Transportation Subcommittee hearing on FY2000 appropriations for the U.S. Coast Guard. 2358 RHOB. 10 a.m.

Energy

Energy and Water Development Subcommittee hearing on FY2000 appropriations for nuclear waste management and disposal. 2362-B RHOB. 10 a.m.

Labor

Labor-HHS-Education Subcommittee hearing on FY2000 appropriations for the office of the Labor secretary. ***Witness:*** Labor Secretary Herman. 2358 RHOB. 10 a.m. **(Revised.)**

Labor

Labor-HHS-Education Subcommittee hearing on FY2000 appropriations for the Employment Standards Administration and the Mine Safety and Health Administration. 2358 RHOB. 2 p.m.

Law Enforcement

Commerce-Justice-State-Judiciary Subcommittee hearing on FY2000 appropriations for state and local law enforcement assistance. H-309 Capitol. 2 p.m.

USGS

Interior Subcommittee hearing on FY2000 appropriations, focusing on the U.S. Geological Survey. B-308 RHOB. 10 a.m.

Armed Services

Installations Planning

Military Installations and Facilities Subcommittee hearing on long-term planning for military infrastructure and installations management requirements. 2212 RHOB. 1 p.m.

Maritime/Panama

Merchant Marine Subcommittee hearing on the FY2000 authorization requests of the Maritime Administration and the Panama Canal Commission. 2216 RHOB. 1 p.m.

Banking

Homeless Assistance

Housing and Community Opportunity Subcommittee hearing on H.R.1073, to amend the Stewart McKinney Homeless Assistance Act to consolidate the federal programs for housing assistance for the homeless into a block grant program that en-

BRIEFING ON BANKRUPTCY REFORM
Background for March 17, 1999 meeting with retail creditors

I. SUMMARY OF LAST YEAR'S DEBATE

Last year, the Administration expressed its strong opposition to the House bankruptcy reform bill, H.R. 3150.[1] We encouraged passage of the Senate bankruptcy reform bill, S. 1301, "as an important step toward balanced bankruptcy reform," but noted that the Administration would support its enactment "only if the essential reforms incorporated by the Senate managers' amendment [were] preserved and strengthened and the unbalanced and arbitrary elements of the current House bill [were] omitted."[2] We believed that the extraordinary bipartisan support for the Senate bill was an endorsement of balance and moderation. We noted that even the Senate bill could be further improved to better protect the rights of debtors.[3] We were sorely disappointed when the Conference Report "contain[ed] many flawed aspects of the House bill and fail[ed] the test of balance."[4] The President's senior advisors recommended that he veto the Conference Report.[5]

II. ACTIVITIES THIS YEAR

Rep. Gekas, along with 44 Republicans and 27 Democrats (including Reps. Boucher, Kennedy, Holden, Menendez, Roemer, Maloney, Velazquez, etc.), has reintroduced last year's Conference Report as H.R. 833. Hearings are ongoing in the House this week. Subcommittee Chairman Gekas has represented that the hearings are really just a nod to the Judiciary Democrats so they can not complain about process. He thinks the issues have been fully vetted. There is little sign that the bill's proponents intend to compromise on key issues.

Ranking Democrats Conyers (on full Judiciary) and Nadler (on the relevant subcommittee) have been working with bankruptcy experts to try to craft a serious effort at reform (unlike Nadler's bill last year that was largely designed to make a point). They have written to the President asking him to weigh in again on the importance of balance and moderation in hopes of strengthening their hand.[6] However, our assessment is that we will again face overwhelming support for last year's Conference Report in the House. (Note that Gephardt voted for the Conference Report last year.)

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1 June 10, 1998, SAP on H.R. 3150, the House bankruptcy reform bill.

2 September 17, 1998, SAP on S. 1301, the Senate bankruptcy reform bill.

3 Id.

4 October 9, 1998, letter from Jack Lew to Senator Lott.

5 Id.

6 March 4, 1998, letter from Representatives Conyers and Nadler to the President.

In the Senate, Senator Grassley has been working with Senators Biden and Torrecelli, both of whom are expected to co-sponsor his bill to be introduced on Tuesday, March 16. The Grassley bill is also modeled after the Conference Report, but he has made some significant movements in our direction. However, the bill remains seriously problematic in a number of areas. Torrecelli told the First Lady that he planned to send a letter to Grassley indicating that his support was conditional (*i.e.*, he would oppose the bill on the floor unless further changes on a few key issues were made). We have not yet seen that letter.

Like last year, our best hope for a moderate bill is with the Senate. If a bill we do not like leaves the Senate, the prospects for something better coming out of conference are very slim. We expect Judiciary Committee mark-up of both the House and Senate bills as early as next week.

III. CURRENT ADMINISTRATION POSITION

We have a draft letter to Nadler and Conyers in clearance (may be ready before the Wednesday meeting) reiterating the Administration's concerns from last year on key issues. (See talking points.) DoJ is also preparing detailed comment letters on the Conference Report and the Grassley bill to send before the mark-ups. We are working closely with Senate Judiciary Committee Democrats to help them to try to win concessions, but we have not entered into direct negotiations with the Republicans ourselves, as we do not want to alienate the more liberal Democrats.

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

Dear Chairman Hyde:

We understand the House Judiciary Committee will mark up H.R. 833, the Bankruptcy Reform Act of 1999, on March 25, 1999. This letter provides the Justice Department's general views on H.R. 833. The Administration remains committed to balanced, responsible bankruptcy reform.

TITLE I: CONSUMER BANKRUPTCY PROVISIONS

SUBTITLE A: NEEDS BASED BANKRUPTCY

Section 102. Dismissal or Conversion.

Section 102 of H.R. 833 amends section 707(b) of the Bankruptcy Code. Under this amendment, a chapter 7 case filed by an individual with primarily consumer debts may be dismissed for abuse upon the motion of any party in interest, with certain limitations. Abuse is presumed when the debtor is able to repay at least 25 percent of non-priority unsecured debts or $5000 over 60 months, applying IRS expense guidelines. The debtor may rebut the presumption of abuse by demonstrating extraordinary circumstances that require additional expenses or an adjustment of current monthly income. In deciding whether a case is abusive, the court must also consider whether the case was filed in bad faith or the ▒totality of the circumstances▒ demonstrates abuse.

The Department supports strengthening the provisions of section 707 to ensure that abuse debtors do not obtain a chapter 7 discharge. However, the proposed amendments rasie a number of concerns, and for these reasons, we must oppose section 102.

First, we are concerned that the "thresholds" are too low (and should in any event be combined factors rather than alternative factors), and will have the effect of sweeping far too many debtors into Chapter 13 when in fact they have no significant ability to repay their debts. Moreover, we believe that the proper formulation should be the ability repay some percentage of non-priority unsecured debts AND (not "or") some absolute amount over a specified time. In addition, this section does not make clear whether the ability to repay standards apply only to an individual debtor, or also to joint debtors.

Second, in addition, in considering allowable expenses under the formula provided, use of the Internal Revenue Standards is inappropriate because those standards were not intended for these purposes. The IRS does not provide fixed numbers for "other necessary expenses"; rather, the IRS simply provides giudleines for interpretation. Without a definitive chart or formula to refer to for "other necessary expenses" it is unclear hwo the debtor can calculate, or the court can determine whether abuse is presumed.

Third, and critically, the standards for rebutting the presumption are far too strict in that the debtor can rebut the presumption "only" if he can demonstrate "extraordinary circumstances" that require additional expenses or adjustments of income. The court must have the discretion to consider other factors besides these two. In addition, we believe that the phrase "extraordinary circumstances," risks being interpreted much too narrowly. We would prefer language more along the lines of simply allowing the presumption to be rebutted if the court finds that the debtor has established meritorious "special circumstances." This approach would give the court more latitude in evaluating the debtor's particular situation.

Fourth, and importantly, the procedures set forth in Section 102 would impose a substantial burden on the courts and the trustees, threatening to significantly clog the formal bankruptcy processes.

Fifth, we believe that the inclusion of "bad faith" as a dismissal factor under section 707(b) may lead some courts to conclude that "bad faith" is not grounds to dismiss a case under section 707(a), which allows a court to dismiss any chapter 7 case "for cause." To avoid confusion, we urge that sections 707(a) and (b) be merged into one section 707 to permit dismissal of any chapter 7 case based on ability to repay, bad faith, the totality of circumstances, or any of the factors set forth in section 707(a). In the event that the Committee decides not to merge section 707(a) and (b), consideration should be given to expanding section 707(b) to cover debtors whose debts are primarily consumer debts or taxes. The expansion is needed because taxes are not considered to be consumer debts, and section 707(b) should be available to prevent debtors from discharging tax claims in a chapter 7 proceeding when capable of repaying those obligations under chapter 13.

Sixth, we do not think it appropriate for Section 102 to impose a higher duty on debtor's counsel than that set forth in Rule 9011, and are concerned that the formulation set forth in Section 102 could be so interpreted.

Seventh, we do not believe it is appropriate to remove the risk of sanctions from all creditors who bring unjustified Rule 707(b) motions just because those creditors' claims may be less than $1000. If the goal is to encourage small business creditors to bring appropriate Rule 707(b) motions, then the rule should be drafted more narrowly. Otherwise the rule will serve to protect large creditors with small claims, who clearly do not need this protection.

Eighth, section 102 also amends section 704 to require the trustee to file a statement with the court 10 days before the meeting of creditors, especially when section 604 of this bill gives debtors up to 45 days to complete their schedules, and liberal amendments to schedules are permitted. The necessity of such a statement is also doubtful insofar as section 102 requires the debtor to file a statement containing the necessary ability to repay calculations.

Ninth, there are several drafting errors, which would be pleased to address separately.

[Note for Senate Bill: Unlike the House Bill, Section ___ does not rely on IRS standards but instead requires the Department of Justice to promulgate new standards. We oppose this approach because it is the court, and not the Justice Department or the IRS, that should determine what expenses are appropriate. Unlike the House Bill, Section ___ allows the presumption to be rebutted by a showing of special circumstances. [What else -- deletes something else, but not all of it?) that is pretty good, and will drop only and replace require with justify, all of which are good but don't go far enough. And, re: 1000, may modify to protect small busiensses, which would be ok.

Section 103. Notice of Alternatives.

Section 103 of H.R. 833 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 a credit counseling service approved by the United States Trustee for that district. We support the concept of consumer education that underlies section 103, but question whether the notice will be effective when it is likely provided after the debtor has decided to file bankruptcy. We are concerned about putting the U.S. Trustee's in the business of approving credit counseling services, although we believe that with appropriate flexibility, as appears to be provided by this provision, some form of approval process could be devised if adequate resources were appropriated.

Section 104. Debtor Financial Management Test Program

Section 104 of H.R. 833 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 provided that adequate resources are appropriated. However, H.R. 833 creates confusion as to whether debtor education is to be a test or a permanent program. Section 302(b) and (c) of H.R. 833 conditions the debtor's discharge upon completion of "an instructional course concerning personal financial management described in section 111." This language suggests a permanent program. Moreover, section 111 does not address such courses. We believe these provisions may have been carried over inadvertently from an earlier draft, and suggest they be deleted.

SUBTITLE B: CONSUMER BANKRUPTCY PROTECTIONS

Sections 105 to 108. Disclosures (Debt relief agencies)

Sections 105 to 108 of H.R. 833 deal with debt relief agencies. Section 105 defines covered debt relief agencies. Section 106 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. Debt relief agencies would be required to provide a separate notice advising the assisted person that the debt relief agency is required, *inter alia*, to enter a written contract. Finally, debt relief 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 106, 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 debt relief 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 106 of H.R. 833 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 107 of H.R. 833 would provide the assisted person certain substantive rights when using a debt relief 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. Section 107(b)(2) provides that a debt relief agency shall not "make any statement . . . which is untrue and misleading <u>or</u> which upon the exercise of reasonable care, should be known by the debt relief agency to be untrue or misleading." (emphasis added). The underlined disjunctive "or" would impose strict liability upon a debt relief agency by imposing liability if the statement is untrue and 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 108 of H.R. 833 would provide penalties and other remedies for the failure of a debt relief agency to comply with the requirements of section 106 and 107; 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, debt relief agencies would be required to refund or waive fees. 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.

Section 108 also empowers the United States Trustees to bring actions seeking such penalties and injunctions against offending debt relief agencies. Section 108 should be clarified to allow a debtor to bring an action for a violation.

Section 110. Discouraging Abus[ive] Reaffirmation Practices

Section 110 addresses a problem of great significance; namely, unscrupulous creditor practices designed to coerce debtors into reaffirming debts, particularly unsecured debts, even when doing so clearly is not in the best interests of the debtor. Currently, section 524(c) of the Code imposes a number of limitations on reaffirmation agreements, but the extant evidence suggests that abusive reaffirmation practices continue. The National Bankruptcy Review Commission recommended even more strict rules regarding reaffirmation of secured debt, and the Commission recommended eliminating the reaffirmation of unsecured debt.

Section 110 attempts to address this problem by requiring that creditors who seek reaffirmation on wholly unsecured consumer debt must provide a disclosure that that the debtor is entitled to a hearing but that the debtor can waive his right to a hearing.

We believe that a far more effective approach would (1) require disclosure of the component amounts of any debt to be reaffirmed; (2) require court review for reaffirmations of relatively small amounts where the creditor claims a purchase money security interest; (3) prohibit the addition of costs and attorneys fees on at least these smaller claims. Such an approach would effectively reach harassing reaffirmations of minor household goods and items, and address those situations where retailers are attempting to take security interests in negligible items such as household goods. We would be happy to work with the Committee to develop stronger, more effective rules to discourage abusive reaffirmation practices.

Section 111. Promoting Alternative Dispute Resolution.

Section 111 would create an incentive for the parties to use alternative dispute resolution prior to the filing of a petition. We wholeheartedly support efforts to incent the use of alternative dispute resolution in this context, but believe Section 111 is faulty because it applies only to circumstances where a creditor who unreasonably refused to negotiate an alternative repayment schedule proposed by an approved credit counseling agency; it applies only if the debtor's offer was made at least 60 days prior to the filing of the petition; and the offer provided a specified percentage payment (60% over a specified time). An effective alternative dispute resolution rule should be no limited by any of these factors, but rather should encourage parties to use any appropriate neutral, and give them leeway to determine when it is appropriate to settle and for what amount. We would be happy to work with the Committee to draft a more effective rule.

Section 115. Protection of Savings Earmarked for the Postsecondary Education of Children.

The Department takes no position on this provision at this time, which would provide an exemption for certain qualified tuition savings programs.

Sections 116 to 117. Effect of Discharge; Automatic Stay.

Section 116 addresses several issues. First, it states that the willful failure of a creditor to credit payments received under a confirmed plan shall constitute a violation of a discharge injunction under subsection 524(a)(2) of the Code. We support this provision but suggest two modifications. First, the court should be given discretionary, rather than mandatory, authority to grant sanctions, so as to allow the court to consider situations where the creditor had a good faith basis to believe the debt was not discharged. Second, we suggest the provision be amended to require the debtor first to exhaust efforts to obtain administrative relief, to account for those situations where the federal government, particularly the IRS, may make in occasional innocent mistake resulting from the volume of payments processed.

Next, section 116 provides that debtors who are injured by the failure of a creditor to comply with the law regarding reaffirmation agreements or regarding the effective of the discharge injunction may not bring a class action and may recover only actual damages or $1000, whichever is greater, plus costs and attorneys' fees. We oppose this provision. Recent litigation has demonstrated that these kinds of violations are in fact perpetrated, at times, on a class-wide basis in circumstances where individual damages may be too small to incent a debtor to bring a claim. Moreover, we believe that treble damages would be a more effective incentive to debtors to bring these claims. Accordingly, we strongly oppose this provision.

Section 117 bars class actions for violations of the automatic stay, and limits debtor recover to actual damages and reasonable costs, including attorneys fees. Once again, we strongly oppose the limitation on class actions, and support a treble damages provision as a more effective incentive to obtain compliance with the provisions of the automatic stay rules.

[Senate Bill may change some of this]

Section 119. Discouraging Bad Faith Repeat Filings.

In cases of refiling within a year, section 119 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 123. Giving Secured Creditors Fair Treatment In Chapter 13.

Section 123 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 123. 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 124. Restraining Abusive Purchases on Secured Credit.

Section 124 amends Section 506 of the Code by barring the stripping of liens in cases of individuals for personal property acquired by the debtor within 5 years of filing the bankruptcy petition. Currently, the debtor's power to strip liens in plans under chapters 11, 12 and 13 to the value of the collateral is not limited by the time lapsed since purchase.

Expanding the ▒look back▒ to 5 years changes its character, and creates a significant limitation on the attractiveness of reorganizations for debtors, especially under chapter 13. A key advantage of chapter 13 for debtors is the expanded ability it affords to retain property subject to liens. Not only can debtors reduce the payments down to the value of the collateral, but they can also pay the liens off over time from the plain payments. Many courts allow debtors to ▒front load▒ the payments for their secured debt; in such cases, debtors who retire their secured debts under their plans may have no incentive to finish their plans, and may default without making substantial payments to their unsecured creditors. (The latter result is addressed by section 123, which precludes a strip down where the debtor fails to complete the plan; we support this provision.) This provision therefore may reduce substantially the number of debtors who voluntarily file chapter 13. This change benefits lenders who take personal property, such as cars, as collateral. The lack of strip down means that debtors must devote a greater percentage of their limited assets to secured creditors.

[So, what is our position; should we take no position?]

[Senate bill will have a change on this]

Section 126. Exemptions.

Section 126 would amend section 522(b0(2)(A) of the Code to permit the use of state exemption only if the debtor has been domiciled in the respective state for at least two years before filing. As written, this amendment appears to deny a debtor who has not resided in a state for at least two years, but is otherwise a resident of that state, the use of any state's exemption because many states prohibit the use of federal exemption law under so-called ▒opt out▒ laws. To prevent this situation from resulting in the debtor being unable to claim any homestead, the opt-out language of section 522 should also be modified, or this provision should be amended to permit the use of a state's exception law where the debtor domicile has been located for the last two years, or for a longer portion of the last two years than in any other place.

Section 131. Additional Amendments to Title 11.

Section 131 establishes as the tenth priority those claims for death or personal injury resulting from the operation of a motor vehicle or vessel if the debtor-operator was intoxicated or under the influence of drugs. Although we recognize the important public policy behind this provision, we do not think it is appropriate to elevate these kinds of claims over the many other equally sympathetic claims that one could bring against a debtor.

Section 132. Amendment to section 1325.

Section 132 amends the statutory definition of ▒disposable income▒ found in section 1325(b)(2) of the Code to exclude ▒child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law and which is reasonably necessary to be expended▒ received by the debtor. The Department opposes his change because it would lead to an artificially low amount. While this change removes income received for the benefit of a dependent child, it would not remove the expenses paid for the maintenance and support of the dependent child. ▒Disposable income▒ as currently defined by the Code properly takes into account both the income received and the expenses incurred on behalf of a dependent child.

Section 135. Limitations on Luxury Goods.

Section 135 would amend Section 523(a)(2)(C) of the Code to change the non-dischargeability rules for certain so-called luxury goods. First, it defines ▒luxury goods or services▒ so as to exclude those ▒reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.▒ Second, it would establish a cap on dischargeable luxury goods or services of $250, or cash advances of $250, incurred within 90 days of filing the petition. We oppose the limitation. This would be a substantial change from the current law, which sets forth limits of $1075 during the preceding 60 day period. We would support limits of $1000 during the past 90 days as more reasonable. Moreover, it is important to bear in mind that cash advances are not always obtained for frivolous expenses; debtors sometimes use cash advances to buy absolute necessities such as groceries.

[This needs to be put more artfully; and are we ok with the definition?]

[Senate bill will be different]

Sections 141 to 147. Domestic Support Obligation.

Sections 141 defines domestic support obligations, and Section 142 establishes domestic support obligation as the first priority. We generally support this recognition of the critical societal importance of ensuring that domestic support obligations are not unduly reduced as a result of a debtor's bankruptcy. Without payments from domestic support obligations, the recipients of those payments may become destitute; it is therefore appropriate to give them first priority. However, recognizing also that it is important to ensure the adequate funding and support of the entire bankruptcy system, domestic support obligations should be given co-first priority with administrative expenses rather than relegating administrative expenses to the second priority.

Sections 143 to 147 establish other special rules in the domestic support obligation context. Sections 143 and 144 establish special rules regarding confirmation and discharge, and exceptions to the automatic stay, in cases involving domestic support obligations. Section 145 makes certain domestic support obligations non-dischargeable. We support these provisions for the reasons stated above.

Section 149. Nondischargeable Debts.

Section 149 amends Section 523(a) of the Code in two ways. First, it would make non-dischargeable any debt that was incurred by pay an otherwise non-dischargeable debt with the intent to discharge the newly acquired debt. We support this change.

Second, Section 149 would also makes non-dischargeable all debts incurred to pay non-dischargeable debts, without regard to intent, if incurred within 90 days of the petition. We do not support this provision. By failing to weigh the intent of the debtor, this rule is overbroad.

[Should we say more here?]

[Senate Bill may be different]

TITLE II: DISCOURAGING BANKRUPTCY ABUSE

Section 201. Reenactment of Chapter 12.

Section 201 reenacts Chapter 12 of the Code, pertaining to family farmers. We support this provision.

Section 202. Meetings of Creditors and Equity Security Holders.

Section 202 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 203. Protection of Retirement Savings in Bankruptcy.

Section 203 exempts from the bankruptcy estate a qualified retirement fund, pursuant to certain standards set forth in this section. Section 203. The effect of the amendments would be to enhance debtors' ability to prevent their interests in retirement accounts and funds, including Individual Retirement Accounts, from being used to satisfy their debts. Whatever the merits of this amendment as applied to other claims, the expanded protection of retirement interests should not be available with respect to tax claims. A debtor should not be able to fund his or her retirement with unpaid taxes. Indeed, the generally applicable anti-alienation restrictions regarding interests in tax-qualified retirement funds do not preclude enforcement of a federal tax levy or collection by the United States on a judgment resulting from an unpaid tax assessment. See Treas. Reg. 1.401(a)-13(a)(2) (26 C.F.R.). We submit that debtors should not be encouraged to seek bankruptcy relief in order to prevent taxes from being paid out of retirement accounts and funds that would be subject to enforced collection outside of bankruptcy.

Section 206. Creditor and Equity Security Holders Committees.

Section 206 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 206 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 209. Amendment to Section 330(a)

Section 209 would provide that in determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission based on the results achieved. We oppose this provision, which could lead to abuses. We prefer the current multifactor analysis set forth in section 330(a)(3) of the Code.

Section 211. Preferences.

Section 211 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.

Section 215 (second instance). Defaults Based on Nonmonetary Obligations.

Section 215 amends Section 365 of the Bankruptcy 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 is 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.

Currently, Section 365 of the Code allows a debtor to resume performance (or "assume") of an executory contract or an unexpired lease, notwithstanding a default that would normally cost the debtor that right. To do so, the debtor must cure the default, compensate for the monetary loss, and assure adequately its future performance. Wiving 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. The non-debtor party should not be forced to perform where deprived of the full benefit of the bargain.

If section 215 is intended to address the problem that minor contractual breaches could otherwise be an obstacle to the debtor's power to assume, then this fear is misplaced. The common law has long distinguished between defaults that are minor (entitling only damages) and major (voiding the agreement). This proposal replaces, in the case of executory contracts, this familiar concept with the wholly novel notion of "equities." This gives no guidance to the judge or parties as to what factors should be weighed, and will therefore generate confusion and litigation.

We oppose this provision.

TITLE III: GENERAL BUSINESS BANKRUPTCY PROVISIONS

Section 302. Miscellaneous Improvements.

Section 302 bars any debtor from filing a petition unless they have sought the assistance of credit counseling during the 90-day period prior to the filing of the petition. This provisin does not apply in certain circumstances, such as filings due to exigent circumstances. Section 302 also requires debtors to attend educational courses prior to discharge in Chapter 7 and 13 cases. Section 302 requires the clerk of the court to maintain a list of credit counseling services and educational courses that have been approved by the U.S. Trustee.

The lack of a definition for credit counseling creates a void on several key issues that will have to be decided either by the courts on a case by case basis, or through regulations issued by the Attorney General because the United States Trustees must approve the providers. For example, the "briefing" that must occur within 90 days will have to be defined so that parties know exactly what must occur within the 90-day period. If the debtor received counseling a year earlier, attended briefings and participated in a debt repayment plan up until the 90-day period prior to filing, one might presume that the debtor satisfies the criteria. Even so, one might argue that the debtor is ineligible unless the briefing occurred within the 90-day period. There are a number of providers that use 1-800 numbers and the Internet. If the U.S. Trustee approves these low-cost providers one could argue nevertheless that the briefing must be in person or by a local provider. None of these issues are directly addressed in H.R. 833.

There is no automatic dismissal to enforce this provision if a debtor fails to file a certificate from a counselor pre or post-petition. Assuming the petition gets filed without a certificate, a party would then have to move to dismiss the case under 707(a), 1112(b), 1208(c), or 1307(c) based on the debtor's ineligibility.

We also question the utility of requiring credit counseling after filing, especially if attendance at an instructional course is going to be required as a condition of discharge (depending on whether debtor education is a permanent or test program). The United States Trustee might possibly allow the two functions to be combined into one session. In any event, this may be more of an issue when a debtor files a chapter 12 or chapter 13 case, because it will not be clear what difference one repayment plan and budget analysis make over the other.

If would-be debtors encounter problems with a credit counseling service, there is no apparent mechanism to address or remedy the situation in the bankruptcy court context. The only thing the U.S. Trustee can do is remove the agency from the "approved" list.

Section 302(b)-(c) provide that a chapter 7 and a chapter 13 discharge are conditioned upon the debtor's completion of a post-filing instructional course. As noted above in comments to section 104, H.R. 833 appears to contain provisions for a pilot program, but this provision seems to assume a permanent program. There is a need to dispel the confusion. A pilot program is preferable.

If the requirement is to remain, it is not clear what happens if the debtor never completes the course. We presume the case can still be closed in the normal course but without a discharge. This will lead to an increase in situations where the debtor returns a year or two later seeking to reopen the case to take a course and get a discharge. It may also lead to repeat filings.

Section 303. Extensions

Section 303 of H.R. 833 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 United States Trustee Program's nationwide expansion. Pub. L. No. 101-650, 317(a), (c), 104 Stat. 5115, 5116 (1992). In these six 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 bankruptcy 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 Bankruptcy Administrator programs, additional challenges to the constitutionality of this dual system seem likely. See, e.g., St. Angelo v. Victoria Farms, Inc. 38 F.3d 1525, 1532 (1994); Joelson v. United States, 179 B.R. 857, 864 (N.D. Ohio 1995). 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 justified 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.

Finally, we note that section 303 is not referenced in the table of contents set out in section 1 of H.R. 833.

TITLE IV: SMALL BUSINESS BANKRUPTCY PROVISIONS

Sections 401 and 403. Flexible Rules for Disclosure Statement and Plan; Standard Form Disclosure Statements and Plans.

Section 401 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 403 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 402. Definition of Small Business Debtor.

This section suffers from some technical problems, which we would be happy to help correct.

Section 404. Uniform National Reporting Requirements.

Section 404 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 405. Uniform Reporting Rules and Forms.

Section 405 would require the Judicial Conference of the United States 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 404 of the bill. We support this provision, but suggest that it be amended to indicate that the Judicial Conference should consult with the Attorney General and the Small Business Administration in developing the rule and form proposals.

Section 408. Plan confirmation deadline.

Section 408 of H.R. 833 requires that small business chapter 11 cases be confirmed within 150 days of filing. This time period may be enlarged only if the debtor demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable time.

The Department encourages the prompt disposition of cases in its oversight but the 150-days cutoff may be a bit tight. Currently only 4% of chapter 11 confirmations occur within 150 days of filing. Although substantial improvements in processing times have occurred during the last decade, the majority of confirmations still occur more than one year after filing. Additionally, over 60% of dismissals and conversions to chapter 7 occur more than 150 days after filing. Although section 408 would allow enlargement of this time period, our statistics show that only about 30% of chapter 11 cases result in confirmation. Furthermore, based solely on when a case is filed, there is no age at which a chapter 11 cases has a 50% or better chance of being confirmed

Section 410. Duties of the United States Trustee.

Section 410 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 $10 million over 5 years.

Section 411. Scheduling Conferences.

Section 411 would amend section 105(d) of the Code to require the courts to hold status conferences "as necessary." 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 411 -- 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 we therefore oppose the provision.

Section 412. Serial Filer Provisions.

Section 412 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 412 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 413. Expanded Grounds For Dismissal or Conversion and Appointment of Trustee.

Section 413 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 415. Payment of Interest

Section 415 would amend section 362(d)(3) of the Bankruptcy Code to limit the automatic stay in case of a single asset real estate (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.

TITLE VI: STREAMLINING THE BANKRUPTCY SYSTEM

Section 601. Creditor Representation at First Meeting of Creditors.

Section 601 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 602. Audit Procedures

Section 602 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 out of every 250 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 602 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 $18.6 million to more than $59 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.

We recommend that the following changes be made to Section 602:

- 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;

- 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 603. Giving Creditors Fair Notice in Chapter 7 and 13 Cases

Section 603 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 604. Failure for Failure to Timely File Schedules or Required Information.

Section 604 provides that in voluntary cases under chapters 7 or 13, the case shall automatically be dismissed if the debtor fails to file all required information within 45 after filing the petition. The Department does not oppose this provision, so long as dismissal is without prejudice, and we suggest an appropriate clarification.

Section 605: Adequate Time to Prepare for Hearing on Confirmation of the Plan.

Section 605 of H.R. 833, *inter alia*, would give a chapter 13 debtor up to 90 days after the order for relief to file a chapter 13 plan. Under current law, a debtor must file a plan within 15 days from entry of the order of relief. Fed. R. Bankr. P. 3015(b). The Department opposes this enlargement of time as contrary to the principles of expeditious case administration. Due to other provisions in H.R. 833 requiring the debtor to file certain information and documents with the petition, both the chapter 13 debtor and debtor's counsel should be well prepared to propose a plan within the current 15-day window.

Section 606. Chapter 13 Plans to Have a 5-year Duration in Certain Cases.

Section 606 of H.R. 833 would amend section 1329 of the Code, *inter alia*, to read that a modified plan may not call for payments extending beyond "the applicable commitment period under section 1325(b)(1)(B)(ii)." Section 1325(b)(1)(B)(ii) states that a debtor can be required to submit all disposable income to a plan for three years. The drafters apparently intended to amend section 1325(b)(1)(B)(ii) to call for a longer period of time if the debtor's income is equal to or greater than the highest national median family income reported for a family of equal or lesser size, but no provision of H.R. 833 seeks to make this change. In addition, section 606 also seeks to amend section 1329 to set forth the "duration period" of a modified plan (page 156, line 20 to page 157, line 7). This amendment appears to be misplaced.

Section 608. Elimination of Certain Fees Payable in Chapter 11 Bankruptcy Cases.

Section 608 of H.R. 833 would amend section 1930(a)(6) of title 28, United States Code, to except all debtors whose quarterly disbursements are less than $300,000 from paying post-confirmation quarterly fees. The Department opposes this provision because it would eliminate one of the most effective tools to encourage the prompt administration and closing of chapter 11 cases. This section would also result in a revenue loss to the United States Trustee Program of at least $9 million annually.

Section 609. Prompt Relief from Stay in Individual Cases.

Section 609 provides that, in any individual case under chapters 7, 11 or 13, the automatic stay shall terminate 60 days after so requested by a party unless the court makes a final decision, the parties agree to an extension, or the court finds good cause supporting an extension. We support this provision.

Section 610. Stopping Abusive Conversions From Chapter 13.

Section 610 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 that we support section 123, we also support this change. This provision addresses a different aspect of the same problem dealt with in section 123 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 123, however, section 610 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 13, and then convert to a chapter 7 without finishing their chapter 13 plans.

TITLE VII: BANKRUPTCY DATA

Sections 701 and 702. Improved Bankruptcy Statistics

Section 701 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 701 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 701 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 701 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 702, 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 question the provision in section 702 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 702 provides for electronic access through the Internet. We would be happy to work with the Committee to recommend appropriate changes to these provisions.

TITLE VIII: BANKRUPTCY TAX PROVISIONS

Section 801. Treatment of Certain Liens.

Section 801 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 802. Effective Notice to Government

Section 802 of 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 803. Notice of Request for a Determination of Taxes.

Section 803 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.

Section 804. Rate of Interest on Tax Claims.

Section 804 would enact as Section 511 of the Code a new provision relating to the interest rate on, or determining the present value, of a tax claim. Under current law, the court must generally determine the "market rate" under such circumstances. Section 511 would provide 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. The section 6621(a)(2) rate is also based on the Federal short-term rate, plus three percentage points, but is fixed on a quarterly basis at the rate for the first month of a quarter rather than redetermined monthly. In the case of secured tax claims and administrative tax claims, the applicable nonbankruptcy rate would apply with respect to federal taxes, i.e., the section 6621(a)(2) rate.

We would prefer that the legislation simply fix the interest rate for all deferred tax payments at the applicable nonbankruptcy interest rate. On the other hand, the rate for unsecured taxes under section 804 of H.R. 833 is merely a minimum rate and does not preclude a taxing authority from insisting on a higher rate. Thus, we would not oppose this provision.

Section 805. Tolling of Priority of Tax Claims Time Periods.

Section 805 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.

We urge that this provision be modified. First, the time periods applicable to employment and excise taxes should be suspended during the pendency of a prior bankruptcy case. Second, this section should be modified to suspend time periods in which collection was stayed under the terms of a confirmed plan under chapters 11, 12 or 14, plus six months. Third, the Internal Revenue Service Restructuring and Reform Act of 1998 gave taxpayers new rights to appeal collection actions that, when invoked, have the effect of staying collection. Thus, the time periods should also be suspended while the IRS is prohibited from collecting as a result of an appeal of a collection action taken under applicable nonbankruptcy law.

Section 807. Chapter 13 Discharge of Fraudulent and Other Taxes.

Section 807 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.

Section 808. Chapter 11 Discharge of Fraudulent Taxes.

Section 808 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 809. Stay of Tax Proceedings.

Section 809 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 810. Periodic Payment of Taxes in Chapter 11 Cases.

Section 810 would amend sectin 1129(a)(9)(c) of the Code to provide that deferred payments of tax claims under a chapter 11 plan must be made in installments with the result that balloon payments would be proscribed. In lieu of the current five-year payment period measured from the date of assessment, such payments would end on the earlier of five years after the petition date or on the last date on which payments are to be made to unsecured creditors under the plan. In addition, secured tax claims would be treated as priority claims for deferred tax purposes, where such claims would have had priority absent their secured status. We support this provision.

Section 811. The Avoidance of Statutory Tax Liens Prohibited.

Section 811 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 814. Income Tax Returns Prepared by Tax Authorities.

Section 814 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 815. The Discharge of the Estate's Liability for Unpaid Taxes.

Section 815 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 816. Requirement to File Tax Returns to Confirm Chapter 13 Plans.

Section 816 would require chapter 13 debtors to file tax returns due for three years prior to the petition date. Tax authorities are placed at a severe disadvantage in preparing and filing timely proofs of claim when a chapter 13 debtor has ignored his or her tax return filing obligations. Outside of bankruptcy, the IRS will typically ask a delinquent debtor to file tax returns for the prior six tax years. We submit that the Code should similarly require the filing of delinquent tax returns for six years rather than for three years, and we therefore urge that this provision be modified accordingly.

Section 818. Setoff of Tax Refunds.

Section 818 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.

TITLE IX: ANCILLARY AND OTHER CROSS-BORDER CASES

Section 901. Amendment to Add Chapter 15 to Title 11.

Section 901 adds a new chapter to the Code to be codified as Chapter 15. This chapter would address insolvencies which cut across international borders. We generally support these provisions, with the following exceptions.

Proposed section 1507 allows the court to provide the representative of a foreign insolvency "additional assistance" based upon standards that are vague and duplicative of section 304 of the Code. This approach is inconsistent with the purpose of the cross-border chapter; namely, to create new and better treatment for international bankruptcies.

We also oppose proposed sections 1519 and 1521 to the extent they grant the court open-ended authority to enjoin anything needed to protect assets and creditors. As written, the sections are overbroad.

TITLE XI: TECHNICAL CORRECTIONS

Section 1130. Trustees.

Section 1130 of H.R. 833 would amend section 586 of title 28, United States Code, to establish procedures for judicial review of decisions by a United States Trustee to either terminate or suspend from a panel of trustees or as a standing trustee, and decisions to deny an expense request by standing trustees.

As an initial matter, the Department supports clarifying and improving the judicial review already available trustees who are aggrieved by the actions of the United States Trustee Program. Historically, a decision to terminate or suspend a trustee from the panel of trustees was not subject to judicial review. E.g., Joelson v. United States, 86 F.3d 1413 (6th Cir. 1996). In response to concerns about a lack of judicial review, the Department promulgated an administrative rule giving private trustees the ability to seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 552 *et seq.* of any action by the Department to suspend or remove a trustee from future case assignments. 28 C.F.R. § 58.6. The Department believes that standing trustee budget disputes are already subject to judicial review under the APA. In addition, the United States Trustee Program has implemented procedures for mediating standing trustee budget disputes. Notwithstanding its position that review is available under the APA, the Department engaged in protracted negotiations with the affected parties and the assistance of Congressional staff and after much effort, a compromise was reached. Unfortunately, Section 1130 does not reflect the compromise.

Unless further revisions are made, the Department must oppose section 1130. Section 1130(b) sets forth the standard of review for standing trustee expense requests. This standard, unlike the proposed standard for review of trustee termination and suspension, is whether the decision is "unreasonable **or** without cause." This is unacceptable. The standard of review should be revised to "unreasonable **and** without cause" in keeping with the compromise.

* * * *

We wish to raise two additional issues with the Committee. First, we feel strongly that the homestead exemption, which has been subject to abuse and is perceived as giving certain debtors a significant shelter for their assets, should be uniformally capped at a fair amount (we would suggest $100,000).

Second, as noted in our comments above, many of the provisions set forth in this bill would impose substantial burdens on the United States Trustees and their Executive Office. Currently, the Trustees program is fully self-funded through fees. However, to implement the requirements of this bill, the Trustees would be required to expand tens of millions of dollars. We therefore request that a special appropriation be authorized for each provision that imposes a new burden on the United States Trustees or their Executive Office.

We look forward to working with the Committee as it considers these and other issues raised by H.R. 833. 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,

Dennis Burke
Acting Assistant Attorney General