

SYNOPSIS
OF
Bankruptcy Abuse Prevention and
Consumer Protection Act
of 2005

PREPARED BY
THOMAS J. YERBICH, ESQ.
ANCHORAGE, ALASKA

Does not include provisions on
Stockbroker Liquidation
Commodity Broker Liquidation
Ancillary and other Cross-Border Cases [New Chapter 15]
or
Title 15 United States Code [Commerce and Trade]

Except as otherwise specifically provided, the amendments made by this Act are effective 180 days after enactment. Section 1001 of the Act permanently reenacts Chapter 12, as amended, effective July 1, 2005

TABLE OF AMENDMENTS EFFECTIVE UPON ENACTMENT					
Section	Page	Section	Page	Section	Page
28 U.S.C. §1334	39	§507(a)(4)	24	§522(o), (p), (q)	22
§548(a)(1)	28	§548(e)	28	§727(a)(12)	3
§1104(e)	5	§1114(l)	5	§1141(d)(5)(C)	5
§1222(a)(2)	8	§1228(d)	9	§1328(h)	12

CONTENTS

Chapter 7 1
Dismissal or Conversion 1
Presumption of Abuse (“Means Test”) 1
U.S. Trustee Review 1
Presumption of Abuse Notice 1
Current Monthly Income 1
Allowable Expenses 2
Rebuttal of Presumption 2
Exceptions to Presumption 2
Median Family Income 2
Standing to Bring Motion to Dismiss 3
Distributions 3
Discharge 3
Discharge Delayed 3

Chapter 11 — General 3
Creditors’ Meeting 3
Committee Membership 3
Committee Duties 4
Property of Estate 4
Plan 4
Plan Confirmation 4
Disclosure Statement 4
Modification of Plan 4
Appointment of Trustee/Examiner 4
Appointment of Trustee/Examiner (CEO/CFO Fraud) 5
Conversion/Dismissal 5
Retiree Benefits 5
Impaired Claims 5
Discharge (Individual) 5
Discharge Delayed (Individual) 5
Discharge (Corporation) 5

Chapter 11 — Small Business 6
Defined 6
Duties of Small Business DIP 6
Duties of U.S. trustee 6
Reporting Requirements 7
Plan 7
Disclosure Statement 7

Chapter 12 7
Family Farmer 7
Family Fisherman 8
Dismissal 8
Plan 8
Plan Confirmation 8

Plan Modification	8
Discharge	8
Discharge Delayed	9
Chapter 13	9
Conversion or Dismissal	9
Assigned Domestic Support Claims	9
Interest on Nondischargeable Claims	9
Commitment Period	9
Repayment of Pension Plan Loans	9
Confirmation Hearing	9
Secured Claims	10
Cure Arrearage on Secured Debt	10
Effect of Conversion	10
Unsecured Claims	10
Other Confirmation Requirements	10
Disposable Income	11
Debtor's Payments	11
Discharge	12
Discharge Delayed	12
Filing Prepetition Tax Returns	12
Tax Claims (Chapter 13)	12
Postconfirmation Modification	13
Postpetition Reports	13
Debtor's Duties	13
Prepetition Credit Counseling	13
Statement of Financial Affairs	14
Perform Intentions	14
PMSI in Personal Property	14
As ERISA Administrator	14
Education Accounts	14
Provide Tax Returns	15
Establish Identity	15
Dismissal for Failure to Provide Information	15
Debtors' Counsel	16
Signature as Certification	16
Sanctions	16
Debt Relief Agency	16
Restriction on Debt Relief Agencies	16
Debt Relief Agency Disclosures	17
Debt Relief Agency Requirements	17
Nonprofit Credit Counseling Agencies	18
Approval/Listing	18
Requirements for Credit Counseling	18
Requirements for Instructional Courses	18

Bankruptcy Petition Preparers (“BPP”)	19
Non-Individual BPP	19
Notice to Debtor	19
Fees	19
Sanctions	19
Fines	20
Exclusions from Estate	20
Education Account	20
Tuition Credit Account	20
Contributions to Qualified Benefit Plans	20
Pawned Property	21
Tax Exempt Organizations	21
Exemptions	21
General Domiciliary Requirements	21
Retirement Funds	21
Lien Avoidance on Exempt Property	21
State Homestead Exemptions	22
Claims	22
International Fuel Tax	22
Domestic Support Obligation	22
Trustee’s Notice (Domestic Support Claims)	23
Secured Valuation	23
Reduction of Claim (Unsecured Consumer Credit)	23
Administrative Expenses	23
Back Pay Awards	23
Taxes	23
Nonresidential Real Property Lease	23
Health Care Closing Costs	24
Reclamation Claims	24
Limitations on Insider Claims	24
Claims Entitled to Priority	24
General Note	24
Wage Claims	24
Employee Benefits	24
Taxes	24
DUI Claims	25
Nondischargeable Debts	25
Taxes	25
Consumer Debts	25
Domestic Support Obligations	25
Student Loans	25
Incurred to Pay Taxes	25
Incurred to Pay Election Law Fines	25

Non-Support Marital Debts	25
Condo Dues	25
Prisoner's Fees	25
Pension Plan Loans	26
Reaffirmation/Redemption	26
Disclosures by Creditor	26
Debtor's Affirmations	26
Attorney's Certification	26
Creditor Payments	26
Presumption of Undue Hardship	27
Redemption Payment	27
Trustee Avoidance/Preferences/Fraudulent Transfers	27
Statutory Liens	27
Reclamation Rights	27
Warehouseman's Lien	27
Ordinary Course of Business Exception	27
De Minimis Exception	27
Time of Transfer	28
Alternate Repayment Plan	28
Insider Employment Contracts	28
"Look back" Period	28
Self-Settled Asset Protection Trusts	28
Automatic Stay — Exceptions	28
Tax Court Proceedings	28
Domestic Relations	29
Pension Plan Obligations	29
Eviction Judgment (Residential)	29
Residential Lease Eviction (Drugs)	30
Non-avoidable Transfers	30
Securities Investigations	30
Tax Refunds	30
Medicare Programs	30
Automatic Stay — Termination	31
Prior Case Dismissed	31
More than One Prior Case Dismissed	31
Real Property (<i>In Rem</i>)	32
Time for Ruling on Motion (Individuals)	32
Personal Property (Individual Debtors)	32
Sanctions	32
Small Business Cases	33
Order Confirming Termination	33

Executory Contracts/Leases	33
Nonmonetary Defaults	33
Nonresidential Real Property	33
Personal Property Leases	33
Special Tax Provisions	34
State & Local Taxes	34
Interest on Tax Claims	34
Subordination of Tax Liens	34
Dismissal for Failure to File Tax Returns	34
Determination of Liability	34
Tax Liability – Estate	35
Health Care Business	35
Defined	35
Patient Care Ombudsman	35
Disposal of Patient Records	35
Transfer of Patients	36
Personal Privacy	36
Taxpayer Identification Numbers	36
Personally Identifiable Information	36
Sale of Consumer Information	36
Consumer Privacy Ombudsman	37
Miscellaneous	37
Names of Minors	37
Involuntary Petitioners	37
False or Fictitious Involuntary Petitions	37
Professional Compensation	37
Sharing Compensation	37
Estate Professionals	37
Trustee Compensation	38
Appearances at Creditors' Meetings	38
Creditor Addresses	38
Sale or Lease by Trustee	38
Purchase of Consumer Credit Interests	38
Utility Service	39
Trustee Surcharges	39
Discharge Injunction	39
Disinterested Person	39
Definition of Transfer	39
Adjustment of Dollar Amounts	39
Jurisdiction	39
Venue	39
Appeals	40
Bankruptcy Fraud	40
Investigation of Fraud	40

CHAPTER 7	
Dismissal or Conversion §707(b)(1), (b)(3), (c)	<p>In a consumer case, the court may dismiss or, with consent of the debtor, convert a case to a case under chapter 11 or 13 for abuse.</p> <ul style="list-style-type: none"> ▶ In making this determination, the court may not take into consideration contributions a debtor has made or continues to make to a qualified religious or charitable organization, to the extent it does not exceed 15% of the debtor's gross annual income <p>May dismiss if petition filed in bad faith or totality of circumstances demonstrates abuse</p> <p>May dismiss on motion of the victim of person convicted of a crime of violence or drug trafficking crime if in best interests of the victim</p> <ul style="list-style-type: none"> ▶ may not dismiss if filing a case necessary to satisfy a claim for a domestic support obligation
Presumption of Abuse ("Means Test") §707(b)(2)	<p>Abuse is presumed if the amount of debtor's current monthly income exceeds allowable expenses multiplied by 60 exceeds <i>the lesser of</i>—</p> <ul style="list-style-type: none"> ▶ \$10,000 or ▶ <i>the greater of</i> 25% of unsecured nonpriority claims or \$6,000
U.S. Trustee Review §704(b)(1)	<p>The U.S. trustee must review all materials submitted by the debtor, and</p> <ul style="list-style-type: none"> ▶ NLT than 10 days after the meeting of creditors submit a report as to whether abuse should be presumed, and ▶ NLT than 30 days thereafter either file <ul style="list-style-type: none"> ▶ a motion to dismiss or convert, with a statement that debtor's currently monthly income X 12 is not less than the median family income in the state for a family of comparable or smaller size, or ▶ a statement as to why a motion is not appropriate
Presumption of Abuse Notice §342(d) §704(b)(1)(B)	<p>Clerk must give notice that a presumption of abuse has arisen to all creditors—</p> <ul style="list-style-type: none"> ▶ if revealed in the petition filed by the debtor, within 10 days of the date the petition is filed, or ▶ within 5 days of the date the U.S. trustee files the report under §704(b)(1)(A)
Current Monthly Income §101(10A)	<p>Average monthly received by debtor (and spouse if filing jointly) from all sources during preceding 6 months ending on the last day of the calendar month preceding the filing date</p> <p>Includes amounts regularly paid by others for household expenses</p> <p>Excludes—</p> <ul style="list-style-type: none"> ▶ social security payments ▶ payments received by victims of war crimes, crimes against humanity, or terrorism

<p>Allowable Expenses §707(b)(2)(A)(ii)–(iv)</p>	<p>Determined under the National and Local Standards and actual Other Necessary Expenses as provided in the Collection Financial Standards issued by the Internal Revenue Service without regard for debt payments</p> <p>Additional allowable expenses include—</p> <ul style="list-style-type: none"> ▶ necessary health insurance, disability insurance, and health savings plans ▶ maintain safety under the Family Violence Prevention and Services Act ▶ continuation of expenses paid for the care of an elderly, chronically ill, or disabled member of the household ▶ if eligible for chapter 13, the actual administrative expenses not to exceed 10% of projected plan payments ▶ up to \$1,500/year for expenses of dependent minor child to attend a private or public elementary or secondary school (documented and explained) ▶ actual expenses for utilities in excess of allowance specified in Collection Financial Standards ▶ an additional 5% of the National Standards for food and clothing if reasonable and necessary <p>Payments on secured debt determined by dividing total payments on secured debts (including payments to cure any prepetition arrearage) to be made during the 60-month period following the date the petition is filed by 60</p> <p>Payments on priority debt determined by dividing total payments on priority debt to be made during the 60-month period following the date the petition is filed by 60</p>
<p>Rebuttal of Presumption §707(b)(2)(B)</p>	<p>Presumption may be rebutted only by establishing exceptional circumstances such as serious medical or call to active duty in armed forces</p> <p>Additional expenses must be</p> <ul style="list-style-type: none"> ▶ itemized and documented ▶ necessary and reasonable
<p>Exceptions to Presumption §707(b)(3)</p>	<p>Does not apply to disabled veteran whose indebtedness was incurred primarily during a period when—</p> <ul style="list-style-type: none"> ▶ on active duty, or ▶ performing a homeland defense activity
<p>Median Family Income §101(39A)</p>	<p>The median family income calculated and reported by the Bureau of Census for the most recent year</p> <p>If not calculated in the then current year, adjusted annually after the most recent year by the increase in the CPI for all Urban Consumers during the period occurring between the most recent and current year</p>

Standing to Bring Motion to Dismiss §707(b)(1), (6), (7)	<p>If current monthly income of debtor X 12 exceeds median family income of a family of the same or smaller size for the state, may be brought by any party in interest, U.S. trustee, or on court's own motion</p> <p>If current monthly income of debtor (and spouse in a joint case) X 12 is equal to or less than median family income of a family of equal or smaller size for the state, only court or U.S. trustee may bring motion</p> <p>If current monthly income of the debtor and debtor's spouse combined X 12 is equal to or less than the median family income of the same or smaller size, the motion may not be brought</p> <ul style="list-style-type: none"> ▶ Does not include income of spouse if living separate and apart
Distributions §726	May pay tardily filed claims filed on before the earlier of the date the trustee commences final distribution or 10 days after the summary of the trustee's final report is mailed to creditors
Discharge §727(a)(8), (11), (d)(4)	<p>Time between chapter 7 filings extended to 8 years</p> <p>Must complete an instructional course in personal financial management</p> <ul style="list-style-type: none"> ▶ Excused if U.S. trustee determines approved instructional courses are not adequate to service the additional individuals required to complete the course <p>Denied if debtor makes a material misstatement in an audit or fails to make necessary papers/records available for inspection in connection with an audit</p>
Discharge Delayed §727(a)(12)	<p>Entry may be delayed if there is an action pending in which the debtor may be found—</p> <ul style="list-style-type: none"> ▶ guilty of a felony, or ▶ liable for a debt arising from <ul style="list-style-type: none"> ▶ violation of federal Securities Exchange Act or similar state law ▶ criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual ▶ RICO civil penalty

CHAPTER 11 — GENERAL	
Creditors' Meeting §341(e)	The court may dispense with the creditors' meeting in chapter 11 case in which a prepackaged plan has been approved prepetition
Committee Membership §1102(a)(4)	<p>At request of party in interest, the court may order the U.S. trustee to change membership of a committee</p> <ul style="list-style-type: none"> ▶ necessary to ensure adequate representation of creditors or equity security holders ▶ may increase number members to include a small business concern if creditor holds claims that are disproportionately large in relation to gross revenues

<p>Committee Duties §1102(b)(3)</p>	<p>Committee must—</p> <ul style="list-style-type: none"> ▶ provide access to creditors who <ul style="list-style-type: none"> ▶ claims of the kind represented by the committee and ▶ who are not members of the committee ▶ solicit and receive comments from the represented creditors ▶ be subject order of court that compels any additional report or disclosure to represented creditors
<p>Property of Estate §1115</p>	<p>For an individual, includes all property as defined in §541 acquired and personal services income earned postpetition</p>
<p>Plan §1121(d) §1123(a)(8)</p>	<p>120-day exclusive period for filing a plan may not be extended beyond 18 months 180-day period for confirmation may not be extended for a period exceeding 20 months If debtor is an individual, must provide for payment to creditors of all or such portion of personal service earnings as necessary for the execution of the plan</p>
<p>Plan Confirmation §1129(a)(9), (a)(14), (b)(2)(B)</p>	<p>Tax claims, priority or secured (if would be priority except for secured status) must be paid in regular cash installments</p> <ul style="list-style-type: none"> ▶ period not exceed 5 years from date of petition ▶ manner not less favorable than most favored unsecured nonpriority claims <p>Domestic support obligations must be current If individual, plan may be crammed down if holder of unsecured claim objects, amount distributed to unsecured claims may not be less than—</p> <ul style="list-style-type: none"> ▶ current value of allowed claim <i>or</i> ▶ projected disposable income as computed under §1325(b)(2) during first 5 years of plan payments
<p>Disclosure Statement §1125(a)</p>	<p>Must include an analysis of potential tax consequences of the plan</p>
<p>Modification of Plan §1127(e), (f)</p>	<p>If debtor individual, plan may be modified at any time before completion of payments under the plan to—</p> <ul style="list-style-type: none"> ▶ increase or reduce amount of payments to any class of creditors; ▶ extend or reduce the time for payments; or ▶ alter payments to a creditor to account for payments received from sources outside the plan ▶ §§1121–1128 and requirements of §1129 apply to a modification of the plan ▶ modification not effective until approved by the court
<p>Appointment of Trustee/Examiner §1104(a)(3)</p>	<p>Grounds for dismissal or conversion also grounds for appointment of a trustee/examiner as an alternative</p>

Appointment of Trustee/Examiner (CEO/CFO Fraud) §1104(e)	U.S. trustee must move for appointment of a trustee/examiner if reasonable grounds exist to suspect CEO/CFO (or members of body who selected CEO/CFO) participated in actual fraud, dishonesty or criminal conduct in management of debtor or public financial reporting
Conversion/Dismissal §1112(b)	Conversion/dismissal must be granted in absence of unusual circumstances specifically identified by the court that not in best interests of creditors or estate Expanded grounds for dismissal/conversion <ul style="list-style-type: none"> ▶ gross mismanagement of the estate; ▶ failure to maintain appropriate insurance ▶ unauthorized use of cash collateral ▶ failure to comply with court order ▶ untimely failure to satisfy any reporting requirement ▶ failure to attend creditors' meeting or Rule 2004 examination or as requested by U.S. trustee ▶ failure to timely pay postpetition taxes or file return ▶ failure to pay domestic support obligation
Retiree Benefits §1114(l)	Reinstatement of benefits modified within 180 days of filing if insolvent at time of modification
Impaired Claims §1124(2)(D)	Must compensate actual pecuniary loss arising out of a nonmonetary default other than a nonresidential real property lease
Discharge (Individual) §1141(d)(5)(A), (B)	Discharge for an individual is not entered until payments under the plan are completed <i>except</i> may be discharged without full payment similar to "hardship discharge" in chapter 13
Discharge Delayed (Individual) §1141(d)(5)(C)	Entry of a discharge for an individual may be delayed— <ul style="list-style-type: none"> ▶ if there is an action pending in which the debtor may be found <ul style="list-style-type: none"> ▶ guilty of a felony, or ▶ liable for a debt arising from <ul style="list-style-type: none"> ▶ violation of federal Securities Exchange Act or similar state law ▶ criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual ▶ RICO civil penalty
Discharge (Corporation) §1125(d)(6)	Corporations not discharged from debts— <ul style="list-style-type: none"> ▶ owed to a domestic governmental unit obtained by fraud ▶ for a tax with respect to which the debtor filed a fraudulent tax return or willfully attempted to evade or defeat a tax

CHAPTER 11 — SMALL BUSINESS

<p>Defined §101(51D) §1102(a)(3)</p>	<p>Aggregate noncontingent liquidated debts, secured and unsecured, (excluding debts to affiliates or insiders) do not exceed \$2,000,000 and no creditors' committee appointed upon request of a party in interest for cause, or court determines committee inactive and not providing adequate oversight of the debtor.</p> <ul style="list-style-type: none"> ▶ Does not include a member of an affiliated group having aggregate noncontingent unsecured debts in excess of \$2,000,000. ▶ Does not include a person whose primary activity is owning or operating real property or businesses incidental thereto
<p>Duties of Small Business DIP §1116</p>	<p>In addition to other duties of DIP, must:</p> <ul style="list-style-type: none"> ▶ append to the petition or furnish within 7 days a copy of most recent balance sheet, statement of operations, cash-flow statement, and tax return; ▶ attend through senior management and counsel all meetings scheduled by the court; ▶ timely file all schedules and statements (may be extended not more than 30 days after petition is filed absent extraordinary and compelling circumstances); ▶ file all postpetition financial and other required reports; ▶ maintain insurance customary and appropriate for the industry; ▶ timely file tax returns and pay taxes entitled to administrative expense priority; and ▶ permit the U.S. trustee to inspect business premises, books and records.
<p>Duties of U.S. trustee 28 USC §586(a)(3)(H), (7)</p>	<p>Conduct an initial interview before the creditors' meeting—</p> <ul style="list-style-type: none"> ▶ begin investigation of debtor's viability ▶ inquire about debtor's business plan ▶ explain the debtor's duties about monthly operating reports and other required reports ▶ attempt to get an agreed scheduling order ▶ inform debtor of other obligations <p>If appropriate</p> <ul style="list-style-type: none"> ▶ visit debtor's business premises ▶ inspect debtor's books and records ▶ verify filing of tax returns <p>Diligently review and monitor debtor's operations to promptly identify whether debtor will be able to confirm a plan</p>

<p>Reporting Requirements §308</p>	<p>Periodic financial reports must include—</p> <ul style="list-style-type: none"> ▶ profitability ▶ reasonable approximation of projected cash receipts/disbursements over a reasonable period ▶ comparison of actual cash receipts/disbursements to prior projections ▶ whether debtor is in compliance with all applicable provisions fo the Code and rules ▶ whether tax returns and other governmental reports filed and taxes paid timely ▶ If not in compliance with Code, rules, governmental reporting requirements or tax payments, identify the deficiencies, the costs incurred, and when expected to be remedied <p>[NOTE: This provision does not become effective until 60 days after the Supreme Court adopts implementing rules]</p>
<p>Plan §1121(e) §1129(a)(9), (e)</p>	<p>Only debtor may file plan for first 180 days but must be filed within 300 days. Confirmation within 45 days after plan is filed.</p> <ul style="list-style-type: none"> ▶ May be extended only if— <ul style="list-style-type: none"> ▶ debtor establishes by preponderance of evidence that a plan may be confirmed within a reasonable time, ▶ the court sets a deadline date, and ▶ order is signed before existing deadline has expired.
<p>Disclosure Statement §1125(f)</p>	<p>Court may conditionally approve without a hearing; hearing on any objection to adequacy held concurrently with confirmation hearing Court may dispense with separate disclosure statement if determines that plan itself contains sufficient information</p>

<p>CHAPTER 12</p>	
<p>Family Farmer §101(18)</p>	<p>Individual, individual and spouse, whose—</p> <ul style="list-style-type: none"> ▶ aggregate debts do not exceed \$3,237,000 ▶ NLT 50% of aggregate noncontingent liquidated debts (other than the residence of the farmer) arise out of farming operations ▶ 50% of gross income is received from farming operations for the— <ul style="list-style-type: none"> ▶ tax year preceding, or ▶ each of the 2nd and 3rd tax years preceding filing <p>A qualified corporation, whose—</p> <ul style="list-style-type: none"> ▶ aggregate debts do not exceed \$3,237,000 ▶ NLT 50% of aggregate noncontingent liquidated debts (other than the residence of the farmer) arise out of farming operations

<p>Family Fisherman §101(7A), (19A), (19B) §109(f)</p>	<p>Individual or individual and spouse</p> <ul style="list-style-type: none"> ▶ aggregate debts NTE \$1,500,000 ▶ NLT 80% of noncontingent liquidated debts (excluding family residence) arise out of a commercial fishing operation owned by debtor or spouse ▶ At least 50% of gross income from prior year received from commercial fishing operations <p>Corporation or partnership</p> <ul style="list-style-type: none"> ▶ NLT 50% owned by family conducting commercial fishing operation ▶ More than 80% of value of assets consist of assets related to commercial fishing operation ▶ aggregate debts NTE \$1,500,000 ▶ NLT 80% of noncontingent liquidated debts (excluding residence owned used a principal dwelling of partner or shareholder) arise out of a commercial fishing operation ▶ No stock held publicly <p>Commercial fishing operation includes catching or harvesting fish, shrimp, lobster, shellfish, seaweed or other aquatic species and aquaculture</p>
<p>Dismissal §1208(c)(10)</p>	<p>May be dismissed for failure to pay domestic support obligation coming due postpetition</p>
<p>Plan §1222(a), (b)(7)</p>	<p>Claim owed to a governmental unit arising out of the disposition of a farm asset used in debtor's farming operation treated as an unsecured claim without priority if debtor receives a discharge</p> <p>May provide for payment of less than 100% of priority domestic support obligations if all disposable income devoted to the plan for 5 years</p> <p>May provide for payment of interest on priority claims if unsecured claims first paid in full</p>
<p>Plan Confirmation §1225(a)(7), (b)(2)(A)</p>	<p>Debtor must have paid all postpetition domestic support obligations</p> <p>Plan may be confirmed if property distributed during term of the plan is not less than debtor's disposable income</p> <p>Disposable income does not include domestic support obligations coming due postpetition</p>
<p>Plan Modification §1229(d)</p>	<p>Plan may not be modified—</p> <ul style="list-style-type: none"> ▶ to increase payments coming due before the modification ▶ except by the debtor based on an increase in disposable income to increase payments to unsecured creditors for a particular month so that the aggregate payments exceed debtor's disposable income for the month ▶ except by the debtor in the last year of the plan if the increase would leave insufficient funds to carry on farming operations
<p>Discharge §1228(a)</p>	<p>Debtor must certify that all postpetition domestic support obligations, (including payments on prepetition obligations to the extent required by the plan) have been paid</p>

Discharge Delayed §1228(f)	Discharge may be delayed if there is an action pending in which the debtor may be found <ul style="list-style-type: none"> ▶ guilty of a felony, or ▶ liable for a debt arising from <ul style="list-style-type: none"> ▶ violation of federal Securities Exchange Act or similar state law ▶ criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual ▶ RICO civil penalty
-------------------------------	---

CHAPTER 13	
Conversion or Dismissal §1307(a)(11), (e)	Chapter 13 may be dismissed or converted if debtor— <ul style="list-style-type: none"> ▶ fails to make any domestic support payment coming due postpetition ▶ file a tax return as required by §1308
Assigned Domestic Support Claims §1322(a)(4)	The plan need not provide for payment in full of domestic support claims assigned to a governmental unit if all of the debtor's disposable income is committed to the plan for 5 years
Interest on Nondischargeable Claims §1322(b)(10)	The plan may provide for the payment of interest on nondischargeable claims provided that a debtor has sufficient disposable income to pay all claims in full
Commitment Period §1322(d) §1325(b)(4)	If the current monthly income of the debtor and the debtor's spouse combined multiplied by 12 is less than the median family income for the state for a family of the same or smaller size, the commitment period for the plan is 3 years <ul style="list-style-type: none"> ▶ Court may, for cause, approve a longer period, not to exceed 5 years If the current monthly income of the debtor and the debtor's spouse combined multiplied by 12 is equal to or greater than the median family income for the state for a family of the same or smaller size, the commitment period for the plan is 5 years
Repayment of Pension Plan Loans §1322(f)	A chapter 13 plan may not materially alter the repayment terms of a loan made by a plan established by the employer under IRC §§401, 403, 408, 408A, 414, 457, and 501(c)
Confirmation Hearing §1324(b)	The confirmation hearing may be held not less than 20 nor more than 45 days after the date of the creditors' meeting <ul style="list-style-type: none"> ▶ Court may hold earlier if no party in interest objects

<p>Secured Claims §1325(a)(5)(B)</p>	<p>Secured claimants retain security interest until—</p> <ul style="list-style-type: none"> ▶ paid the entire balance due under applicable nonbankruptcy law, or ▶ discharge is entered under §1328 <p>If case is dismissed or converted before completion of plan, creditor retains secured status as determined by applicable nonbankruptcy law Periodic payments must be monthly Amount of payments must not be less than amount required to provide the creditor with adequate protection Debtor may not “strip down” a PMSI—</p> <ul style="list-style-type: none"> ▶ if collateral a motor vehicle, if incurred within 910 days of the date the petition was filed ▶ if collateral other personal property, within 1-year of date petition filed
<p>Cure Arrearage on Secured Debt §707(b)(2)(A)(iii)(II)</p>	<p>In a chapter 13 may include in allowable monthly expenses the total amount necessary to cure an arrearage in an obligation secured by the debtor’s residence, automobile or other property reasonably necessary for support, divided by 60.</p>
<p>Effect of Conversion §348(f)(1)(C)</p>	<p>In a case converted from chapter 13 to chapter 7</p> <ul style="list-style-type: none"> ▶ a secured creditor retains the security interest until the full amount of the claim as determined under applicable nonbankruptcy law is paid in full ▶ Unless a prepetition default has been fully cured through the plan at the time of conversion, the default has the effect given under applicable nonbankruptcy law
<p>Unsecured Claims §1325(b)</p>	<p>If trustee or unsecured creditor object all disposable income during the commitment period must be applied to payments to unsecured creditors</p>
<p>Other Confirmation Requirements §1325(a)(7), (8), (9)</p>	<p>Petition must have been filed in good faith Debtor is current on all postpetition domestic support payments Debtor has filed all tax returns as required by §1308</p>

<p>Disposable Income §541(b)(7)(A)(i) §1322(f) §1325(b)(2)</p>	<p>Current monthly income is current monthly income determined under §101(10A) excluding in addition—</p> <ul style="list-style-type: none"> ▶ child support & foster care payments ▶ disability payments for a dependent child to the extent reasonably necessary for the support of the child <p>Exclusions from disposable income—</p> <ul style="list-style-type: none"> ▶ payments made to repay a loan made from a pension plan established by an employer under IRC §§401, 403, 408, 408A, 414, 457, and 501(c) ▶ contributions to a qualified religious or charitable organization, to the extent it does not exceed 15% of the debtor’s gross annual income ▶ domestic support payments ▶ contributions— <ul style="list-style-type: none"> ▶ employee benefit plan under ERISA Title I or a government plan under IRC §414(d) ▶ deferred compensation plan under IRC §457 ▶ tax deferred annuity under IRC §403(b) <p>If the debtor has current monthly income X 12 greater than the median family income in the state for a family of the same or smaller size, monthly expenses are the same as computed under §707(b)(2)(A) & (B) [NOTE: As §1325 is silent on the subject it is assumed under generally accepted canons of legislative interpretation that Congress did not intend to change existing law: if debtor’s monthly income X 12 is less than the median income for a family of comparable size, debtor’s actual expenses not those determined under §707(b)(2), to the extent reasonable and necessary under the existing standard, are used]</p>
<p>Debtor’s Payments §1326</p>	<p>Not later than 30 days after the <i>earlier</i> of the filing of the petition or the plan, the debtor must commence making payments</p> <ul style="list-style-type: none"> ▶ proposed by the plan to the trustee ▶ scheduled in a lease of personal property directly to the lessor that portion of the lease payments that come due postpetition ▶ that provides adequate protection directly to a creditor holding a PMSI in personal property for the portion of the obligation that comes due postpetition ▶ court may modify, increase or reduce the payments to be made pending confirmation of the plan <p>Not later than 60 days after the petition is filed, the debtor must provide all lessors and holders of claims secured by personal property, in whole or in part attributable to the purchase of the property, of evidence of insurance</p> <p>Unpaid fees of a chapter 7 trustee in a case converted from chapter 7 or a case refiled after dismissal under §707(b) by prorating the amount owed over the duration of the plan and paid monthly in an amount not to exceed the greater of—</p> <ul style="list-style-type: none"> ▶ \$25, or ▶ 5% of the amount payable to general unsecured creditors divided by the number of months in the plan

<p>Discharge §1328(a), (f), (g)</p>	<p>Debtor must certify that all postpetition domestic support obligations, (including payments on prepetition obligations to the extent required by the plan) have been paid</p> <p>Added nondischargeable debts</p> <ul style="list-style-type: none"> ▶ fraud (523(a)(2)) ▶ unsecured debts (523(a)(3)) ▶ fraud or defalcation by a fiduciary, larceny, embezzlement (523(a)(4)) ▶ restitution or damages awarded in a civil action as result of willful or malicious injury resulting in personal injury or death of an individual <p>Discharge disallowed if debtor has received a discharge—</p> <ul style="list-style-type: none"> ▶ in case under chapter 7, 11, or 12 in the 4-year period preceding the filing of the petition ▶ in a case under chapter 13 in the 2-year period preceding the filing of the petition <p>Must complete an instructional course in personal financial management</p> <ul style="list-style-type: none"> ▶ Excused if U.S. trustee determines approved instructional courses are not adequate to service the additional individuals required to complete the course
<p>Discharge Delayed §1328(h)</p>	<p>Entry of discharge may be delayed if there is an action pending in which the debtor may be found</p> <ul style="list-style-type: none"> ▶ guilty of a felony, or ▶ liable for a debt arising from <ul style="list-style-type: none"> ▶ violation of federal Securities Exchange Act or similar state law ▶ criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual ▶ RICO civil penalty
<p>Filing Prepetition Tax Returns §1308</p>	<p>Not later than the date set for the first meeting of creditors, all tax returns required to be filed under applicable nonbankruptcy law must be filed</p> <ul style="list-style-type: none"> ▶ if not filed by date of first meeting of creditors, the trustee may hold the meeting open for a reasonable period of time <ul style="list-style-type: none"> ▶ if return past due, not more than an additional 120 days ▶ if return not past due until the later of 120 days after the first meeting date or the date upon which the return is due under the last automatic extension of time for which the debtor has timely requested under applicable nonbankruptcy law ▶ Court may by order entered before the expiration of the tolling period extend the time established by the trustee— <ul style="list-style-type: none"> ▶ if the debtor shows that the failure to file was due to circumstances beyond the control of the debtor ▶ for an additional period of 30 days <p>For the purposes of this section a return includes a return filed under IRC §6020(a) or (b) (a “forced filing”), or comparable state law</p>
<p>Tax Claims (Chapter 13) §502(b)(9)</p>	<p>In a chapter 13 case a claim for taxes filed by a governmental unit is timely if filed within 60 days after a return is filed as required by §1308</p>

<p>Postconfirmation Modification §1329</p>	<p>May reduce payments by actual amount of health insurance premiums for coverage of the debtor and debtor's family</p> <ul style="list-style-type: none"> ▶ reasonable and necessary ▶ not materially greater than payments for previous coverage, if any ▶ if no prior coverage, cost not materially higher than reasonable cost that would be incurred by a person in similar circumstances ▶ amount not previously used in determining disposable income ▶ any party in interest may request proof of purchase be filed
<p>Postpetition Reports §521(f)(4), (g)</p>	<p>90 days after the end of a tax year or 1 year after commencement of the case, whichever is later, if a plan has not been confirmed, and annually after confirmation, not later than 45 days before the anniversary date of confirmation, file a statement under penalty of perjury with the trustee that shows—</p> <ul style="list-style-type: none"> ▶ income and expenses for the tax year most recently concluded ▶ monthly income ▶ how income, expenses and monthly income are calculated ▶ the amount and sources of income of the debtor ▶ identity of any person responsible with the debtor for support of any dependents of the debtor ▶ the identity and amount contributed of any person who contributed to debtor's household

DEBTOR'S DUTIES	
<p>Prepetition Credit Counseling §109(h) § 521(b)</p>	<p>An individual must obtain a briefing from an accredited credit counseling agency within 180-day period preceding filing the petition</p> <ul style="list-style-type: none"> ▶ May be telephonic or on internet ▶ Waived if residing in district where U.S. trustee has determined approved agencies are not reasonably able to provide counseling services ▶ May be waived for period of 30 days postpetition if debtor requested but was unable to obtain counseling within 5 days of the filing date ▶ Court may, for cause, extend for an additional 15 days <p>Requirement does not apply with respect to a debtor who is</p> <ul style="list-style-type: none"> ▶ incapacitated ▶ disabled ▶ on active military duty in a war zone <p>File with the court—</p> <ul style="list-style-type: none"> ▶ certificate of the credit counseling agency that provided the services describing the services provided, and ▶ a copy of the plan, if any, developed by the credit counseling agency

<p>Statement of Financial Affairs §521(a)(1)</p>	<p>Include with the statement of financial affairs—</p> <ul style="list-style-type: none"> ▶ if §342(b) applies <ul style="list-style-type: none"> ▶ a statement by counsel or the bankruptcy petition preparer who signed the petition that the statement required by §342(b) has been delivered to the debtor ▶ if no attorney or bankruptcy petition preparer appears on the petition, a statement that the debtor has received and read the notice ▶ copies of all payment advices received from any employer in the 60 days preceding the filing date ▶ statement of net monthly income itemized to show calculation ▶ statement disclosing any changes in income or expenses reasonably expected to occur in 12 months following the filing of the petition
<p>Perform Intentions §521(a)(2)</p>	<p>Perform intent to surrender, reaffirm or redeem debt secured by property of the estate within 30 days after the first date set for the meeting of creditors [NOTE: no longer limited to secured consumer debts]</p>
<p>PMSI in Personal Property §521(a)(6)</p>	<p>In a chapter 7 case in which the debtor is an individual, with respect to personal property secured by a PMSI—</p> <ul style="list-style-type: none"> ▶ within 45 days after the first meeting of creditors either— <ul style="list-style-type: none"> ▶ reaffirm ▶ redeem, or ▶ surrender the property ▶ If debtor does not reaffirm or redeem within 45 days the property is no longer property of the estate unless the court on motion of the trustee, filed within the 45-day period, determines the property is of consequential value to the estate
<p>As ERISA Administrator §521(a)(7)</p>	<p>Unless a trustee is appointed in the case, continue to perform duties as an Administrator under an ERISA plan</p>
<p>Education Accounts §521(c)</p>	<p>File a record of any interest the debtor has in an education individual retirement account</p>

<p>Provide Tax Returns §521(e)(2), (f), (g)(2)</p>	<p>NLT 7 days before the first date set for the creditors' meeting, provide the trustee with a copy of the federal tax return (or a transcript of the return) for the most recent tax year preceding the filing for which a return was filed</p> <ul style="list-style-type: none"> ▶ must also provide a copy to any creditor who has timely requested a copy ▶ Court must dismiss for failure to comply unless debtor shows that failure to comply was beyond the control of the debtor <p>At the request of the court, U.S. trustee, or any party in interest in a case under chapter 7, 11, or 13 in which the debtor is an individual, file at the same time filed with the taxing authority a copy of—</p> <ul style="list-style-type: none"> ▶ each tax return for tax years ending in which the case is pending ▶ returns filed for tax years preceding the filing filed while the case is pending ▶ any amendment to the returns ▶ returns filed are available for inspection and copying by the U.S. trustee, trustee, or any party in interest <p>[NOTE: §315(c) of the Act requires the Administrative Office of the U.S. Courts to promulgate guidelines by the effective date of the Act to preserve the privacy of tax returns, including restriction on access by creditors]</p>
<p>Establish Identity §521(h)</p>	<p>If requested by the U.S. trustee or the trustee, provide photo identification that establishes the identity of the debtor</p>
<p>Dismissal for Failure to Provide Information §521(l)</p>	<p>A failure to provide any required information required under §521(a) within 45 days of the date the petition is filed results in automatic dismissal on the 46th day, except—</p> <ul style="list-style-type: none"> ▶ Upon request of the debtor made within the 45-day period, the court may extend the period for an additional 45 days ▶ Upon motion of the trustee made within the 45-day period the court may decline to dismiss the case if the court finds— <ul style="list-style-type: none"> ▶ the debtor in good faith attempted to comply, and ▶ the best interests of the estate would be served by administration of the estate ▶ Within 5 days of a request by a party interest the court will enter an order of dismissal

DEBTORS' COUNSEL	
Signature as Certification §707(b)(4)(C), (D)	Signature on petition, pleading or motion is certification that attorney has— <ul style="list-style-type: none"> ▶ performed a reasonable investigation into the circumstances giving rise to the petition, pleading or motion ▶ determined that the petition, pleading or motion is well grounded in fact ▶ warranted by existing law or a good-faith extension, modification, or reversal of existing law and does not constitute an abuse ▶ the attorney has no knowledge after an inquiry that any information in the schedules filed with the petition is incorrect
Sanctions §707(b)(4)(A), (B)	Court may award trustee reasonable costs, including attorneys fees, in bringing a motion under §707(b), if— <ul style="list-style-type: none"> ▶ grants the trustee's motion and ▶ finds that the debtor's attorney violated Rule 9011 If debtor's attorney violates Rule 9011, the court may also assess a civil penalty payable to the U.S. trustee
Debt Relief Agency §101(3), (12A)	Any person who provides any bankruptcy assistance to an assisted person for compensation, <i>except</i> <ul style="list-style-type: none"> ▶ an officer, director, employee, or agent of the person who provides assistance ▶ non-profit organization exempt under IRC §501(c)(3) ▶ a creditor of the assisted person to extent assisting the person in restructuring a debt owed to the creditor ▶ A depository institution or credit union ▶ author, publisher or distributor of works subject to copyright protection An "assisted person" is a consumer debtor having nonexempt property with a value of less than \$150,000
Restriction on Debt Relief Agencies §526	Debt relief agencies may not— <ul style="list-style-type: none"> ▶ fail to perform any service promised ▶ counsel or advise making an untrue or misleading statement in connection with any case filed under the Code ▶ misrepresent the services to be rendered ▶ misrepresent the benefits and risks of filing bankruptcy ▶ advise incurring additional debt to pay for any services to be rendered Waiver of rights is unenforceable

<p>Debt Relief Agency Disclosures §527</p>	<p>Provide the notice required under §342(b) Debt relief agencies must in a clear and conspicuous written notice advise the assisted person that—</p> <ul style="list-style-type: none"> ▶ all information given in the petition and the case must be complete, accurate, and truthful ▶ all assets and liabilities must be completely and accurately disclosed ▶ replacement value of property subject to a lien or encumbrance must be stated after a reasonable inquiry ▶ current monthly income and allowable expenses and disposable income in a chapter 13 case are to be stated after reasonable inquiry ▶ all information provided may be subject to audit and failure to provide such information may result in dismissal of the case and/or criminal sanctions <p>[The statute sets out in detail a written notice that must be provided to all assisted persons.]</p>
<p>Debt Relief Agency Requirements §528</p>	<p>A debt relief agency must—</p> <ul style="list-style-type: none"> ▶ within 5 days of first providing assistance but before the petition is filed provide a written contract that clearly and conspicuously explains <ul style="list-style-type: none"> ▶ the services to be provided, and ▶ fees and charges for those services ▶ Include in any advertisement the words “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” <p>Advertisements include any communication directed to the general public of bankruptcy assistance services or the benefits of bankruptcy, including—</p> <ul style="list-style-type: none"> ▶ in general media ▶ seminars ▶ specific mailings ▶ telephonic ▶ or electronic messages <p>An advertisement directed to the general public that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay consumer debt is included</p> <p>Descriptions of assistance in connection with a chapter 13, even if chapter 13 is not mentioned, “federally supervised repayment plan” or “federal debt restructuring” fall within these strictures</p>

NONPROFIT CREDIT COUNSELING AGENCIES	
Approval/Listing §111(a), (b)	<p>Clerk maintains a list of all approved credit counseling agencies and instructional courses</p> <p>Credit counseling agencies/instructional courses must be approved by the U.S. trustee</p> <ul style="list-style-type: none"> ▶ thorough review of qualifications ▶ determine that the agency meets the standards ▶ initial approval is probationary for a period of 6 months ▶ subsequent approvals are for 1-year periods on condition that agency has met the requirements during the preceding period and adequately demonstrated it will continue to so do
Requirements for Credit Counseling §111(c)	<p>Minimum requirements include—</p> <ul style="list-style-type: none"> ▶ a board the majority of whom are not employed by the agency and will not benefit financially, directly or indirectly, from the outcome of the services provided ▶ charge only a reasonable fee and provide services irrespective of ability to pay ▶ provide for safekeeping and payment of client funds, including an annual audit and adequate bonding ▶ provide full disclosure to clients, including sources of funding, counselor qualifications, possible impacts on credit reports, costs of the program that will be paid by the client and how those costs will be paid ▶ provide adequate counseling with respect to client's financial problems including an analysis of the client's current condition, factors that caused the condition, and how to develop a plan to respond to the conditions without negatively amortizing debt ▶ provide trained experienced counselors who receive no bonus or commission based on the outcome of the services provided ▶ demonstrate adequate experience and background in credit counseling ▶ have adequate financial resources to continue service over the life any plan
Requirements for Instructional Courses §111(d)	<p>Minimum requirements for instructional courses include—</p> <ul style="list-style-type: none"> ▶ personnel with adequate experience and training ▶ learning materials and methodologies designed to assist in understanding personal finance management ▶ adequate facilities in reasonably convenient locations (may include telephonic and internet, if effective) ▶ maintain adequate records to permit evaluation of effectiveness, including satisfaction of each debtor attending, which records must be available for inspection by the U.S. trustee or the Chief Bankruptcy Judge ▶ if a fee is charged, it must be reasonable and services must be offered without regard to ability to pay

BANKRUPTCY PETITION PREPARERS (“BPP”)	
Non-Individual BPP §110(b)(1), (c)(2)(B)	<p>If the BPP is not an individual, an officer, principal, responsible person, or partner must—</p> <ul style="list-style-type: none"> ▶ sign the document ▶ print on the document the name and address of the signer ▶ include the SSN of the signer
Notice to Debtor §110(b)(2)	<p>Before preparing any document or accepting a fee, give debtor written notice—</p> <ul style="list-style-type: none"> ▶ BPP is not an attorney and may not give legal advice ▶ signed by the debtor and, under penalty of perjury, the BPP ▶ filed with any document for filing <p>May include a description of any advice the BPP may not give</p>
Prohibited Legal Advice §110(e)(2)	<p>A BPP may not give the debtor legal advice, including—</p> <ul style="list-style-type: none"> ▶ whether to file a petition or commencing a case under chapter 7, 11, 12, or 13 is appropriate ▶ whether the debtor’s debts will be discharged ▶ whether the debtor will be able to retain the debtor’s residence, car or any other property ▶ concerning the tax consequences of filing or the dischargeability of any tax claim ▶ whether a debtor should promise to repay debts or enter into a reaffirmation agreement ▶ how to characterize interests in property or debts ▶ concerning bankruptcy procedure or rights
Fees §110(h)	<p>Maximum fees may be set in FRBP or by guidelines promulgated by Judicial Conference of U.S.</p> <p>BPP must—</p> <ul style="list-style-type: none"> ▶ advise a debtor of maximum fees permitted before accepting any payment or preparing any document ▶ file a declaration with the petition under penalty of perjury stating the total fees received in the 12-months preceding the filing and, if maximum fees have been set, a certification that the fees do not exceed the maximum <p>The court must disallow and order refund of any fees excess of—</p> <ul style="list-style-type: none"> ▶ the value of the services rendered, or ▶ the maximums provided by rule or JCUS guideline
Sanctions §110(j)	<p>In addition to the other remedies provided, the court may enjoin a BPP that has violated a previous order <i>sua sponte</i> or upon the motion of the trustee or U.S. trustee</p>

Fines §110(l)	<p>A BPP may be fined \$500 for each violation of the prohibitions in this section</p> <p>Fine may be tripled if—</p> <ul style="list-style-type: none"> ▶ advises the debtor to exclude assets of income that should have been included ▶ advised debtor to use a false SSN ▶ failed to inform the debtor that the debtor was filing for relief under the Code ▶ prepared a document for filing that failed to disclose the identity of the BPP <p>Motion to impose a fine may be brought by—</p> <ul style="list-style-type: none"> ▶ debtor ▶ creditor ▶ trustee ▶ U.S. trustee
------------------	--

EXCLUSIONS FROM ESTATE	
Education Account §541(b)(5), (e)	<p>Funds placed in an education individual retirement account (IRC §530(b)(1))—</p> <ul style="list-style-type: none"> ▶ at least 365 days before the petition is filed ▶ for benefit of a child, stepchild, grandchild, or step grandchild (including adopted or foster child who is member of debtor's household) for taxable year in which deposited ▶ not pledged or promised as collateral for an obligation ▶ not an excess contribution as defined in IRC §4793(e) ▶ funds placed in an account or accounts having the same beneficiary within 365 to 720 days before filing can not exceed \$5,000
Tuition Credit Account §541(b)(6), (e)	<p>Funds used to purchase a tuition credit under a qualified state tuition program (IRC §529(b))—</p> <ul style="list-style-type: none"> ▶ at least 365 days before the petition is filed ▶ for benefit of a child, stepchild, grandchild, or step grandchild (including adopted or foster child who is member of debtor's household) for taxable year in which deposited ▶ not pledged or promised as collateral for an obligation ▶ not an excess contribution as defined in IRC §529(b)(7) ▶ funds placed in an account or accounts having the same beneficiary within 365 to 720 days before filing can not exceed \$5,000
Contributions to Qualified Benefit Plans §541(b)(7)	<p>Amounts withheld from wages by an employer or received from an employee for payment of a contribution to—</p> <ul style="list-style-type: none"> ▶ employee benefit plan subject to ERISA Title 1 or a government plan under IRC §414(d) ▶ deferred compensation plan under IRC §457 ▶ tax-deferred annuity under IRC §403(b) ▶ health insurance plan regulated by state law

Pawned Property §541(b)(8)	Interest of the debtor in tangible personal property pledged or sold as collateral for a loan or an advance by a licensed lender— <ul style="list-style-type: none"> ▶ property in the possession of the pledgee/transferee ▶ debtor has no obligation to repay the money, redeem the collateral or buy back the property at a stipulated price ▶ neither the debtor nor the trustee have exercised any right to redeem the property under state law in a timely manner as provided by state law as extended by §108(b)
Tax Exempt Organizations §541(f)	Property of a IRC §501(c)(3) organization may be transferred to a non-IRC §503(c)(1) organization under the same conditions as if the debtor were not a debtor

EXEMPTIONS	
General Domiciliary Requirements §522(b)(3)(A)	State law exemptions of state in which debtor resided for 730 days preceding the filing <ul style="list-style-type: none"> ▶ if debtor did not reside in any one state for 730 days, the state in which the debtor resided for 180 days or longer than 180 days in any one state ▶ If debtor does not meet domiciliary requirements of any state, debtor may elect federal exemptions
Retirement Funds §522(b)(3)(C), (4), (12), (n)	Retirement funds covered by IRC §§401, 403, 408, 408A, 414, 457, or 501(a) are exempt irrespective of whether state or federal exemptions are elected <ul style="list-style-type: none"> ▶ If in IRA or SEP under §§408 or 408A, NTE \$1,000,000 [excluding any rollovers under §§402(c), 402(e)(6), 403(a)(4), 403(a)(5), or 403(b)(8)] ▶ Direct transfer from I qualified account to another does not affect qualification for exemption ▶ Distribution that qualifies as an eligible rollover distribution from an exempt account retains its exempt status if deposited in another qualified account within 60 days after distribution
Lien Avoidance on Exempt Property §522(f)	The classification of “household goods” for the purpose of avoiding liens that impair exemptions has been severely restricted

<p>State Homestead Exemptions §522(o), (p), (q)</p>	<p>A state-law homestead exemption is reduced by the amount that the value of the exemption is attributable to any property disposed of by the debtor during the preceding 10 years with the intent to hinder, delay or defraud a creditor, to the extent the property disposed was not exempt at the time of disposition</p> <p>May not exempt more than \$125,000 under a state-law homestead exemption acquired within 1215 days of filing the petition, except that it does not apply to—</p> <ul style="list-style-type: none"> ▶ the residence of a family farmer ▶ any amount rolled over from another residence acquired by the debtor prior to the 1215 day period provided the prior and current residences are located in the same state <p>May not exempt more than \$125,000 under a state-law homestead exemption if—</p> <ul style="list-style-type: none"> ▶ convicted of a felony, which under the circumstances demonstrates that filing would constitute an abuse, or ▶ owes a debt arising from <ul style="list-style-type: none"> ▶ violation of federal Securities Exchange Act or similar state law ▶ criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual ▶ RICO civil penalty ▶ Does not apply to the extent that the interest is reasonably necessary to the support of the debtor or debtor's dependents
---	--

CLAIMS	
<p>International Fuel Tax §501(e)</p>	<p>Claim for international fuel tax may be filed as single claim by the base jurisdiction designated under the International Fuel Tax Agreement</p>
<p>Domestic Support Obligation §101(14A) §507(a)(1)</p>	<p>Debt under applicable nonbankruptcy law owed to—</p> <ul style="list-style-type: none"> ▶ spouse, former spouse, child, child's parent, legal guardian, or responsible relative ▶ for alimony, maintenance or support ▶ established by a separation agreement, divorce decree, property settlement agreement, court order, or determination under applicable nonbankruptcy law by a governmental unit <p>Includes debt assigned to a governmental unit for collection purposes Is entitled to first priority</p> <ul style="list-style-type: none"> ▶ subject to payment of certain administrative expenses incurred by the trustee in administering assets otherwise available for payment of the claim

<p>Trustee's Notice (Domestic Support Claims) §§704(c) §1106(c) §1202(c) §1302(d)</p>	<p>Provide the holder of a domestic support claim with notice including—</p> <ul style="list-style-type: none"> ▶ right to use services of a child support agency ▶ name, address, and telephone number of the agency ▶ an explanation of the rights of the holder under chapter 7 <p>Provide notice to the child support agency of the claim and the name, address and telephone number of the claimant</p> <p>Upon entry of discharge, provide the holder of the claim and the child support agency of—</p> <ul style="list-style-type: none"> ▶ granting of the discharge ▶ last recent known address of the debtor ▶ last recent known name and address of the debtor's employer ▶ the name of each creditor that holds a claim— <ul style="list-style-type: none"> ▶ not discharged ▶ reaffirmed
<p>Secured Valuation §506(a)(2)</p>	<p>In individual chapter 7 or 13 case, value is replacement value disregarding costs of sale</p> <p>For consumer goods, value is price a retail merchant would charge considering the age and condition</p>
<p>Reduction of Claim (Unsecured Consumer Credit) §502(k)</p>	<p>Court may upon motion of debtor reduce by not more than 20% a claim based on an unsecured consumer debt if the debtor proves by clear and convincing evidence that—</p> <ul style="list-style-type: none"> ▶ creditor unreasonably refused to negotiate a repayment schedule proposed through a credit counseling agency ▶ the offer was made within 60 days preceding the filing of the petition ▶ the proposal repaid at least 60% of the balance over a period not exceeding the repayment period of the loan, or a reasonable extension ▶ no part of the debt is nondischargeable

ADMINISTRATIVE EXPENSES	
<p>Back Pay Awards §503(b)(1)(A)</p>	<p>Certain awards by courts or the NLRB for back pay and benefits for services attributable to postpetition periods are entitled to administrative expense priority even if no services are performed</p>
<p>Taxes §503(b)(1)(B), (D)</p>	<p>Includes both secured and unsecured and property taxes whether liability is <i>in rem</i> or <i>in personam</i></p> <p>Taxing authority does not need to file a request for payment as a condition of allowance as administrative expense</p>
<p>Nonresidential Real Property Lease §503(b)(7)</p>	<p>Nonresidential real property lease assumed and then rejected the lessor entitled to an administrative expense claim—</p> <ul style="list-style-type: none"> ▶ all monetary obligations (except failure to operate penalties) due for 2-year period following the later of date of rejection or surrender of possession without reduction except for amounts paid by an entity other than the debtor ▶ sums due for the balance of lease term a claim under §502(b)(6)

Health Care Closing Costs §503(b)(8)	Actual necessary costs incurred by the trustee or Federal, state or local agency in closing a health care business, including— <ul style="list-style-type: none"> ▸ disposing of patient records ▸ transferring patients to another health care facility
Reclamation Claims §503(b)(9)	Value of goods received by the debtor within 20-day prepetition period sold by the debtor in the ordinary course of business
Limitations on Insider Claims §503(c)	Subsection (b) notwithstanding claims of insiders are not allowed or paid for purpose of inducing the insider to stay unless the court finds— <ul style="list-style-type: none"> ▸ essential to retention of the person because of bona fide job offer from another business at same or greater pay ▸ services are essential to operation of the business ▸ amount does not exceed either <ul style="list-style-type: none"> ▸ 10 times the amount paid a nonmanagement employee for any purpose during calendar year in which payment is made, or ▸ if no such transfer made, 25% of the amount of any similar transfer made to the insider for any purpose during the preceding calendar year Severance pay to an insider, unless— <ul style="list-style-type: none"> ▸ part of a program applicable to all employees ▸ amount not greater than 10 times the mean severance pay paid to nonmanagement employees during calendar year in which payment is made Any other transfer outside the ordinary course of business not justified by the facts and circumstances

CLAIMS ENTITLED TO PRIORITY	
General Note	Domestic support claims moved from seventh to first priority; former first through sixth dropped one place to second through seventh
Wage Claims §507(a)(4)	Amount raised to \$10,000 in wages salaries earned within 180 days of filing date
Employee Benefits §507(a)(5)	Amount raised to \$10,000 per employee
Taxes 507(a)(8)	The 240-day assessment period is extended for any period during which a stay was in effect in a prior case plus 30 days Property tax date is measured from when the obligation was incurred (vice date of assessment) All time periods are tolled during the time— <ul style="list-style-type: none"> ▸ a taxing authority is prohibited from collecting as result of a request for hearing or appeal by the debtor, plus 90 days ▸ any time a stay was in effect in a prior bankruptcy case or collection was precluded by 1 or more confirmed plans, plus 90 days

DUI Claims §507(a)(10)	Claims for personal injury or death arising out of the operation of a motor vehicle, boat, or aircraft while under the influence of alcohol, drugs, or another substance
---------------------------	--

NONDISCHARGEABLE DEBTS	
Taxes §523(a)(1)	Return means a return that satisfies applicable nonbankruptcy law (including filing requirements), including <ul style="list-style-type: none"> ▶ a return filed under IRC §6020(a) or similar state or local law ▶ written stipulation to final judgment or order by nonbankruptcy tribunal Does not include a return filed under IRC §6020(b), or comparable state or local law
Consumer Debts §523(a)(2)	Consumer debts incurred for luxury goods and services owed to a single creditor in excess of \$500 incurred within 90 days of filing are presumed nondischargeable Cash advances in excess of \$750 made within 70 days of filing are presumed nondischargeable The terms “consumer,” “credit,” and “open-end credit plan” have same meaning as in TILA §103
Domestic Support Obligations §523(a)(5)	Former (a)(5) deleted and replaced with simply the term “domestic support obligations” [See “Domestic Support Obligation,” <i>ante</i> , p. 22]
Student Loans §523(a)(8)	Expanded to include any student loan the interest paid on which is deductible for federal income tax purposes
Incurred to Pay Taxes §523(a)(14A)	Obligations incurred to pay taxes (other than federal taxes) that would not be dischargeable under 523(a)(1)
Incurred to Pay Election Law Fines §523(a)(14B)	Obligations incurred to pay a fine or penalty imposed under Federal election law
Non-Support Marital Debts §523(a)(15)	Non-support obligations owed to a spouse, former spouse, or child incurred in connection with a divorce or separation are automatically excepted from discharge [the former 2-prong test has been rescinded]
Condo Dues §523(a)(16)	Postpetition dues/fees for as long as the debtor or trustee holds an equitable, legal or possessory interest in the unit
Prisoner’s Fees §523(a)(17)	Fees assessed against prisoners expanded to include those imposed under state law comparable to federal law

Pension Plan Loans §523(a)(18)	<p>Obligations owed to a pension plan established by an employer under IRC §§401, 403, 408, 408A, 414, 457, and 501(c) to the extent—</p> <ul style="list-style-type: none"> ▶ permitted under ERISA §408(b)(1) or subject to IRC §72(p) ▶ permitted loan from a thrift savings plan meeting the requirements of 5 USC §8433(g) <p>Loan made by under a government plan under IRC §§414(d) or a contract under §403(b) does not constitute a claim or debt under the Code</p> <p>[NOTE: Former §523(a)(18) deleted]</p>
-----------------------------------	---

REAFFIRMATION/REDEMPTION	
Disclosures by Creditor §524(k)(1)–(3)	<p>Section 524(k) spells out in considerable detail the disclosures that must be made by a creditor before a debt may be reaffirmed, including essentially the form and language that must be used</p> <ul style="list-style-type: none"> ▶ Disclosures must be made before the reaffirmation is signed by the debtor
Debtor's Affirmations §524(k)(4), (6)	<p>The debtor must—</p> <ul style="list-style-type: none"> ▶ sign the agreement ▶ state the amount of monthly take home pay and other income, current monthly expenses (including post-bankruptcy obligations and other debt(s) reaffirmed), and the amount available to make the payments on the debt being reaffirmed ▶ affirm that entering into the reaffirmation agreement will not impose an undue hardship and that the debtor has the ability to make the payments or, if a presumption of undue hardship arises, how the debtor intends to make the payment
Attorney's Certification §524(k)(5)	<p>Debtor's attorney must certify that—</p> <ul style="list-style-type: none"> ▶ debtor fully informed and agreement voluntary ▶ attorney has fully explained the effect of a reaffirmation ▶ that either— <ul style="list-style-type: none"> ▶ the agreement does not impose an undue hardship, or ▶ if the presumption of undue hardship applies, in the opinion of the attorney the debtor has the ability to make the payments
Creditor Payments §524(l)	<p>Creditor may receive payments before or after the reaffirmation agreement is filed if debtor believes in good faith the agreement is effective</p> <ul style="list-style-type: none"> ▶ good faith established if disclosure requirements of §524(k) satisfied

Presumption of Undue Hardship §524(m)	For the period extending through 60 days after the agreement is filed, a reaffirmation agreement is presumed to create an undue hardship if the statement required by §523(a)(6) shows that debtors expenses plus the payment on the reaffirmed debt exceed monthly income <ul style="list-style-type: none"> ▶ May be rebutted if debtor identifies additional sources of funds to make the payment ▶ Court may disapprove reaffirmation agreement after hearing concluded before entry of the discharge This subsection does not apply where the creditor is a credit union
Redemption Payment §722	Redemption price must be paid at the time of redemption

TRUSTEE AVOIDANCE/PREFERENCES/FRAUDULENT TRANSFERS	
Statutory Liens §545(2)	Trustee may not avoid a perfected lien in any case where the purchaser described in IRC §6323, or similar state or local law
Reclamation Rights §546(c)	Reclamation claims are not subject to avoidance— <ul style="list-style-type: none"> ▶ goods received by the debtor within 45 days preceding the filing ▶ creditor makes written reclamation demand— <ul style="list-style-type: none"> ▶ NLT 45 days after receipt of goods by debtor ▶ NLT 20 days after the petition is filed if the 45-day period expires postpetition ▶ If creditor does not give timely notice, retains administrative expense claim under §503(b)(9)
Warehouseman's Lien §546(i)	May not avoid a lien for storage, transportation, or incidental charges for storage and handling of goods Applied in a manner consistent with UCC §7-209 as adopted by the state
Ordinary Course of Business Exception §547(c)(2)	May not avoid a transfer made the debtor and creditor if— <ul style="list-style-type: none"> ▶ made in the ordinary course of business between the debtor and the creditor, <i>or</i> ▶ made according to ordinary business terms
De Minimis Exception §547(c)(9)	May not avoid a transfer by a debtor who is not a consumer debtor if the aggregate amount of the transfer is less than \$5,000

Time of Transfer §547(e)(2)	A transfer is deemed made— <ul style="list-style-type: none"> ▶ at the time the transfer takes effect between the transferor and transferee if perfected within 30 days after the transfer ▶ at the time the transfer is perfected, if perfected more than 30 days after the transfer ▶ immediately before the petition is filed if not perfected at the later of— <ul style="list-style-type: none"> ▶ the date of filing, or ▶ 30 days after the transfer takes effect between the transferor and transferee
Alternate Repayment Plan §547(h)	Trustee may not avoid a payment made to a creditor under an alternate repayment plan created by an approved credit counseling agency
Insider Employment Contracts §548(a)(1)	Transfer includes a transfer made to an insider on account of an employment contract between the debtor and insider <ul style="list-style-type: none"> ▶ not in the ordinary course of business
“Look back” Period §548(a)(1), (b)	Extends the look back period for fraudulent transfers to 2 years [NOTE: Effective 1 year after enactment]
Self-Settled Asset Protection Trusts §548(e)	Avoid a transfer made to any self-settled or similar trust made within 10 years of the date the petition— <ul style="list-style-type: none"> ▶ transfer made by the debtor ▶ the debtor the beneficiary ▶ made with the actual intent to hinder, delay or defraud Includes a transfer made in anticipation of any money judgement, settlement, criminal fine, civil penalty, equitable order— <ul style="list-style-type: none"> ▶ any violation of federal or state securities law, or ▶ fraud, deceit, or manipulation in connection with the purchase or sale of any registered security

AUTOMATIC STAY — EXCEPTIONS	
Tax Court Proceedings §362(a)(8)	Limited to— <ul style="list-style-type: none"> ▶ corporate tax proceedings that bankruptcy court may determine ▶ individual tax periods ending before the petition is filed

<p>Domestic Relations §362(b)(2)</p>	<p>Stay does not apply to domestic relations/domestic support—</p> <ul style="list-style-type: none"> ▶ child custody/visitation ▶ marital dissolution (except property division) ▶ domestic violence ▶ withholding of income that is property of the estate or the debtor for payment of domestic support obligations ▶ withholding or suspension of a driver's, professional, or occupational license as specified in Social Security Act ▶ reporting of overdue support obligations to a credit reporting agency by a parent as specified in the Social Security Act ▶ interception of a tax refund in satisfaction of support obligation ▶ enforcement of a medical obligations as specified in the Social Security Act
<p>Pension Plan Obligations §362(b)(19)</p>	<p>Stay does not apply to withholding from wages and collection of amounts under an agreement with the debtor for repayment of loans made by plans established by the employer under IRC §§401, 403, 408, 408A, 414, 457, and 501(c)</p> <ul style="list-style-type: none"> ▶ Payments must be applied to the repayment of the loan
<p>Eviction Judgment (Residential) §362(b)(22), (l)</p>	<p>Stay does not apply to enforcement of residential eviction judgment entered prepetition Provision not effective until 30 days after the petition is filed if the debtor—</p> <ul style="list-style-type: none"> ▶ files with the petition and serves on the lessor a certification that under applicable nonbankruptcy law circumstances exist that permit cure of the default, and ▶ deposits with the clerk the rental that would accrue during that 30-day period <p>Exception does not apply if during the 30-day period the debtor files a certification that the debtor has cured under applicable nonbankruptcy law the monetary default If lessor contests debtor's certification, court must hold a hearing within 10 days If court upholds the lessor's objection or the debtor fails to file the certifications, the stay is terminated and lessor may continue the action to obtain possession</p>

<p>Residential Lease Eviction (Drugs) §362(b)(23), (m)</p>	<p>Stay does not apply to continuation of residential eviction action based on endangerment of the property or illegal use of drugs on the property if the lessor files with the court and serves on the debtor a certification that—</p> <ul style="list-style-type: none"> ▶ an eviction action has been commenced, or ▶ that such activity has occurred in the 30 days preceding the filing of the certification <p>Applies 15 days after lessor’s certification filed unless the debtor serves and files an objection to the truth or legal sufficiency of the lessor’s certification</p> <ul style="list-style-type: none"> ▶ Court must hold hearing on objection within 10 days ▶ debtor must establish that conditions did not exist or have been remedied <p>If debtor does not object or court does not uphold the debtor’s objection the stay is terminated and lessor may continue the eviction action</p>
<p>Non-avoidable Transfers §362(b)(24)</p>	<p>Transfers that are not avoidable under §§ 544 or 549 are excepted from the stay</p>
<p>Securities Investigations §362(b)(25)</p>	<p>Actions by self-regulatory securities organization excepted from stay</p> <ul style="list-style-type: none"> ▶ investigations or actions to enforce organization’s regulatory powers ▶ enforce order, other than monetary sanctions, obtained in enforcing regulatory powers ▶ delist, delete or refuse to permit quotation of stock that does not meet organization’s regulations
<p>Tax Refunds §362(b)(26)</p>	<p>Setoff under applicable nonbankruptcy law of tax refunds for against tax liabilities for tax periods ending prepetition excepted from stay</p> <p>If setoff not permitted due to pending action to determine liability, governmental unit may hold refund pending resolution unless upon motion of trustee court may grant adequate protection to taxing authority</p>
<p>Medicare Programs §362(b)(28)</p>	<p>Exclusion by Secretary of Health & Human Services from participation in medicare or federal health care programs</p>

AUTOMATIC STAY — TERMINATION	
<p>Prior Case Dismissed §362(c)(3), (i)</p>	<p>Stay terminated 30 days after petition is filed in case filed by individual under chapter 7, 11, or 13 if a case pending within 1-year preceding was dismissed other than a case refiled after dismissal under §707(b) Stay may be continued if the court finds after a hearing upon motion of a party in interest that refiling was in good faith Case presumed not to be in good faith (rebuttable only by clear and convincing evidence) <u>As to all creditors if—</u></p> <ul style="list-style-type: none"> ▶ more than 1 case under chapter 7, 11, or 13 pending in previous year ▶ previous case was dismissed because debtor failed to— <ul style="list-style-type: none"> ▶ amend petition or schedules when ordered by court without substantial excuse (inadvertence or neglect not substantial excuse unless caused by debtor’s attorney) ▶ provide adequate protection ordered by the court ▶ there has not been a substantial change in the debtor’s financial or personal affairs or any other reason to conclude that the later case will not be concluded— <ul style="list-style-type: none"> ▶ if a chapter 7, with a discharge, or ▶ if a chapter 11 or 13, with a confirmed plan that will be fully performed <p><u>As to any creditor</u> who had filed a motion under §362(d) and at the time of dismissal the motion was pending or had been resolved by the termination, modification, or conditioning of the stay in the prior case If dismissal of prior case under chapter 7, 11, or 13 due to creation of a debt repayment plan, subsequent refiling not presumed to not be in good faith</p>
<p>More than One Prior Case Dismissed §362(c)(4)</p>	<p>No stay goes into effect in case filed by individual under chapter 7, 11, or 13 if 2 or more cases pending within 1-year preceding were dismissed other than a case refiled after dismissal under §707(b) Court may impose the stay upon request of a party in interest if it is established that later filing was in good faith</p> <ul style="list-style-type: none"> ▶ must be filed within 30 days of the date the petition is filed ▶ effective on date order entered ▶ good faith presumption same as under §362(c)(3) <p>Upon request court may enter order confirming that no stay was in effect</p>

<p>Real Property (<i>In Rem</i>) §362(d)(4)</p>	<p>Stay may be terminated as against real property securing an obligation if the court finds that the filing was part of a scheme to hinder, delay, or defraud the creditor involving—</p> <ul style="list-style-type: none"> ▶ transfer of an ownership interest without the approval of the creditor or court order, or ▶ multiple bankruptcy filings involving the property <p>If recorded in accordance with state law an order entered under this paragraph is binding in any other case filed under the Code within 2 years of the entry of the order</p> <ul style="list-style-type: none"> ▶ debtor may obtain relief from order in subsequent filing upon showing of good cause or changed circumstances
<p>Time for Ruling on Motion (Individuals) §362(e)(2)</p>	<p>In a case filed by an individual under chapter 7, 11, or 13, the stay automatically terminates 60 days after a motion under §362(d) is filed unless—</p> <ul style="list-style-type: none"> ▶ a final decision is rendered within the 60 days ▶ the 60-day period is extended by— <ul style="list-style-type: none"> ▶ agreement of the parties, or ▶ by the court for a specific time upon good cause as described in the findings of the court
<p>Personal Property (Individual Debtors) §362(h)</p>	<p>In a case where the debtor is an individual the stay is terminated as to personal property securing an obligation or subject to a lease if the debtor fails to—</p> <ul style="list-style-type: none"> ▶ timely file a statement of intentions indicating that the debtor will— <ul style="list-style-type: none"> ▶ surrender, ▶ retain and redeem or reaffirm, or ▶ assume the lease (see “Personal Property Leases,” <i>post</i>, p. 33), and ▶ take timely action to perform the intentions <p>Does not apply if upon motion of the trustee filed within the time specified in §521(a)(2)—</p> <ul style="list-style-type: none"> ▶ the court determines that the personal property is of consequential value to the estate ▶ orders adequate protection for the creditor/lessor ▶ orders the debtor to deliver the personal property to the trustee
<p>Sanctions §362(k)(2)</p>	<p>Sanctions limited to actual damages if creditor believes in good faith that the stay as to personal property was terminated under §362(h)</p>

<p>Small Business Cases §362(p)</p>	<p>Stay does not apply to cases in which the debtor is a small business at the time the petition filed if—</p> <ul style="list-style-type: none"> ▶ was a debtor in small business case in which an order of dismissal became final within 2 years preceding the filing of the petition ▶ was debtor in which a order confirming a plan was entered within 2 years preceding the filing of the petition ▶ an entity that has acquired substantially all the assets of a small business having had a dismissal or plan confirmed within the 2 years preceding unless it is established that the acquisition was in good faith and not for the purpose of evading this provision <p>Does not apply—</p> <ul style="list-style-type: none"> ▶ to an involuntary petition filed without the collusion of the debtor, or ▶ if the debtor proves— <ul style="list-style-type: none"> ▶ filing resulted from circumstances beyond the control of the debtor, and ▶ more likely than not that the court will confirm a feasible non-liquidating plan within a reasonable time
<p>Order Confirming Termination §362(j)</p>	<p>Upon request, the court may enter an order confirming termination of the stay under §362(c)</p>

EXECUTORY CONTRACTS/LEASES	
<p>Nonmonetary Defaults §365(b)</p>	<p>Need not cure nonmonetary faults under an unexpired lease of real property that is impossible to cure prior to assumption except a failure to operate in accordance with the terms of a nonresidential lease, in which case the default must be cured at the time of assumption and the lessor be compensated for any pecuniary loss resulting from the breach</p>
<p>Nonresidential Real Property §365(d)(4)</p>	<p>Lease of nonresidential real property deemed rejected if not assumed by the earlier of—</p> <ul style="list-style-type: none"> ▶ 120 days after the petition is filed, or ▶ date a plan is confirmed <p>Court may extend 120-day period for an additional 90 days</p> <ul style="list-style-type: none"> ▶ any further extension requires written consent of the lessor
<p>Personal Property Leases §365(p)</p>	<p>In a chapter 7 case filed by an individual the debtor may assume a lease of personal property</p> <ul style="list-style-type: none"> ▶ written notification to the lessor of desire to assume ▶ creditor, at creditor’s option, may notify debtor of consent to assumption ▶ creditor may condition assumption on cure of any arrearage ▶ within 30 days debtor must notify lessor that lease is assumed ▶ assumption is by debtor and no liability may be imposed on the estate ▶ stay not violated by notice to debtor and negotiation of cure <p>In a chapter 11 or 13 case in which the debtor is an individual, if a lease of personal property is not assumed in the plan, it is deemed rejected</p>

SPECIAL TAX PROVISIONS	
State & Local Taxes §346	<p>As amended, conforms state and local income tax administrative issues to the Internal Revenue Code by requiring the states to follow the Federal convention. It conforms state and local tax administration to the Internal Revenue Code in the following areas:</p> <ul style="list-style-type: none"> ▶ division of tax liabilities and responsibilities between the estate and the debtor ▶ tax consequences with respect to partnerships and transfers of property, and ▶ the taxable period of a debtor <p>The estate must use the same accounting method used by the debtor if it complies with applicable nonbankruptcy law</p> <p>Except as otherwise provided in this section or §505, returns are filed in accordance with otherwise applicable nonbankruptcy law</p>
Interest on Tax Claims §511	<p>Interest on tax claims or administrative tax expenses is determined under the applicable nonbankruptcy law</p> <p>For taxes paid under a plan, the applicable rate is the rate in effect in the month in which the plan is confirmed</p>
Subordination of Tax Liens §724(b) §724(e) §724(f)	<p>Excludes perfected <i>ad valorem</i> property tax liens from subordination</p> <p>Excludes chapter 11 administrative expense claims other than those for wages, salaries or commissions from distribution</p> <p>Before subordinating tax lien on real or personal property, the trustee must—</p> <ul style="list-style-type: none"> ▶ exhaust the unencumbered assets of the estate and ▶ recover from secured creditors costs and expenses under §506(c) <p>May pay wage claims entitled to priority under §507(a)(4) and contributions to an employee benefit plan entitled to priority under §507(a)(5)</p>
Dismissal for Failure to File Tax Returns §521(j)	<p>If the debtor does not timely file a tax return or request an extension, a taxing authority may request the court to dismiss or convert the case</p> <p>If the debtor does not file the return or obtain an extension within 90 days of the date of the request that the case be converted or dismissed, the court must dismiss or convert the case, whichever is in the best interests of the creditors and the estate</p>
Determination of Liability §505(a)(1)(C)	<p>Court may not determine amount or legality of an <i>ad valorem</i> property tax if the time for contesting or redetermining has expired under applicable nonbankruptcy law</p>

<p>Tax Liability – Estate 28 USC §960</p>	<p>Taxes to be paid on or before due date under applicable nonbankruptcy law unless—</p> <ul style="list-style-type: none"> ▶ property tax secured by lien on property abandoned within reasonable time after lien attaches, or ▶ payment excused under a specific provision of Code <p>In chapter 7 case, payment may be deferred until final distribution if—</p> <ul style="list-style-type: none"> ▶ tax not incurred by the trustee, or ▶ before the due date of the tax, court finds a probable insufficiency of funds to pay in full administrative claims having same priority
---	--

HEALTH CARE BUSINESS	
<p>Defined §101(27A)</p>	<p>Any private or public entity primarily engaged in offering to the general public facilities and services for—</p> <ul style="list-style-type: none"> ▶ diagnosis and treatment of injury, deformity or disease ▶ surgical, drug treatment, psychiatric, or obstetric care
<p>Patient Care Ombudsman §333</p>	<p>In a case in which a health care business is the debtor, the court must order the appointment of a health care ombudsman within 30 days of the date the petition is filed</p> <p>The U.S. trustee must appoint a disinterested person to serve</p> <ul style="list-style-type: none"> ▶ If debtor provides long-term care, the State Long-Term Care Ombudsman may be appointed <p>The ombudsman’s duties include—</p> <ul style="list-style-type: none"> ▶ monitor the quality of patient care ▶ NLT than 60-days after appointment and at 60-day intervals thereafter at a hearing or in writing regarding the debtor’s quality of care ▶ if it is determined the quality of care is declining significantly or is otherwise being materially compromised, immediately file a motion or written report and give notice to interested parties ▶ has access to patient records but must maintain confidentiality
<p>Disposal of Patient Records §351</p>	<p>If the trustee in a case of a health care business has insufficient funds to store patient records, the trustee must—</p> <ul style="list-style-type: none"> ▶ promptly publish in 1 or more newspapers notice that if patient records are not claimed by patient or an insurance provider by a date not less than 365 days after notice, the records will be destroyed ▶ during the first 180 days attempt to notify directly by mail at the last known address each patient and insurance provider, or family member or contact person for the patient ▶ at the end of the 365-day period, mail by certified mail a request to each appropriate federal agency requesting permission to deposit unclaimed patient records with that agency ▶ records that are not claimed or accept for storage by a federal agency are destroyed— <ul style="list-style-type: none"> ▶ if written, by shredding or burning ▶ if magnetic, optical or other electronic records, by destroying in a manner so that they may not be retrieved

Transfer of Patients §704(a)(12)	Trustee must use reasonable and best efforts to transfer patients of a health care business in the process of being closed to an appropriate health care business that— <ul style="list-style-type: none"> ▶ is in the vicinity of the health care business being closed ▶ provides patients with substantially similar care ▶ maintains a reasonable quality of care
-------------------------------------	--

PERSONAL PRIVACY

Taxpayer Identification Numbers §342(c)(2)(B)	Notices sent to creditors contain the full taxpayer identification number of the debtor The copy of the notice filed with the court will only contain the last 4-digits
Personally Identifiable Information §101(41A)	Personally identifiable information of an individual is— <ul style="list-style-type: none"> ▶ first name (or initial) and last name ▶ geographic address or physical place of residence ▶ electronic (e-mail) address ▶ telephone number at place of residence ▶ social security account number ▶ credit card account number If associated with one of the foregoing— <ul style="list-style-type: none"> ▶ birth date ▶ place of birth ▶ number of birth, adoption or naturalization certificate
Sale of Consumer Information §363(b)(1)	If the privacy policy of the business being sold or leased, as disclosed to individuals and in effect on the date the case was commenced, prohibits the transfer of personally identifiable information to persons not affiliated with the debtor, the trustee may not sell that information unless— <ul style="list-style-type: none"> ▶ the sale/lease is consistent with that policy, or ▶ after appointment of a privacy ombudsman the court approves the sale/lease— <ul style="list-style-type: none"> ▶ giving due consideration to the facts, circumstances, and conditions of the sale/lease, and ▶ no showing is made that the sale/lease would violate otherwise applicable nonbankruptcy law

<p>Consumer Privacy Ombudsman §332</p>	<p>Not later than 5 days before the hearing on the sale/lease of personally identifiable information, the U.S. trustee appoints a disinterested person as the consumer privacy ombudsman</p> <p>The ombudsman appears at the hearing on the sale/lease and presents to the court—</p> <ul style="list-style-type: none"> ▶ debtor’s privacy policy ▶ potential losses or gains of privacy to consumers if the sale/lease is approved ▶ potential costs or benefits to consumers if the sale/lease is approved ▶ potential alternatives that would mitigate potential privacy losses or potential cost to consumers <p>The ombudsman must keep all personally identifiable information confidential</p>
--	--

MISCELLANEOUS	
<p>Names of Minors §112</p>	<p>Debtor may not be required to disclose the name of minor child in public documents</p> <p>May be required to disclose the name of a minor child in a nonpublic document maintained by the court and made available for inspection to the U.S. trustee, trustee, and auditor, who may not disclose the name</p>
<p>Involuntary Petitioners §303(h)</p>	<p>A creditor whose claim is subject to a bona fide dispute as to liability or amount may not be an involuntary petitioner</p>
<p>False or Fictitious Involuntary Petitions §303(l)</p>	<p>Upon motion of the debtor, the court must seal all records of the court and all references to the proceeding if—</p> <ul style="list-style-type: none"> ▶ the petition is false or contains materially false, fictitious, or fraudulent statement ▶ debtor is an individual ▶ court dismisses the petition <p>Court may enter an order prohibiting all consumer reporting agencies from making any consumer report that contains any information relating to the petition or the case</p>
<p>Professional Compensation §328(a)</p>	<p>Professional compensation may be awarded on an hourly, fixed, percentage or contingency fee basis</p>
<p>Sharing Compensation §504(c)</p>	<p>Prohibition on sharing compensation does not apply to sharing with a public service referral program</p>
<p>Estate Professionals §330(a)(1)</p>	<p>Consumer privacy ombudsman added as a professional entitled to be paid from the estate</p> <p>[NOTE: the patient care ombudsman is not listed. Was this omission an oversight or intentional?]</p>

Trustee Compensation §330(a)(7)	Compensation of a trustee is to be determined as a commission under §326
Appearances at Creditors' Meetings §341(c)	A corporation, partnership or LLC (other than the debtor) may appear at a creditors' meeting without an attorney
Creditor Addresses §342(c), (e), (f), (g) §505(b)(1)	<p>If within the 90-day period preceding the filing a creditor has provided 2 communications to the debtor in which the creditor provided the account number and address where communications were to be sent, the debtor must use that address and account number</p> <p>In individual chapter 7 & 13 cases, a creditor may provide court and serve on debtor a notice of an address to be used for notices in the case, which address must be used</p> <p>A creditor may provide all or any court with an address at which it desires to receive notices in chapter 7 & 13 cases</p> <p>If the creditor designates a person or organizational subdivision to receive notice, notice must be addressed to that person or organizational subdivision to be effective</p> <p>Notice not given in accordance with this section is not effective until such time as the notice is actually brought to the attention of the creditor</p> <ul style="list-style-type: none"> ▶ No monetary penalty may be assessed for a violation of the stay if notice is not effective <p>Clerk to maintain a list of addresses provided by a governmental taxing authority designated as the address to which notices are to be sent</p> <ul style="list-style-type: none"> ▶ If no other address provided, notice to be sent to address for filing a return
Sale or Lease by Trustee §363(d)	Sale must be in accordance with applicable nonbankruptcy law governing the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust
Purchase of Consumer Credit Interests §363(o)	Purchaser of an interest in a consumer credit transaction governed by TILA or a consumer credit contract (as defined in 16 CFR 433.1) remains subject to all claims and defenses as could be asserted if the interest was acquired in a transaction other than a transaction under §363

<p>Utility Service §366(c)</p>	<p>“adequate assurance” of payment means—</p> <ul style="list-style-type: none"> ▶ cash deposit ▶ letter of credit ▶ certificate of deposit ▶ surety bond ▶ prepayment ▶ mutually agreeable form of security <p>In a chapter 11 case, service may be altered, refused, or discontinued if utility does not receive adequate assurance of payment within 30 days of the date the petition is filed</p> <p>In making a determination of whether assurance of payment is adequate, the court may not consider—</p> <ul style="list-style-type: none"> ▶ the absence of prepetition security ▶ that the debtor made prepetition payments timely ▶ the availability of an administrative expense priority <p>Utility may setoff against a prepetition deposit without notice or order of the court</p>
<p>Trustee Surcharges §506(c)</p>	<p><i>Ad valorem</i> property taxes added to the items that the trustee may recover from a secured claimant</p>
<p>Discharge Injunction §524(i)</p>	<p>Willful failure of a creditor to properly credit payments made under a confirmed plan constitutes a violation of the discharge injunction if the failure causes material injury to the debtor</p> <ul style="list-style-type: none"> ▶ Does not apply if— <ul style="list-style-type: none"> ▶ plan revoked ▶ plan in default ▶ has not received payments in accordance with the plan
<p>Disinterested Person §101(14)</p>	<p>Person was not an officer, director or employer of the debtor within 2 years of the date the petition is filed</p>
<p>Definition of Transfer §101(54)</p>	<p>Transfer includes—</p> <ul style="list-style-type: none"> ▶ creation of a lien ▶ retention of title as a security instrument ▶ foreclosure of a debtor’s equity of redemption
<p>Adjustment of Dollar Amounts §104</p>	<p>Adds the amounts in §§101(3); 101(18); 101(19); 101(51D); 522(f)(3), (4); 522(n), (p), (q); 523(a)(2)(C); 541(b); 547(c)(9); 707(b); 1322(b); 1325(b); 1326(b)(9); and 28 USC §1409(b) to those adjusted every 3 years</p>
<p>Jurisdiction 28 USC §1334</p>	<p>The district court in which the case is commenced has exclusive jurisdiction over all claims involving the construction of or disclosure requirements under §327</p>
<p>Venue 28 USC §1409(b)</p>	<p>A case to recover money on a consumer debt of less than \$15,000 or a debt (excluding a consumer debt) against a non-insider of less than \$10,000 must be brought in the district in which the defendant resides</p>

<p>Appeals 28 USC §158(d)(2)</p>	<p>An appeal filed under §158(a) will be transferred to the appropriate court of appeals if the bankruptcy court, district court, or bankruptcy appellate panel, on its own motion or the request of a party, certifies the appeal—</p> <ul style="list-style-type: none"> ▸ involves a question of law that on which there is no controlling circuit or Supreme Court authority or involves a matter of public importance ▸ involves a question of law requiring resolution of conflicting decisions ▸ an immediate appeal may materially advance the progress of the case or proceeding from which the appeal is taken <p>The court of appeals accepts immediate transfer (it may decline) Any request by a party for certification must be filed not later than 60 days after entry of the judgment</p>
<p>Bankruptcy Fraud 18 USC §157</p>	<p>Bankruptcy fraud includes a fraudulent involuntary petition filed under §303</p>
<p>Investigation of Fraud 18 USC §158</p>	<p>The U.S. Attorney for the district and the FBI field office have primary responsibility for investigating abusive reaffirmations and materially fraudulent representations in schedules that are intentionally false or misleading</p> <p>Each bankruptcy court is responsible for establishing procedures for referring any case that may contain a materially fraudulent representation to the designated investigators</p>

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
S. 256
109th Cong. – 1st Sess. (April 20, 2005)

THE NEW RULES OF BANKRUPTCY FOR "SMALL BUSINESS DEBTORS"

"Congress has in recent years recognized that a 'one-size-fits-all approach' to business reorganizations fails to adequately address the needs of a system dominated by small business bankruptcies."

REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION

*George H. Singer
Lindquist & Vennum, PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 371-2493
Facsimile: (612) 371-3207
gsinger@lindquist.com*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. HISTORY OF LEGISLATION 1

 A. Bankruptcy Reform Act of 1994 1

 (1) Summary of “Small Business” Provisions..... 1

 (2) The National Bankruptcy Review Commission 2

 B. Commission Report..... 2

 (1) Rejection of “One-Size-Fits-All Approach” to Chapter 11 2

 (2) Objectives 2

 (3) Legislative Intent..... 2

III. NEW LEGISLATION: “SMALL BUSINESS” PROVISIONS 2

 A. Effective Date 2

 B. New Rules for “Small Business Debtors” 2

 C. Definition of “Small Business Debtor”: 11 U.S.C. § 101 3

 (1) Operations Test 3

 (2) Debt Test..... 3

 (3) Committee Presence, Representation and Participation Tests 3

 D. Enhanced Duties in “Small Business Cases”: 11 U.S.C. § 1116 3

 (1) New Filings or Statement of Unavailability..... 3

 (2) Meeting Attendance 3

 (3) Timely Filings of Schedules..... 4

 (4) Filing of Postpetition Reports..... 4

 (5) Insurance Requirements 4

 (6) Tax Returns/Tax Payments..... 4

 (7) Inspections 4

E. New Periodic Reporting Requirements: 11 U.S.C. § 308.....	4
(1) Requirements.....	4
(2) Implementation.....	4
(3) Effective Date.....	5
F. Plans and Disclosure Statements: 11 U.S.C. § 1125.....	5
(1) Standardized Forms.....	5
(2) Adequate Information.....	5
(3) Increased Flexibility.....	5
G. Plan Filing and Confirmation Deadlines: 11 U.S.C. § 1121.....	5
(1) Exclusivity.....	5
(2) Plan Filing Deadline.....	5
(3) Extensions.....	6
(4) Plan Confirmation Deadline.....	6
H. Expanded Duties of United States Trustee: 28 U.S.C. § 586.....	6
(1) Conduct Initial Debtor Interview.....	6
(2) Conduct Inspections.....	6
(3) Monitor Small Business Debtor.....	6
(4) Move for Dismissal or Conversion.....	6
I. Serial Filer Provisions: 11 U.S.C. § 362.....	7
(1) Inapplicability of Automatic Stay.....	7
(2) Exception to the Exception.....	7
J. Study of Small Business Debtor Amendments: S.256 § 443.....	7
K. Miscellaneous Amendments Impacting Small Business Cases.....	7

APPENDIX I– Report of National Bankruptcy Review Commission

I. INTRODUCTION

S. 256, "The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," represents the most comprehensive set of changes to the Bankruptcy Code in over twenty-five years.¹ The new law makes significant changes to the dynamics of business reorganizations, particularly in a "small business case".

II. HISTORY OF LEGISLATION

A. BANKRUPTCY REFORM ACT OF 1994

(1) Summary of "Small Business" Provisions. The Bankruptcy Reform Act of 1994 (the "1994 Act"),² which applied to cases filed after October 22, 1994, resulted in the creation of an "optional" statutory fast-track procedure for the "small business" debtor. A "small business" debtor under pre-amendment law is defined as a person engaged in commercial or business activity (other than those engaged in the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debt does not exceed \$2 million.³ Under current law, the debtor must elect to be treated as a small business.⁴ The major changes to Chapter 11 for small business bankruptcies implemented by the 1994 Act include the following:

(A) Creditor's Committee Eliminated. A debtor, or other party in interest, may request that the court not appoint a creditors' committee in a small business bankruptcy case.⁵ The request, which is made by motion, will be granted upon a demonstration of "cause."

(B) Exclusivity Abbreviated. The 120-day exclusivity period that is available in Chapter 11 was shortened under the 1994 Act to *100 days* for electing debtors.⁶ The exclusivity period may be shortened for "cause", but can only be extended for reasons that are "caused by circumstances for which the debtor should not be held accountable" (i.e. reasons beyond the debtor's control).⁷ In any event, exclusivity cannot be extended beyond 160 days from the order of relief (see Plan Filing Deadline Imposed, subparagraph (C), below).

(C) Plan Filing Deadline Imposed. The 1994 Act imposed a plan-filing deadline on small business debtors. All plans must be filed within *160 days* after the commencement of the case.⁸

(D) Disclosure, Solicitation and Confirmation Streamlined. The 1994 Act changed the disclosure and solicitation rules for small business debtors. A court may "conditionally approve" the disclosure statement in small business cases (thereby allowing the debtor to solicit acceptances) and combine the hearing on the disclosure statement with a hearing on confirmation of the plan.⁹ The 1994 Act sought to reduce delay and curtail the administrative costs of Chapter 11 by eliminating multiple mailings and hearings.¹⁰

(2) The National Bankruptcy Review Commission. The 1994 Act also resulted in the creation of the National Bankruptcy Review Commission (the "Commission"). Congress charged the Commission with the responsibility of studying the nation's bankruptcy laws and making recommendations for reform to the President, the Congress and the United States Supreme Court.

B. COMMISSION REPORT

On October 20, 1997, the Commission submitted a comprehensive Report setting forth a number of specific recommendations for improving bankruptcy law and procedure for small business cases (the "Commission Report").¹¹ The Commission's recommendations for reform of small business bankruptcies were all adopted with near consensus among the Commissioners.

(1) Rejection of "One-Size-Fits-All Approach" to Chapter 11. The Commission believed that the current Chapter 11 framework, driven by a "one-size-fits-all approach" to business reorganizations, failed to adequately address the needs and realities of small business cases.¹²

(2) Objectives. The Commission's recommendations were designed to (1) increase the likelihood of a successful reorganization for viable businesses and return to creditors, "by reducing the high cost of, and time delays in, Chapter 11,"¹³ and (2) enable the prompt identification and disposition of those cases that have no genuine prospects of reorganization.¹⁴

(3) Legislative Intent. Congress has implemented the Commission's objectives in the new legislation, although a number of the specific details of the law are different. As such, the Commission Report provides useful guidance in determining Congressional intent with respect to the "small business" amendments (see Appendix I, attached hereto).

III. NEW LEGISLATION: "SMALL BUSINESS" PROVISIONS

A. EFFECTIVE DATE

The amendments to the Bankruptcy Code and other related statutes promulgated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "2005 Act") will generally take effect for cases filed 180 days after the date of enactment (or October 17, 2005) and, subject to certain limited exceptions, will not apply to cases commenced before the effective date.¹⁵

B. NEW RULES FOR "SMALL BUSINESS DEBTORS"

The 2005 Act creates a separate set of requirements for a "small business debtor" in Chapter 11 and a "small business case".¹⁶ The election by a debtor of "small business," fast-track treatment under the 1994 Act has been replaced by requiring *mandatory* compliance with a different set of rules for all debtors satisfying the definitional prerequisites.

C. DEFINITION OF "SMALL BUSINESS DEBTOR": 11 U.S.C. § 101

(1) Operations Test. A "small business debtor" is a person that is engaged in commercial or business activities (including any affiliate of such person that is also a debtor under Title 11) other than the business of owning or operating real property or activities incidental thereto (i.e. not single-asset real estate debtors).¹⁷

(2) Debt Test. The business debtor must have aggregate, noncontingent, liquidated debt of "not more than \$2,000,000" as of the petition date or the date of the order of relief—exclusive of debts owed to affiliates or insiders.¹⁸ This amount is subject to periodic adjustment every three years in accordance with 11 U.S.C. § 104.

(3) Committee Presence, Representation and Participation Tests. Regardless of whether the operations test and the debt test described above are nevertheless satisfied, a business debtor will not be deemed a "small business debtor" if the United States Trustee has appointed a committee of unsecured creditors, unless the "court has determined" that the committee "is not sufficiently active and representative to provide effective oversight of the debtor."¹⁹ In other words, a debtor that satisfies the relatively bright-line operations test and debt test will be deemed to be a "small business debtor" if no committee of unsecured creditor's is appointed. However, even in cases in which a committee is appointed early in the case, a debtor may nevertheless be (later) subject to the separate, "small business debtor" requirements if the court determines that the committee is not sufficiently active in the case or its members not sufficiently representative of the universe of claimants. Accordingly, it is quite possible that a debtor's status—along with the rules it is required to operate under—may change during the course of the bankruptcy case.

D. ENHANCED DUTIES IN "SMALL BUSINESS CASES": 11 U.S.C. § 1116

The trustee or debtor-in-possession in a small business case has enhanced duties under the 1995 Act that are designed to "implement greater administrative oversight and controls" over small business debtors.²⁰ In addition to the other duties imposed by the Bankruptcy Code or applicable law, the new legislation includes new Code § 1116 that *expressly* requires the small business debtor to comply with all of the following:

(1) New Filings or Statement of Unavailability. The small business debtor is now required in a voluntary case to file along with the bankruptcy petition (i.e. append to the petition), or in an involuntary case file not later than 7 days after the order of relief, its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return, or make a statement under penalty of perjury that no such documents have been prepared or filed.

(2) Meeting Attendance. The small business debtor is required to attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States Trustees, including initial debtor interview, first meeting of creditors and scheduling conferences. The court may waive the meeting attendance requirement only upon a finding of "extraordinary and compelling circumstances."

(3) Timely Filings of Schedules. The small business debtor is required to “timely file all schedules and statement of financial affairs” unless extended by the court for a period of up to 30 days. The court is not allowed to grant an extension beyond 30 days absent a finding of “extraordinary and compelling circumstances”.

(4) Filing of Postpetition Reports. The small business debtor is required to file all postpetition financial and other reports required by federal and local rule.

(5) Insurance Requirements. The small business debtor is required to maintain (and presumably obtain) insurance “customary and appropriate to the industry.”

(6) Tax Returns/Tax Payments. The small business debtor is required to timely file tax returns and other government filings and timely pay all taxes entitled to administrative expense priority and not being contested in appropriate proceedings.

(7) Inspections. The small business debtor is required to allow the United States Trustee, or a designated representative, to inspect the debtor’s business premises, books and records at reasonable times and upon reasonable notice.²¹

E. NEW PERIODIC REPORTING REQUIREMENTS: 11 U.S.C. § 308

In addition to the new duties imposed on “small business debtors” under the 2005 Act, the legislation also imposes new periodic reporting requirements. The requirements emanated from the Commission’s recommendations and are designed to improve the ability of parties in interest to more readily identify those debtors which have a reasonable prospect of succeeding in Chapter 11 and those which do not.²²

(1) Requirements. A “small business debtor” will now be required under new Code § 308 to file periodic financial and other reports containing information, including information addressing (a) the debtor’s profitability (meaning the amount of the money earned or lost during current and recent fiscal periods); (b) reasonable approximation of projected cash disbursements and receipts over a reasonable period; (c) comparisons of actual receipts and disbursements with prior period projections; and (d) whether or not the debtor is in material compliance with postpetition requirements imposed by the Code and Rules, including those relating to the filing of tax returns and governmental reports, and the payment of taxes and other administrative expenses (and, if not in compliance, the debtor is required to identify its failures “and how, at what cost, and when the debtor intends to remedy such failure”).²³

(2) Implementation. The Judicial Conference of the United States is required to propose amended Federal Rules of Bankruptcy Procedure and official forms in accordance with 28 U.S.C. § 2073 to implement the small business debtor’s new reporting requirements under new Code § 308. The rules and form are to be designed to achieve a practical balance among (a) the reasonable needs of the court, the United States Trustee, creditors and other parties in interest for reasonably complete

information; (b) the small business debtor's interest that the required reports be easy and inexpensive to complete; and (c) the interest of all parties that the required reports "help such debtor to understand" the debtor's financial condition and plan for the future.²⁴

(3) Effective Date. The enhanced reporting requirements set forth in Code § 308 shall not become effective until 60 days after the date that the Rules are prescribed.²⁵

F. PLANS AND DISCLOSURE STATEMENTS: 11 U.S.C. § 1125

(1) Standardized Forms. The Judicial Conference of the United States is directed under the new legislation to propose for adoption standard form disclosure statements and plans of reorganization for small business debtors.²⁶ The 2005 Act requires the forms to achieve a practical balance between the needs of the courts and parties in interest to have reasonably complete information and the debtor's needs for simplicity and economy.²⁷

(2) Adequate Information. The new legislation amends the requirements of 11 U.S.C. § 1125 such that the bankruptcy court, in determining whether a disclosure statement contains "adequate information" is required to consider "the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information."²⁸ While the amendments apply with equal force to all cases filed under Chapter 11, small business debtors will be the primary beneficiaries of this amendment.

(3) Increased Flexibility. The amendments to the Bankruptcy Code provide the small business debtor with substantially increased flexibility in the disclosure statement and plan process in a number of respects. First, the court may, under the new law, find that the "plan itself" provides adequate information and that a separate disclosure statement is unnecessary.²⁹ Second, the court may (as under current law for debtors who affirmatively elect small business treatment) conditionally approve a disclosure statement and combine the hearing on the approval of the disclosure statement with the hearing on confirmation.³⁰ Third, acceptances of the plan may be solicited based upon a conditionally approved disclosure statement if mailed to claimants not later than 25 days prior to the confirmation hearing.³¹ The vagaries associated with flexibility contemplated under the amended statute will inevitably necessitate the development of new federal and/or local rules of procedure.

G. PLAN FILING AND CONFIRMATION DEADLINES: 11 U.S.C. §§ 1121, 1129

(1) Exclusivity. The new legislation grants "small business debtors" the exclusive right to file a plan under 11 U.S.C. § 1121(e) during the first 180 days of the bankruptcy case (rather than 120 days for other Chapter 11 debtors).³²

(2) Plan Filing Deadline. All plans in small business cases must be filed within 300 days of the order for relief (rather than 160 days under current law for businesses electing small business treatment).³³

(3) Extensions. The 180-day exclusivity period and 300-day plan filing period in Code § 1121(e) can be extended under the new law “only” if the debtor, after notice, demonstrates by a preponderance of the evidence that (a) “it is more likely than not that the court will confirm a plan within a reasonable period of time,” (b) the court imposes a new deadline at the time an extension is granted, and (c) the order extending the time is “signed” before the existing deadline expires.³⁴

(4) Plan Confirmation Deadline. A court is required to confirm a plan under Code § 1129(e) not later than 45 days after it is filed if the plan complies with the applicable requirements of the Bankruptcy Code, unless the time for confirmation is extended under the “more likely than not standard” set forth in Code § 1121(e) and described above.³⁵

H. EXPANDED DUTIES OF UNITED STATES TRUSTEE: 28 U.S.C. § 586

The new legislation imposes additional requirements on the United States Trustee in small business bankruptcy cases. The changes in the law emanate from the proposals adopted by the Commission and are intended to expedite the administration of small business cases and the more prompt identification of cases that have no genuine prospect of reorganization. The United States Trustee is, under the new, directed to play a more active role in these bankruptcy cases and viewed as a surrogate for the absent creditors’ committee. In *each* small business case, the United States Trustee is required to:

(1) Conduct Initial Debtor Interview. As soon as practicable after the commencement of the case and, in any event, before the first meeting of creditors, the United States Trustee is required to conduct an initial debtor interview during which (a) an investigation of the debtor’s viability is commenced, (b) an inquiry into the debtor’s business plan is made, (c) the debtor is informed of its obligations to file monthly operating and other reports, (d) an attempt is made to develop an agreed scheduling order, and (e) the debtor is informed of its obligations under the Code and Rules.³⁶

(2) Conduct Inspections. If determined appropriate and advisable, the United States Trustee is required to visit the premises of the debtor, ascertain the state of the debtor’s books and records and verify that the debtor has filed its tax returns.³⁷

(3) Monitor Small Business Debtor. The United States Trustee is expressly required to “review and monitor diligently the debtor’s activities” and identify as “promptly as possible” the likelihood that the debtor will be unable to confirm a plan of reorganization.³⁸

(4) Move for Dismissal or Conversion. In any small business case where the United States Trustee, upon the basis of its continuing review and monitoring, finds material grounds for the conversion or dismissal of the case under Code § 1112, the United States Trustee is required to “promptly” request that relief.³⁹

I. SERIAL FILER PROVISIONS: 11 U.S.C. § 362

The new legislation contains some significant restrictions on the ability of a small business debtor to utilize Chapter 11 in a serial fashion. As noted by the Commission, “[u]nregulated, seriatim refilings would completely undermine the purpose of the small business rules.”⁴⁰

(1) Inapplicability of Automatic Stay. The new legislation makes the automatic stay imposed by 11 U.S.C. § 362(a) inapplicable in a bankruptcy case in which the debtor (a) is a debtor in a small business case at the time the petition is filed; (b) was a debtor in a small business case that was dismissed “for any reason” or confirmed within a 2-year period of the new filing; or (c) the debtor has acquired substantially all of the assets or business of a small business debtor, unless the debtor affirmatively demonstrates by a preponderance of the evidence that the assets of the small business debtor were acquired in good faith and not in an attempt to circumvent the intent of the statute.⁴¹

(2) Exception to the Exception. The rules under the amendments that render the automatic stay inapplicable in the context of certain serial filings of small business cases are inapplicable to (a) an involuntary filing against a small business debtor that does not involve collusion between the debtor and its creditors; and (b) if the debtor (i) establishes by a preponderance of the evidence that the succeeding bankruptcy petition “resulted from circumstances beyond its control” that were not foreseeable at the time the case then pending was filed, and (ii) it is more likely than not that court will confirm a feasible plan that is not a liquidating plan within a reasonable period of time.⁴²

J. STUDY OF SMALL BUSINESS DEBTOR AMENDMENTS: S.256 § 443

The Administrator of the Small Business Administration (the “SBA”), in consultation with the Attorney General, the Director of the Executive Office for United States Trustees, and the Director of the Administrative Office of the United States Courts is required to conduct a study not later than 2 years from the enactment of the new legislation. The study is intended to determine (a) internal and external factors that cause small businesses to become debtors and that cause certain small businesses to successfully reorganize in Chapter 11; and (b) how federal laws relating to bankruptcy can be made more efficient and effective in assisting small business to remain viable. The SBA is required to submit a report to the President pro tempore of the Senate and the Speaker of the House of Representatives summarizing the study.⁴³

K. MISCELLANEOUS AMENDMENTS IMPACTING SMALL BUSINESS CASES

There have been a number of amendments to Chapter 11, some of which are contained in the small business debtor amendments, which impact all business bankruptcy cases—mandatory scheduling conferences,⁴⁴ expanded grounds for conversion, dismissal, or the appointment of a trustee,⁴⁵ bankruptcy tax provisions, changes to reclamation,⁴⁶ and amendments to the preferential/fraudulent transfer

rules,⁴⁷ and requirements for assumption and rejection of nonresidential real estate leases,⁴⁸ to mention only a few.

NOTES

© All rights reserved. Mr. Singer is a partner in the Minneapolis office of Lindquist & Vennum PLLP where he practices in corporate and commercial law, including bankruptcy and reorganizations. He also currently serves as an Adjunct Professor of Law at the Hamline University School of Law and teaches courses on secured transactions and bankruptcy. Prior to joining Lindquist & Vennum, Mr. Singer served as an attorney on Staff with the National Bankruptcy Review Commission. Mr. Singer has also previously served as Judicial Law Clerk to the Honorable Nancy C. Dreher, U.S. Bankruptcy Court Judge, District of Minnesota, and to the Honorable William A. Hill, U.S. Bankruptcy Court Judge, District of North Dakota.

¹ S.256, 109th Cong., 1st Sess. (April 20, 2005)

² Pub. L. No. 103-394, 108 Stat. 4107 (1994).

³ 11 U.S.C. § 101(51C)(1994).

⁴ *Id.* § 1121(e).

⁵ *Id.* § 1102(a)(3).

⁶ *Id.* § 1121(e)(1).

⁷ *Id.* § 1121(e)(3).

⁸ 11 U.S.C. § 1121(e)(2)(1994).

⁹ *Id.* § 1125(f).

¹⁰ Under the 1994 Act, the court can authorize the debtor to mail the notice of the conditional approval of the disclosure statement, the disclosure statement, the plan and the ballot to creditors as part of a single mailing. The disclosure statement must be mailed to parties at least "10 days" before the hearing on the plan. In a combined, streamlined mailing, any issue involving the adequacy of information can be determined after the fact at the time the combined hearing on the disclosure statement and plan is held. *Id.* § 1125(f).

¹¹ REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION (October 20, 1997)[hereinafter, "COMMISSION REPORT"].

¹² *Id.* at 609-60. The Commission Report noted that Chapter 11 is not particularly well suited to small business bankruptcies:

“It takes no elaborate empirical study to justify the conclusion that the problems facing a publicly held corporation facing a mass-tort problem, are quite removed from a “mom-pop” corporation running a shoe repair shop Obviously, a case involving a publicly held corporation with varied constituents requires safeguards, and therefore, the process is justifiably slow. The cost of administration, while it is subject to the court’s control, is unavoidably high However, these same safeguards become insurmountable obstacles to . . . small corporations, elevating the costs of the system to unacceptable proportions.”

Id. at 614 (quoting Hon. Alexander L. Paskay & Frances Pilaro Wolstenholme, *Chapter 11: A Growing Cash Cow: Some Thoughts on How to Rein in the System*, 1 AM. BANKR. INST. L. REV. 331 (1993)).

¹³ The Commission identified the need for the following reforms for the minority of small business cases that had a reasonable likelihood of emerging from Chapter 11 as a rehabilitated enterprise: “(1) simplification of disclosure and plan confirmation process; (2) prompt plan-filing and plan-confirmation deadlines, subject to extension upon proper showing by the debtor; and (3) additional reporting by the debtor regarding postfiling operations and review of that information by the U.S. Trustee or Bankruptcy Administrator.” COMMISSION REPORT, at 609-10.

¹⁴ *Id.* at 609 & 652. With respect to those cases in which a successful reorganization is not likely, the Commission made a number of recommendations for reform “aimed at identifying those cases early and removing them from Chapter 11 via dismissal or conversion to Chapter 7.” *Id.* at 610.

¹⁵ S.256 § 1501.

¹⁶ See 11 U.S.C. § 101(51C) & 101(51D) (2005). A “small business case” is a Chapter 11 filed by a “small business debtor.” See *id.*

¹⁷ *Id.* § 101(51D). The Commission’s recommendation would have included single-asset real estate debtors within the definition of “small business debtor.” See COMMISSION REPORT ¶ 2.5.1, at 618.

¹⁸ 11 U.S.C. § 101(51D). The Commission recommended a “\$5,000,000” debt test. See COMMISSION REPORT ¶ 2.5.1, at 618. Neither the Commission’s recommendation nor the definition of “small business” set forth under the 1994 Act removed insider and affiliate debt from the calculus.

¹⁹ 11 U.S.C. § 101(51D)(emphasis added). One of the most significant criticisms of a consolidated approach to business reorganizations can be attributed to the underlying assumption by Congress in the promulgation of the Bankruptcy Reform Act of 1978 that the active participation of a committee of creditors would be part of the Chapter 11

process. See COMMISSION REPORT, at 642. The role of committees was viewed by Congress to be integral to the supervision of the debtor and the protection of creditors. *Id.* However, there can be no dispute that the vast majority of Chapter 11 cases lack the participation and supervision of a creditor's committee originally envisioned. *Id.* at 642-43.

²⁰ *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, REPORT OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, at § 436, 109th Cong., 1st Sess. (April 8, 2005). The new duties imposed on small business debtors emanated from the Commission's recommendations and view that Chapter 11 often does not represent the joint administration of the bankruptcy estate by debtors and creditors that Congress envisioned, but rather is represented by a process "dominated far too often by the exclusive and largely unsupervised direction of the debtor-in-possession." COMMISSION REPORT ¶ 2.5.4, at 641-43.

²¹ 11 U.S.C. § 1116(1)-(7).

²² COMMISSION REPORT ¶ 2.5.3, at 638-40. The new reporting requirements will assist the United States Trustee and the court "in determining the appropriateness of dismissal or conversion of a case." *Id.* at 640.

²³ 11 U.S.C. § 308.

²⁴ S.256 § 435.

²⁵ S.256 § 434.

²⁶ *Id.* § 433. See 11 U.S.C. § 1125(f)(2) ("the court may approve a disclosure statement submitted on a standard form approved by the court or adopted under section 2075 of title 28").

²⁷ *Id.* Accord COMMISSION REPORT ¶ 2.5.2, at 635. The Commission concluded that, in the small business bankruptcy case, "the prospectus-type disclosure statement, and the separate disclosure hearing are more of a costly burden than an aid for cost-effective reorganization. The small Chapter 11 case simply cannot support the high costs of this process." *Id.* at 636-37 (footnote omitted).

²⁸ 11 U.S.C. § 1125(a).

²⁹ *Id.* § 1125(f)(1). Accord COMMISSION REPORT ¶ 2.5.2, at 635-38.

³⁰ 11 U.S.C. § 1125(f)(3). Accord COMMISSION REPORT ¶ 2.5.2, at 635-38.

³¹ 11 U.S.C. § 1125(f)(3).

³² *Id.* § 1121(e)(1). The Commission recommended an exclusivity period of “90 days.” COMMISSION REPORT ¶ 2.5.5, at 621.

³³ *Id.* § 1121(e)(2). The Commission recommended a plan-filing deadline of “150 days.” COMMISSION REPORT ¶ 2.5.5, at 621.

³⁴ 11 U.S.C. § 1121(e)(3). The requirements for obtaining an extension to the exclusivity and plan-filing deadlines imposed under the new law emanated from the Commission’s recommendations. See COMMISSION REPORT ¶ 2.5.5, at 621. The Commission opined that:

Some debtors who will be able to successfully emerge from Chapter 11 will need extensions of the disclosure statement and plan filing deadlines. These deadlines are not intended to derail valid reorganization efforts, but rather to achieve early dismissal or conversion of those cases which have no genuine prospect of confirming a plan, and therefore no business benefiting from the protections of Chapter 11. To implement this concept, the Commission proposes that debtors requiring deadline extensions must bear the burden of proof to establish entitlement thereto by a “more likely than not” standard.

This standard is not thought to be highly onerous. It would require any debtor needing an extension to bear the burden of coming forward and of persuasion to establish, by a preponderance of the evidence, that the debtor has more than a fifty percent chance of confirming a plan. A frame of reference for the court to use in making this finding would be whether in a hypothetical sample of fifty cases substantially similar to that before the court, at least twenty-six would confirm a plan.

Id. at 645-46.

³⁵ 11 U.S.C. §§ 1121(e)(3), 1129(e).

³⁶ 28 U.S.C. § 586(a)(7)(A). *Accord* COMMISSION REPORT ¶ 2.5.10, at 656.

³⁷ 28 U.S.C. § 586(a)(7)(B). *Accord* COMMISSION REPORT ¶ 2.5.10, at 656.

³⁸ 28 U.S.C. § 586(a)(7)(C). *Accord* COMMISSION REPORT ¶ 2.5.10, at 656-57.

³⁹ 28 U.S.C. § 586(a)(8). *Accord* COMMISSION REPORT ¶ 2.5.10, at 657.

⁴⁰ COMMISSION REPORT, at 649.

⁴¹ 11 U.S.C. § 362(n). *Accord* COMMISSION REPORT ¶ 2.5.8, at 649.

⁴² 11 U.S.C. § 362(n)(2). *Accord* COMMISSION REPORT ¶ 2.5.8, at 649.

⁴³ S.256 § 443.

⁴⁴ 11 U.S.C. § 105(d)(*requiring* the court to hold status conferences as are necessary to further the expeditious and economical resolution of the case). *Accord* COMMISSION REPORT ¶ 2.5.7, at 646-47.

⁴⁵ *See* 11 U.S.C. §§ 1104, 1112.

⁴⁶ *See id.* § 546.

⁴⁷ *See id.* §§ 547, 548, 550.

⁴⁸ *See id.* § 365(b) & (d)(4), 503(b).

SMALL BUSINESS PROPOSALS

The preparation of the discussion sections for these proposals is the individual work of Senior Adviser Stephen H. Case and the members of the Small Business Working Group, John Gose, Jeffrey Hartley and James Shepard, with the staff assistance of Jennifer Frasier and George Singer.

Chapter 11 can be a remarkable tool for saving jobs, protecting going-concern values, and producing recoveries for creditors. The Commission supports the continued availability of relief under Chapter 11 for debtors of all types, large and small. As explained more fully below, the Commission recommends reform measures designed to strengthen the 1994 "small business" amendments to reduce the cost and delay in small business Chapter 11 cases.

The evidence collected by the Working Group on Small Business, Partnerships and Single-Asset Real Estate ("Working Group") suggests that there are two distinct categories of small business Chapter 11 cases. Each requires its own reform measures. The first category consists of the relatively small proportion of cases in which the debtor has a reasonable likelihood of confirming a plan and succeeding as a going business. For this group of cases, the primary goal is to increase the likelihood of successful reorganization and the return to creditors, by reducing the high cost of, and time delays in, Chapter 11. The second category consists of the much larger proportion of cases in which the debtor has no reasonable prospect of rehabilitation.¹⁵⁴⁷ For this group of cases, the primary goal is to reduce the amount of time they consume in Chapter 11.

With respect to the first category, the Commission has identified need for the following reforms: (1) simplification of the disclosure and plan confirmation process;

¹⁵⁴⁷ See, e.g., Letter from J. James Jenkins to the Commission regarding the Small Business Proposal (Apr. 14, 1997).

(2) prompt plan-filing and plan-confirmation deadlines, subject to extension upon proper showing by the debtor; and (3) additional reporting by the debtor regarding postfiling operations and review of that information by the U.S. Trustee or Bankruptcy Administrator.¹⁵⁴⁸

With respect to the second category, those cases in which reorganization is improbable, the Commission has found a need for a longer list of reforms aimed at identifying those cases early and removing them from Chapter 11 via dismissal or conversion to Chapter 7.

In the process of arriving at its recommendations of the Commission reached the following conclusions and arrived at the following findings of fact in arriving at its recommendations to the Commission.

Available statistics (the adequacy of which is found to be poor elsewhere in this report) reveal that only a small fraction of the Chapter 11 cases filed nationwide end in confirmation of a plan of reorganization.¹⁵⁴⁹ The vast majority of cases are dismissed or converted. Furthermore, only a fraction of confirmed plans are fully performed.¹⁵⁵⁰ One study reported that, based on historical data, a debtor entering Chapter 11 only has a 6.5% chance of confirming and performing a plan, *i.e.*,

¹⁵⁴⁸ Hereinafter, "U.S. Trustee" is defined to include Bankruptcy Administrator.

¹⁵⁴⁹ See Edward M. Flynn, Statistical Analysis of Chapter 11, Administrative Office of the United States Courts -- Statistical Analysis & Reports Division (SARD) - Bankruptcy Division 10 (Oct. 1989)(unpublished report) (finding that the confirmation rate for Chapter 11 cases filed between 1979 to 1986 was only 17%); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code? (First Installment)*, 57 AM. BANKR. L.J. 99, 100 (1983). *But see* Letter from Hon. A. Thomas Small, Bankruptcy Judge, to the National Bankruptcy Review Commission regarding the Small Business Proposal (Feb. 12, 1997) (reporting a 62.9% plan confirmation rate in the Eastern District of North Carolina).

¹⁵⁵⁰ Flynn, *supra* note 1349, at 13 (concluding that only 10 to 12% of the Chapter 11 cases filed ever result in successful reorganization). *Accord* Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 COM. L.J. 297, 325 (1992)(finding that only 10% of the Chapter 11 cases filed in a particular study area resulted in a consummated plan); Nancy Rhein Baldiga, *Is This Plan Feasible? An Empirical Legal Analysis of Plan Feasibility*, 101 COM. L.J. 115 (1996)(concluding that even in cases in which the Chapter 11 reorganization plan has undergone an extensive feasibility challenge, half of the confirmed, nonliquidating plans failed to fully consummate).

surviving as a rehabilitated entity.¹⁵⁵¹ Another study suggests that the overall success rate for Chapter 11 cases appears lower than under the Bankruptcy Act.¹⁵⁵²

Reasonable people differ about how to define "success" in Chapter 11 cases.¹⁵⁵³ Some argue that a Chapter 11 case in which no plan is confirmed should be considered successful where the case produces an orderly sale of assets or a negotiated solution without a formal plan. Creditors may define success in terms of distribution amounts or in terms of preserving future dealings with the debtor. The debtor, on the other hand, may define success in terms of job preservation, enhancement of going-concern value, or future returns to equity. The public may define success in terms of overall fairness.¹⁵⁵⁴

The Commission concluded that the appropriate use of Chapter 11 is one in which the debtor confirms and materially performs a plan of reorganization.¹⁵⁵⁵ The benefits of an orderly liquidation can be realized through a liquidating Chapter 11 plan or a Chapter 7 case. A case which is converted or dismissed after a lengthy, inconclusive protection of the debtor in possession in reliance on the automatic stay should not be considered a success.

¹⁵⁵¹ Jensen-Conklin, *supra* note 1350, at 325.

In light of the facts [sic] that 17% of Chapter 11 cases get confirmed, about one-quarter of these involve liquidating plans, and that some of the reorganizations are not successful, it can be estimated that only about 10 to 12 percent of Chapter 11 cases result in an actual reorganization of the filing entity. Further, some of these reorganizations may not be considered fully successful even if the business is reorganized and the creditors are paid. Some reorganized businesses will falter a second time. This may lead to a second Chapter 11, a liquidation, or the sale of the business.

Flynn, *supra* note 1349, at 13

¹⁵⁵² LoPucki, *supra* note 1349, at 100 (finding in a discrete survey area that cases during the first year following the inauguration of the Bankruptcy Code yielded a confirmation rate of only 26%).

¹⁵⁵³ See, e.g., American Bankruptcy Institute Bankruptcy Reform Study Project, *Defining Success in Business Bankruptcy* (May 6, 1995)(unpublished paper presented at the 1995 Annual Meeting of the American Bankruptcy Institute).

¹⁵⁵⁴ *Id.*

¹⁵⁵⁵ See 11 U.S.C. § 1129(a)(11)(1994)(requiring a judicial determination that confirmation is not likely to be followed by liquidation or further reorganization); 11 U.S.C. § 1112(b)(2), (7) (1994) (providing grounds for the conversion or dismissal of a Chapter 11 case if there is an "inability to effectuate a plan" or an "inability to effect substantial consummation of a confirmed plan").

According to the many of the experienced individuals who appeared before the Working Group, the primary reason for the low Chapter 11 confirmation rate is that the great majority of Chapter 11 debtors lack any genuine prospect for reorganization, *i.e.* fundamentally, business viability is measured in terms of a consistent generation of cash revenue in excess of cash disbursed does not exist. Debtors are not required to make any showing of viability to file Chapter 11 (and the Commission has not proposed the imposition of such a requirement). At the same time, a moribund business generally has little to lose by seeking relief in bankruptcy. By filing under Chapter 11, the debtor gets the immediate benefit of the automatic stay, retains control of the business, and is under no requirement to pay creditors or file a plan promptly. Chapter 11 thus lures many small business debtors who have no realistic hope of confirming a plan.¹⁵⁵⁶

Far too [frequently], counsel file a Chapter 11 petition for a debtor, the business of which is in such straits and so incapable of recovery that the Chapter 11 case is nothing more than a holding pattern before an inevitable conversion to Chapter 7 or dismissal. Such a case serves no useful purpose and instead merely prolongs a painful process. Clients would be far better served if counsel examined the economic potential of the business before filing a petition to "rehabilitate" a moribund debtor.¹⁵⁵⁷

It is essential to the legitimacy and continued public acceptance of Chapter 11 that its exceptional protections be limited to those cases in which the public derives

¹⁵⁵⁶ "Chapter 11 is more an intensive-care ward (or mortuary) than a healing potion for sick businesses." Hon. Edith H. Jones, *Chapter 11: A Death Penalty for Debtor and Creditor Interests*, 77 CORNELL L. REV. 1088 (1992).

¹⁵⁵⁷ 5 ASA S. HERZOG & LAWRENCE P. KING, COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 84.02[1][d] (1992). As one bankruptcy judge has remarked in the context of one plan found to be unfeasible:

Bankruptcy is perceived as a haven for wistfulness and the optimist's Valhalla where the atmosphere is conducive to fantasy and miraculous dreams of the phoenix arising from the ruins. Unfortunately, this Court is not held during the full moon, and while the rays of sunshine sometimes bring the warming rays of the sun, they more often also bring the bright light that makes transparent and evaporates the elaborate financial fantasies constructed of nothing more than the gossamer wings and of sophisticated tax legerdemain.

In re Maxim Indus., Inc., 22 B.R. 611, 613 (Bankr. D. Mass. 1982).

a benefit therefrom.¹⁵⁵⁸ Creditors in an open economy have a legitimate interest in a prompt, fair determination of the viability of Chapter 11 debtors. As explained more fully below, a central feature of the Commission's Recommendation is to identify promptly those cases in which there is no real likelihood of rehabilitation and provide an effective mechanism for dismissing those cases or converting them to Chapter 7.

The length of time a business remains in Chapter 11 is critically important. "During that time, the business is at risk because management incentives are inappropriate, professional fees build up at a rapid rate, and business uncertainties increase."¹⁵⁵⁹ Furthermore, unsecured creditors lose the time value of money while they wait to collect their debt during the pendency of the case. The longer they await distribution, the greater is their loss.¹⁵⁶⁰

Yet studies reveal that Chapter 11 debtor often live under the protection of the Bankruptcy Code for literally years,¹⁵⁶¹ often without providing any meaningful return to unsecured creditors. Indeed, the average time from filing to the confirmation of a plan has been historically estimated by one government analyst to

¹⁵⁵⁸ See, e.g., Letter from J. James Jenkins to the Commission regarding the Small Business Proposal (Apr. 14, 1997) (noting that the current resolution of small business Chapter 11 cases undermines the reputation of the bankruptcy system).

¹⁵⁵⁹ LoPucki, *supra* note 1549. See also Philip J. Hendel, Position Paper to the National Bankruptcy Review Commission Proposing Expanded Use of Chapter 13 to Include Closely Held Corporations and Other Business Entities (Dec. 17, 1996) ("Most small business Chapter 11 cases fail. They do, however, take a while to filter through the system. There are usually substantial administrative fees and expenses that have been paid to the professionals. When the well runs dry, the cases therefore die from dehydration. When they are finally converted to Chapter 7 there is rarely a dividend to unsecured creditors).

¹⁵⁶⁰ "Time is money." Since unsecured creditors are not paid pendency interest on their claims, the loss becomes exponentially greater the longer they are forced to await payment. See Hon. A. Thomas Small, 1 AM. BANKR. INST. L. REV. 305 (1993).

¹⁵⁶¹ Cf. Marcy J.K. Tiffany, A Study of Chapter 11 Confirmation Statistics: Central District of California, Los Angeles Division for Cases Filed in 1994 (unpublished study on file with the author and the National Bankruptcy Review Commission)(analyzing 1349 cases filed during 1994 in the Los Angeles Division of the Central District of California in terms of the rate at which cases were converted, dismissed or confirmed as related to their size measured in terms of assets and liabilities as indicated on the petition at the time of filing. The study concludes that (1) The smallest of cases (less than \$500,000 in liabilities or assets) that are not capable of reorganizing move just as quickly through Chapter 11, if not more quickly, than cases with more than \$500,000 in liabilities or assets; (2) There is some indication that cases with less than \$500,000 in liabilities or assets take somewhat longer to confirm plans than cases with more than \$500,000 in assets or liabilities; and that (4) Overall, the data indicate that cases with less than \$500,000 in liabilities or assets are no less successful in Chapter 11 than cases with more than \$500,000 in liabilities or assets).

exceed two years.¹⁵⁶² Nearly two-thirds of the Chapter 11 confirmations occur in the second or third years after filing, with some cases taking more than five years.¹⁵⁶³

Current law may actually work to slow the resolution of small business Chapter 11 cases. It has been persuasively argued that the consolidation of the separate reorganization Chapters under the Bankruptcy Act into a single chapter that imposes a uniform set of rules for all business cases has caused small business cases to be resolved more slowly than under pre-Code law.¹⁵⁶⁴ Chapter 11 contains a number of procedures that were designed for large cases.¹⁵⁶⁵ "When these large-case procedures were applied to ordinary reorganization cases, the dynamics of ordinary cases became more like the dynamics of large cases. Time in Chapter 11 for the two kinds of cases simply converged."¹⁵⁶⁶

Congress has in recent years recognized that a "one-size-fits-all approach" to business reorganizations fails to adequately address the needs of a system dominated by small business bankruptcies.¹⁵⁶⁷ Commentators have also noted that typical Chapter 11 practice is not well suited to small business cases.

It takes no elaborate empirical study to justify the conclusion that the problems facing a publicly held corporation facing a mass-tort problem, are quite removed from a "mom-pop" corporation running a shoe repair shop Obviously, a case involving a publicly held corporation with varied constituents requires safeguards, and therefore, the process is justifiably slow. The cost of administration, while it is subject to the court's control, is unavoidably high However, these same safeguards become insurmountable obstacles to

¹⁵⁶² Flynn, *supra* note 1549, at 23-24 (indicating that the median time from filing to confirmation ranged from a low of 461 days to a high of 941 days).

¹⁵⁶³ *Id.*

¹⁵⁶⁴ See Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729 (comparing the results of five empirical studies of the length of reorganization cases resulting in the confirmation of a plan of reorganization). See, e.g., Jeffrey W. Morris, "Letter from Porter, Wright, Morris & Arthur Regarding the Proposals Before the Small Business Working Group" (Dec. 13, 1996) ("There is little dispute that Chapter 11 cases take too long to complete.").

¹⁵⁶⁵ LoPucki, *supra* note 1364, at 745.

¹⁵⁶⁶ *Id.*

¹⁵⁶⁷ See 11 U.S.C. §§ 101(51C), 1102(a)(3), 1121(e) (1994) ("small business" amendments added to the Code by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106); S. 1985, 102d Cong., 1st Sess. (1991) (failed legislative effort which attempted to create a separate chapter for small business cases).

. . . small corporations, elevating the costs of the system to unacceptable proportions.¹⁵⁶⁸

The Commission's Proposal addresses the need to move small business Chapter 11 cases at a pace appropriate for those cases by (i) establishing presumptive plan-filing and plan-confirmation deadlines specially tailored to fit small business cases; and (ii) directing bankruptcy judges to use modern case-management techniques in all small business cases to further reduce cost and delay.¹⁵⁶⁹

The need for reform can perhaps best be underscored by the fact that nearly every jurist, academician, practitioner, and representative who appearing before the Commission has expressed the unmistakable sentiment that the system needs to be tailored in order to better serve the interests of justice and the special needs of small business debtors and their creditors. Although there were certainly differences in opinion as to the nature and extent of reform that should be made, there has little been more than a handful of advocates for retaining the status quo. To address these concerns, the Commission has undertaken to develop a Proposal which will both expedite the process for debtors that can be saved, and conclude the process quickly for those which cannot benefit from the protections of Chapter 11.

Competing Considerations. Overall, the Commission entertained a wide divergence in views in arriving at its determination. On June 20, 1996, the Working Group held its first public meeting to develop a Proposal to improve the administration of small business Chapter 11 cases. Since this first session, the Working Group met across the country at seven meetings and formulated its Proposals to the Commission. At these numerous gatherings, the Working Group and on some occasions other members of the Commission invited comment, and presented their concerns and ideas to the public. In this process many competing considerations were advanced to the Working Group and to the full Commission. Some of them are addressed in the ensuing paragraphs. Others are addressed below.

A number of able and experienced witnesses expressed strong disagreement with some of the unfavorable views of small business Chapter 11 expressed in this

¹⁵⁶⁸ Hon. Alexander L. Paskay & Frances Pilaro Wolstenholme, *Chapter 11: A Growing Cash Cow: Some Thoughts on How to Rein in the System*, 1 AM. BANKR. INST. L. REV. 331 (1993).

¹⁵⁶⁹ The use of "fast track" procedures in bankruptcy was pioneered in the mid 1980's by the Hon. A. Thomas Small, Chief Bankruptcy Judge for the Eastern District of North Carolina. Judge Small's fast track involves three simple procedures: (i) requiring early filing of the plan; (ii) conditional approval of the disclosure statement; and (iii) a combined hearing on the disclosure statement and plan confirmation. See The Hon. A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV. 305 (1993). A number of other districts have since similar "fast track" procedures, see, e.g. Pamela J. Griffith, *Fast Track Chapter 11 in the District of Oregon*, 41 FED. BAR NEWS & J. 185 (1994). But see *infra* note 1619 and accompanying text.

Report These spokespersons, while agreeing that some abusive cases are sometimes a problem, pointed out a proud record of a number of courts, U.S. Trustees and Bankruptcy Administrators, particularly in North Carolina, California and Oregon (among others) which have found existing law adequate to address the problem. Techniques such as thoughtful judicial management of cases, increased U.S. Trustee/Bankruptcy Administrator focus on compliance issues early in the case and other case-management approaches were more than adequate to address the problems identified by the efforts of the Working Group, in the view of these witnesses, without some or all of the reforms proposed by the Commission.

These spokespersons have also contended that a number of the specific Proposals made by the Commission, such as the deadlines for plan filing and the shifting of the burden of proof to the debtor to stay in Chapter 11 are too short, too onerous and will deprive too many debtors of a fair opportunity to achieve reorganization in Chapter 11.

In addition, a number of additional points of view were considered and rejected.

First, Prior to promulgation of the 1994 Bankruptcy Reform Act, Congress considered and rejected proposed "Chapter 10" legislation, which would have created a separate chapter for businesses with aggregate, liquidated secured and unsecured debts of less than \$2,500,000.¹⁵⁷⁰ The proposed Chapter 10 generated much controversy on a number of substantive grounds, as well as opposition to adding a new chapter to the Bankruptcy Code.¹⁵⁷¹ Critics argued that creating an additional chapter would add unnecessary complexity to the Bankruptcy Code.¹⁵⁷² Furthermore, the proposed new chapter deviated from the absolute priority rule, and permitted use of a Chapter-13-like concept of disposable income.¹⁵⁷³

¹⁵⁷⁰ Memorandum by George H. Singer, Staff Attorney, regarding to Small Business, Partnership & Single-Asset Working Group regarding Chapter 10 (Aug. 12, 1996).

¹⁵⁷¹ *Id.*

¹⁵⁷² *Id.*

¹⁵⁷³ The absolute-priority rule and plan-voting concept are important tools which legitimize Chapter 11 by protecting creditors, in reality or by perception, from unfair treatment by debtors. The Commission believes that these creditor protections, albeit largely illusory, are fundamental to the Bankruptcy Code's careful balance between debtor and creditor rights. Furthermore, the Commission favors maintaining these creditor safeguards to recommending adoption of plan confirmation based on "disposable income" payments, which would likely (i) clog the courts with complex, fact-sensitive litigation about income projections of businesses, and (ii) generate strong opposition in Congress, as did similar legislation proposed as part of the Chapter 10 amendments in 1994.

The Commission has closely examined the merits of separate chapter status, including exhaustive research and review of testimony.¹⁵⁷⁴ Its determination *not* to recommend creation of a separate chapter reflects its conclusion that modifications to the current, carefully crafted Chapter 11 framework tailored specifically for the smaller business provides the appropriate building blocks to allow for expedited and reduced-cost treatment of creditor-ignored debtors, and increased recoveries to unsecured creditors.

Second, several thoughtful and experienced members of the bankruptcy community have urged the Commission to recommend extending Chapter 12 or 13 eligibility to business debtors. The Commission strongly believes that the requirements for creditor voting make Chapter 11 the most legitimate way to address creditors' rights. Therefore, it decline to recommend to the Commission that the law be changed to provide for the administration of small business debtors in Chapters 12 or 13.¹⁵⁷⁵

Third, the Commission considered and rejected recommending deferral of discharge in all cases until completion of plan payments. The Commission proposes no change in the language of section 1141(d), which allows for deferred discharge; however, it believes that the costs of routinely enforcing the deferred discharge rule would disproportionately impact unsecured creditors, whose recoveries would be diminished by the increased expense of administering the debtor's estate. Also, concerns were expressed that a deferred discharge might make it hard for some debtors to obtain financing during the gap between confirmation and plan consummation.

Fourth, some commentators urged that no debtor should continue in Chapter 11 under any circumstances if it gets behind in its payables. The Commission, however, rejected the notion that the debtor must be current on all administrative expense claims as a condition to continued enjoyment of Chapter 11.

¹⁵⁷⁴ Memorandum from Stephen H. Case, Senior Adviser, & George H. Singer, Staff Attorney, to the Commission regarding Working Group Meeting on Small Business & Single-Asset Real Estate (July 22, 1996).

¹⁵⁷⁵ *E.g.*, Transcript of National Bankruptcy Review Commission Hearing at 40-41 (June 20, 1996) (testimony of former Bankruptcy Judge Ralph H. Kelley from the Eastern District of Tennessee); *see also*, Philip J. Hendel, "Position Paper to the National Bankruptcy Review Commission Proposing Expanded Use of Chapter 13 to Include Closely Held Corporations and Other Business Entities" (Dec. 17, 1996); Memorandum by Stephen H. Case, Senior Adviser, Jennifer C. Frasier, Staff Attorney, & George H. Singer, Staff Attorney, to Commission regarding Sept. 19, 1996 Meeting of Working Group on 'Small Business' Bankruptcy" (Oct. 8, 1996).

RECOMMENDATIONS

2.5.1 *Defining the term "Small Business"*

A "small business debtor" is any debtor in a case under Chapter 11 (including any group of affiliated debtors) which has aggregate noncontingent, liquidated secured and unsecured debts as of the petition date or order for relief of five million dollars (\$5,000,000)¹⁵⁷⁶ or less and any single asset real estate debtor as defined in 11 U.S.C. § 101(51B), regardless of the amount of such debtor's liabilities.

2.5.2 *Flexible Rules for Disclosure Statement and Plan*

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed;

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which, if used and completed accurately in all material respects, would be

¹⁵⁷⁶ This dollar figure will be periodically adjusted for inflation pursuant to 11 U.S.C. § 104(a) (1994) which provides as follows:

The Judicial Conference of the United States shall transmit to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year after May 1, 1985, a recommendation for the uniform percentage adjustment of each dollar amount in this title and in section 1930 of title 28.

presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, creditors and other parties in interest for reasonably complete information to arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, e.g., those setting deadlines for filing plans.

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

2.5.3 Reporting Requirements

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules Committee shall be called upon to adopt, with a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as monthly operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

- a. the debtor's profitability, i.e., approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;
- b. what the reasonably approximate ranges of projected cash receipts and cash disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;

- c. how approximate actual cash receipts and disbursements compare with results from prior reports;
- d. whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not, what the failures are, how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and
- e. such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

2.5.4 Duties of the Debtor in Possession

The debtor is required to:

- a. append to the voluntary petition or, in an involuntary case, to file within three days after the order for relief, either (A)(i) its most recent balance sheet, statement of operations and cash-flow statement and (ii) its most recent federal income tax return or (B) a statement made under penalty of perjury that no such financial statements have been prepared or that no federal income tax return has been filed or (C) both;
- b. attend meetings, at which the debtor is represented by its senior management personnel and counsel, scheduled by the court, the U.S. Trustee, or the Bankruptcy Administrator including, but not limited to initial debtor interviews, court-ordered scheduling conferences, and meetings of creditors convened under 11 U.S.C. § 341;
- c. file all schedules and statements of financial affairs for small business debtors within the limits set by the Bankruptcy Rules, unless the court, upon notice to the U.S. Trustee and a hearing, grants an extension, which extension or extensions shall not, in any event, exceed thirty (30) days after the order for relief absent extraordinary and compelling circumstances;

d. comply with postpetition obligations, including but not limited to the duties to: file tax returns, maintain appropriate and reasonable current insurance as is customary and appropriate to the industry, and timely pay all administrative expense tax claims, except those being contested by appropriate proceedings being diligently prosecuted;

e. create within ten (10) business days of the entry of order for relief (or as soon thereafter as possible in case all banks contacted during the first ten (10) business days decline the business) separate deposit accounts with a bank or banks in which the debtor shall be required to timely deposit, until a plan is confirmed or the case is dismissed or converted or a trustee is appointed, after receipt, all taxes collected or withheld by it for governmental units. In compelling circumstances, the court may dispense with these requirements after notice and a hearing;

f. allow the U.S. Trustee or its designated representative to inspect the debtor's business premises, books and records at reasonable times on reasonable prior written notice to the debtor.

2.5.5 *Deadlines for Plan Filing and Confirmation*

In small business cases only, require that the disclosure statement, if any, and plan must be filed within 90 days after the entry of order for relief, unless extended as permitted below. During this 90-day period, only the debtor may file a plan unless on request of a party in interest made during this period and after notice and a hearing, the court, for cause, orders otherwise. In small business cases only, require the plan to be confirmed within 150 days after the entry of order for relief, unless extended as permitted below.

2.5.6 *Burden of Proof for Extensions of Deadlines*

Permit extensions of the deadlines for filing and approving disclosure statements, if any, and filing and confirming plans of reorganization only if the debtor, having duly noticed and appeared at the necessary extension hearing conducted and ruled upon prior to the expiration of the deadline, if any, and having carried the burdens of coming forward and persuasion, demonstrates by a preponderance of the evidence that it is more likely than not to confirm a plan of reorganization within a reasonable time. No such deadline may be extended unless a new deadline is imposed at the time the extension is granted. The Bankruptcy and Judicial Codes will require the U.S. Trustee, as the case

may be, to be a recipient of notice of extension hearings and to participate actively therein, in order to assure, to the maximum extent feasible, that the interests of the public are protected when determinations are made as to whether small business debtors receive extensions and have proven by a preponderance of the evidence that it is more likely than not that they will confirm a plan within a reasonable time.

2.5.7 *Scheduling Conferences*

Require the bankruptcy court to promptly conduct at least one on-the-record scheduling hearing, on notice to the U.S. Trustee and the debtor's 20 largest unsecured creditors to be sure that the deadlines discussed above are met except that no such hearing is required if an agreed order is filed by the debtor and U.S. Trustee and approved by the court after notice and hearing. The court shall also conduct such other scheduling hearings and status conferences as it deems fit and proper. Whenever possible, these hearings shall be scheduled in conjunction with other mandatory events so as to minimize to the most reasonable practicable extent, the time of debtor personnel spent in court and at official meetings.

2.5.8 *Serial Filer Provisions*

Provide in the Bankruptcy Code that, with respect to any debtor (or any entity which has succeeded to substantially all the debtor's assets or business) which files a second case while another case is pending in which such debtor is the (or one of the) debtor(s) or in the event that it again becomes a debtor in a Chapter 11 case within two years after an order of dismissal of a Chapter 11 case in which it was the debtor has become a final order or a Chapter 11 plan has been confirmed, shall not be entitled to the section 362(a) stay unless, after it has become a debtor, it bears the burdens of coming forward and of persuasion, by a preponderance of the evidence, that (1) the new case has resulted from circumstances beyond the control of the debtor not foreseeable at the time the first case was filed and (2) it is more likely than not that it will confirm a feasible plan, but not a liquidating plan, within a reasonable time. In cases involving such debtors when the owners have transferred the business to a new legal entity, owned and arranged by them, the section 362(a) stay would apply on filing but would be lifted on a verified, ex parte motion of the U.S. Trustee, with the right to have it reimposed upon a showing of (1) and (2) above. The Federal Rule of

Civil Procedure governing injunctions applies to the court's award of a stay to the debtor.

2.5.9 Expanded Grounds for Dismissal or Conversion and Appointment of Trustee

a. Modify section 1112 for to read as follows:

(b)(1) Except as provided in subsection (c) of this section or in section 1104(a)(3) of this title, on request of a party in interest or the U.S. Trustee, and after notice and a hearing, the court shall convert a case under this chapter to a case under Chapter 7 of this title or shall dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, where movant establishes cause, except that such relief shall not be granted if the debtor or another party in interest objects and establishes both:

- (A) that it is more likely than not that a plan will be confirmed within a time as fixed by this title or by order of the court; and**
- (B) if the cause is an act or omission of the debtor:**
 - (i) that there exists a reasonable justification for the act or omission; and**
 - (ii) that the act or omission will be cured within a reasonable time fixed by the court not to exceed thirty days after the court decides the motion unless the movant expressly consents to a continuance for a specific period of time or there are compelling circumstances beyond the control of the debtor which justify an extension.**

(2) For purposes of this subsection, cause includes:

- (A) substantial or continuing loss to or diminution of the estate;**
- (B) gross mismanagement of the estate;**
- (C) failure to maintain appropriate insurance;**
- (D) unauthorized use of cash collateral harmful to one or more creditors;**
- (E) failure to comply with an order of the court;**
- (F) failure timely to satisfy any filing or reporting requirement established by this title or by applicable rule;**
- (G) failure to attend the section 341(a) meeting of creditors or an examination ordered under Bankruptcy Rule 2004;**

- (H) failure timely to provide information or attend meetings reasonably requested by the U.S. Trustee or;
- (I) failure timely to pay taxes due after the order for relief or to file tax returns due after the order for relief;
- (J) failure to file or confirm a plan within the time fixed by this title or by order of the court; and
- (K) failure to pay any fees or charges required under Chapter 123 of title 28.

- (3) The court shall commence the hearing on any motion under this subsection within 30 days after filing of the motion, and shall decide the motion within 15 days after commencement of the hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

b. Additional Grounds for Appointment of Trustee

Add the following new section to 11 U.S.C. § 1104:

- (a)(3) where grounds exist to convert or dismiss the case under section 1112 of this title, but the court determines that the appointment of a Chapter 11 trustee is in the best interests of creditors and the estate.

2.5.10 *Enhanced Powers of the United States Trustee and Bankruptcy Administrator*

Add a new subclause (e) to 11 U.S.C. § 341, and amend 28 U.S.C. § 586 (the general statute governing the powers and duties of the U.S. Trustee) and the Manual for Bankruptcy Administrators,¹⁵⁷⁷ (governing the duties of Bankruptcy Administrators) to require U.S. Trustees in every small business debtor case (except where they, in their reasonable discretion determine that the conduct enumerated below is not advisable in the circumstances):

¹⁵⁷⁷ Section 302(d)(3)(I) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, 100 Stat. 3119, 3123, provides the statutory authority for the Judicial Conference of the United States to establish the bankruptcy administrator program.

(1)(a) to conduct an initial debtor interview (“IDI”) with the debtor as soon as practicable after the entry of order for relief but prior to the first meeting scheduled under Bankruptcy Code § 341(a). At the IDI, the U.S. Trustee shall, at a minimum, begin to investigate the debtor’s viability, inquire about the debtor’s business plan, explain the debtor’s obligations to file monthly operating reports and other required reports, attempt to develop an agreed scheduling order, and inform the debtor of other Chapter 11 obligations;

(b) when determined by the U.S. Trustee to be appropriate and advisable, to visit the appropriate business premises of the debtor and ascertain the general state of the debtor’s books and records and verify that the debtor has filed its tax returns. This visit should take place in connection with or reasonably promptly after the IDI (wherever possible, these events shall be combined with other events so as to minimize to the most reasonable practicable extent the amount of time of debtor personnel spent in court and at official meetings); and

(c) to review and monitor diligently on a continuous basis each debtor’s activities, with a view to identifying as promptly as possible those debtors which do not pass the test of being more likely than not to be able to confirm a Chapter 11 plan within a reasonable time; and

(2) in cases where, upon the basis of continuing review, monitoring or otherwise, the U.S. Trustee finds material grounds for any relief under Bankruptcy Code § 1112, to move the court promptly for relief.

DISCUSSION

2.5.1 *Defining the term "Small Business"*

A "small business debtor" is any debtor in a case under Chapter 11 (including any group of affiliated debtors) which has aggregate noncontingent, liquidated secured and unsecured debts as of the petition date or order for relief of five million dollars (\$5,000,000)¹⁵⁷⁸ or less and any single asset real estate debtor as defined in 11 U.S.C. § 101(51B), regardless of the amount of such debtor's liabilities.

Comments. The concept of a "small business" is a fluid one. To a large extent, crafting a definition requires consideration of the context in which the definition will be applied. Selecting a definition of small business for purposes of bankruptcy requires a series of trade-offs between accuracy and precision, in light of the availability and quality of information available to classify the small business debtor at the outset of a bankruptcy case.

Under current bankruptcy law, a "small business" is defined as:

a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000.¹⁵⁷⁹

¹⁵⁷⁸ This dollar figure will be periodically adjusted for inflation pursuant to 11 U.S.C. § 104(a) which provides as follows:

The Judicial Conference of the United States shall transmit to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year after May 1, 1985, a recommendation for the uniform percentage adjustment of each dollar amount in this title and in section 1930 of title 28.

¹⁵⁷⁹ 11 U.S.C. § 101(51C) (1994).

The Small Business Administration ("SBA"),¹⁵⁸⁰ by contrast, defines a "small business concern"¹⁵⁸¹ as "one which is independently owned and operated and which is not dominant in its field of operation."¹⁵⁸² Other relevant factors to the SBA's definition of an entity as a small business concern include the number of employees, dollar volume of the business, net worth, net income, a combination thereof, or "other appropriate factors."¹⁵⁸³ In a typical case, the SBA judges the size of a business by number of employees or annual receipts.¹⁵⁸⁴ Similar to this definition, Senate Bill 1985 would have defined small business by reference to a number of factors including the number of employees and creditors, the value of the debtor's assets, the dollar

¹⁵⁸⁰ The Small Business Administration is a nonincorporated, federal agency created to aid, counsel, and financially assist small-business concerns so that free competitive enterprise is preserved for small, private businesses. See 15 U.S.C. § 631(a) (1994).

¹⁵⁸¹ 15 U.S.C. § 632(a) (Supp. 1996). See George H. Singer, "Small Business & Single-Asset Working Group: Chapter 10" (Aug. 12, 1996)(memorandum on file with the National Bankruptcy Review Commission).

¹⁵⁸² *Id.*

¹⁵⁸³ *Id.* § 632(a)(2)(A), (B) (Supp. 1996).

¹⁵⁸⁴ George H. Singer, "Small Business & Single-Asset Working Group: Chapter 10" (Aug. 12, 1996)(memorandum on file with the National Bankruptcy Review Commission) (citing telephone conversation with John Haitzuka, Attorney, Office of the Small Business Administration, Washington, D.C. (August 13, 1996); Business Credit & Assistance, 13 C.F.R. § 121.201 (March 1, 1996)). The SBA calculates annual receipts as follows:

(1) *Receipts* means "total income" (or in the case of a sole proprietorship "gross income") plus the "costs of goods sold" as these terms are defined or reported on Internal Revenue Service (IRS) Federal tax return forms (Form 1120 for corporations; Form 1120S for SubChapter S corporations; Form 1065 for partnerships; and Form 1040, Schedule F for farm or Schedule C for other sole proprietorships). However, the term receipts excludes net capital gains or losses, taxes collected for and remitted to a taxing authority if included in gross or total income, proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS), and amount collected for another by a travel agent, real estate agent, advertising agent, or conference management service provider.

(2) *Complete fiscal year* means a taxable year including any short period. Taxable year and short period have the meaning attributed to them by the IRS.

(3) Unless otherwise defined . . . all terms shall have the meaning attributed to them by the IRS . . .

Business Credit & Assistance, 13 C.F.R. § 121.104 (March 1, 1996).

volume of the debtor's sales, the nature and substance of the debtor's business, and others.¹⁵⁸⁵

Although a searching inquiry by the court under a multifaceted definition might define small business in a precise manner, it is also likely to engender litigation at the outset of a Chapter 11 case, during which time a debtor is preoccupied with preparing schedules, obtaining cash collateral orders, and the like. By contrast, a bright-line definition minimizes litigation and enables the court and counsel to focus on the merits of the Chapter 11 case.

Developing a bright line in the context of bankruptcy is a difficult task. Very often, little financial information even approaching public-company quality is available upon the commencement of a bankruptcy proceeding,¹⁵⁸⁶ although more detailed information is available within fifteen days postpetition.¹⁵⁸⁷ Specifically, under current laws, the voluntary debtor must file, *inter alia*, a petition,¹⁵⁸⁸ a Summary of

¹⁵⁸⁵ S. 1985 proposed to add the following definition to § 101 of title 11:

(54) "small business" means a person engaged in commercial and business activities where, if appropriate, after court determination, it is found that the best interests of an estate will be served by having such person deemed to be a small business, in light of --

- (A) the number of employees of the person's business activity;
- (B) the number of creditors of the person's activity;
- (C) the number of secured, priority, and unsecured creditors of the person's business activity;
- (D) the value of the assets of the person's business activity;
- (E) the dollar volume of sales of the person's business activity;
- (F) the nature and substance of the person's business activity;
- (G) the history of the person's business activity;
- (H) the nature and substance of the person's business activity as measure by similar persons engage in the same business activity; and
- (I) other pertinent factors.

¹⁵⁸⁶ The only financial information required as of the petition date are summary statistics on the debtor's assets, liabilities, creditors and employees. This information is reported in categories, such as "less than \$50,000" or "greater than \$100,000,000." See Official Form 1 of the Bankruptcy Code.

¹⁵⁸⁷ FED. R. BANKR. P. 1007(c); Official Forms 6 & 7 of the United States Bankruptcy Code. The court may grant an extension of time for the filing of a debtor's schedules and statements on motion for cause shown. *Id.* Anecdotal reports to the Working Group suggest that such extensions are routinely granted.

¹⁵⁸⁸ OFFICIAL FORM 1 of the United States Bankruptcy Code.

Schedules,¹⁵⁸⁹ Schedules of Assets and Liabilities,¹⁵⁹⁰ and “gross amount of income” received from business operations for the beginning of the calendar year preceding the date on which the case was filed and the two years immediately preceding this calendar year.¹⁵⁹¹

The forms on which these financial data are filed must follow the Official Forms prescribed by the Judicial Conference of the United States.¹⁵⁹² Existing forms draw out much balance-sheet information, reflecting a historical background based on asset liquidation rather than capitalization of income. Schedules A & B require the debtor to list all real and personal property owned by the debtor.¹⁵⁹³ Schedules D, E & F require the debtor to list each secured, unsecured priority, and unsecured nonpriority claim against the debtor.¹⁵⁹⁴ However, less detailed information is available about the debtor’s income. Questions 1 & 2 of the Statement of Financial Affairs requires the debtor to “[s]tate the gross amount of income the debtor has received” from the beginning of the prepetition calendar year to the date of the petition, and from the two years immediately preceding the calendar year.¹⁵⁹⁵ Data on a debtor’s monthly and historical gross and net revenues are not available on a going-forward basis, until six to eight weeks into the case, when the debtor files its first monthly operating report as required by the U.S. Trustee.

The information reported by debtors on their schedules and statements has been criticized as routinely inaccurate or missing, despite the requirement that debtors provide it.¹⁵⁹⁶ This problem appears to be endemic to the nature of bankruptcy, which is generally filed by those in financial distress. Regardless of a debtor’s best

¹⁵⁸⁹ OFFICIAL FORM 6 of the United States Bankruptcy Code.

¹⁵⁹⁰ See *id.*, Schedule A (Real Property), Schedule B (Personal Property), Schedule D (Creditors Holding Secured Claims), Schedule E (Creditors Holding Unsecured Priority Claims), and Schedule F (Creditors Holding Unsecured Nonpriority Claims).

¹⁵⁹¹ OFFICIAL FORM 7 of the United States Bankruptcy Code (question numbers 1 & 2).

¹⁵⁹² FED. R. BANKR. P. 9009.

¹⁵⁹³ See Official Form 6 of the United States Bankruptcy Code.

¹⁵⁹⁴ *Id.*

¹⁵⁹⁵ See Official Form 7. It is unclear whether the debtor should provide information on its gross income as defined by the Internal Revenue Code, on its net income, or on its gross or net revenues.

¹⁵⁹⁶ See The Honorable Lisa H. Fenning & Craig A. Hart, *Measuring Chapter 11: The Real World of 500 Cases*, 4 AM. BANKR. INST. L. REV. 119 (1996); see also Jennifer C. Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307 (1996).

intentions and willingness to disclose accurate financial information to the court, the debtor may not have such information if it has not kept good books and records or regularly filed its tax returns. Smaller debtors may not be able to afford a bookkeeper or accountant to maintain proper financial records, and may not have the expertise or time to perform this work themselves. As between information on liabilities and information on revenues, however, the business in financial trouble is more likely to have information on its liabilities, as this is the where the debtor's focus is most likely to be directed.¹⁵⁹⁷ This conclusion comports with testimony of a number of people appearing before the Working Group, who have reported that the nature and size of the debtor's liabilities is the single best predictor of case complexity.¹⁵⁹⁸ For these reasons, the Commission has concluded that a bright-line, liabilities-based test is the most cost-effective manner to accurately categorize a business as large or small for Chapter 11 purposes.

The current bankruptcy-law definition of small business sets the eligibility limit at \$2,000,000 in aggregate, noncontingent, liquidated secured debts.¹⁵⁹⁹ Based on available liabilities data from two of the ninety-four total bankruptcy districts, a liabilities-based definition of \$2,000,000 or less would capture approximately 72% of all Chapter 11 cases filed. Tables which detail this finding and break down liabilities and "gross amount of income" by million dollar categories are provided below:

¹⁵⁹⁷ See, e.g., William T. Neary, *Letter to Linda Stanley re Chapter 11 Statistics for the National Bankruptcy Review Commission* (June 3, 1997) ("[L]ike you, I found the gross income figure both difficult to compile and of questionable validity. In 17 cases, were unable to obtain any information regarding gross income—either the SFA [Statement of Financial Affairs] wasn't filed, or question #1 wasn't answered. . . In another 14 cases, the debtor reported negative gross income figures. ([T]his is an accounting impossibility.) I'm quite sure that a number of debtors are reporting gross revenues or adjusted gross income or some other figure in response to question #1.").

¹⁵⁹⁸ See *id.* at 2 ("My experience has been that it is the size of the debts owed to individual creditors, rather than the level of the debtor's gross income, that determines the level of creditor interest in a case"); see also The Honorable Elizabeth L. Perris, "Letter to John Gose Regarding the Chapter 11 Special Track" (Feb. 18, 1997) ("It is usually debt structure rather than income that creates complexity in Chapter 11.").

¹⁵⁹⁹ 11 U.S.C. § 101(51C) (1994).

Liabilities on petition date	% of Chapter 11 "small business" debtors						
	<u>M.D. Ala.</u> ¹⁶⁰⁰	<u>S.F/Santa Rosa</u>	<u>Del.</u> ¹⁶⁰¹	<u>Phila.</u>	<u>Chicago</u>	<u>Dallas</u>	<u>Average</u> ¹⁶⁰²
\$10,000,000	100%	94%	16%	92%	96%	82%	93% ¹⁶⁰³
\$5,000,000	93%	92%	15%	87%	88%	72%	86%
\$4,000,000	93%	89%	14%	85%	85%	71%	85%
\$3,000,000	93%	86%	13%	80%	80%	65%	81%
\$2,000,000	83%	74%	13%	73%	73%	59%	72%
\$1,000,000	70%	53%	13%	65%	65%	49%	60%

¹⁶⁰⁰ The data from the Middle District of Alabama and the Northern District of California represent Chapter 11 cases filed in 1995. See Dwight H. Williams, Jr., *Letter to Jennifer C. Frasier Regarding Small Business Chapter 11 Data* (Dec. 5, 1996)(on file with the National Bankruptcy Review Commission); Linda E. Stanley, *Letter to Jennifer C. Frasier Regarding Chapter 11 Data* (Nov. 14, 1996)(on file with the National Bankruptcy Review Commission)..

¹⁶⁰¹ The data from the remaining districts represent open Chapter 11 cases filed between October 1, 1996 and April 30, 1997. See Linda E. Stanley, *Letter to Jennifer C. Frasier Regarding Statistics for Open Chapter 11 Cases filed between 10/01/96 and 04/30/97* (June 5, 1997)(on file with the National Bankruptcy Review Commission).

¹⁶⁰² This average excludes Delaware cases as this district appears to be anomalous.

¹⁶⁰³ See Jennifer C. Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. (1996) (Empirical study which examines a random sample of 454 Chapter 7, 11, and 13 bankruptcy cases filed during the first and second quarters of 1994 in the following districts: (i) Connecticut; (ii) Louisiana, Eastern District; (iii) Massachusetts; (iv) New Hampshire; (v) New Jersey; (vi) New York, Southern District; and (vii) Texas, Northern District. The author found that debtors filed their schedules of liabilities (schedules D-F) in 369 out of 454 cases. Of these 369 cases (which include Chapters 7, 11, and 13 filings) there were a total of seven cases in which the debtor's aggregate, noncontingent, liquidated secured and unsecured debts, as reported on the schedules, totaled \$10,000,000 or more. As the study's data are not broken down by both size and chapter, it is unclear whether or not these seven cases are all Chapter 11 cases. Assuming, however, that all seven cases were filed under Chapter 11, then approximately 5% (7/137) of all Chapter 11 debtors have liabilities of \$10,000,000 or more).

"Gross amount of income" on petition date	Percentage of Chapter 11 "small business" debtors ¹⁶⁰⁴					
	<u>S.F/Santa Rosa</u>	<u>Del.</u>	<u>Phila.</u>	<u>Chicago</u>	<u>Dallas</u>	<u>Average</u> ¹⁶⁰⁵
10,000,000	98%	76%	99%	95%	92%	96%
5,000,000	97%	67%	96%	91%	87%	93%
4,000,000	95%	67%	96%	88%	85%	91%
3,000,000	94%	65%	96%	83%	82%	89%
2,000,000	91%	62%	91%	79%	77%	85%
1,000,000	78%	58%	76%	71%	65%	73%

Although these data represent only a small percentage of all bankruptcy districts, and may not be generalizable to the population of Chapter 11 debtors, it would appear that defining small business as one with five million dollars in debt would capture somewhere in the neighborhood of 85% of all Chapter 11 cases.

Competing Considerations. The principal competing consideration argued to the Commission in the process of formulating the definition of small business is that the debt threshold is too high and captures too many cases. This may have the most common and forcefully asserted objection to the Recommendation. The adoption of the Proposal, however, reflects the Commission's conclusion that the available data indicate that creditor participation at the level of debt selected so often tends to be absent that imposition of the higher standards for small business cases is necessary.

A mandatory liabilities-based test which calculates debts based on the filer's noncontingent liquidated aggregate debts has several potential drawbacks. First, small

¹⁶⁰⁴ It is unclear whether these data reflect a high percentage of debtors with low income levels or the high percentage of cases in which income information is missing from the debtor's schedules and statements. It is also unclear whether these data are meaningful given the ambiguity concerning the definition of "gross amount of income" in the Statement of Financial Affairs. See *supra* notes 1595-1597 and accompanying text.

¹⁶⁰⁵ This average excludes Delaware cases as this district appears to be anomalous.

business debtors may have an incentive to “game the system” by reporting their debts as contingent or unliquidated in order to avoid small business treatment. Second, it is arguable that Chapter 11 independently creates strategic incentives for debtors to understate their liabilities and overstate their assets on the face sheet in order to obtain postpetition financing.¹⁶⁰⁶ These potential problems would appear to be either illusory or endemic to the nature of bankruptcy for several reasons. First, the debtor is obliged under penalty of perjury to accurately report information on its schedules and statements.¹⁶⁰⁷ In addition, as noted above, accurate information is difficult to obtain at the outset of any bankruptcy proceeding despite a debtor’s best intentions to accurately report its financial history.

Also, the Working Group ultimately considered and rejected recommending to the Commission that the definition of a small business debtor be couched in alternative terms.¹⁶⁰⁸ The primary competing definition considered by the Working Group was one based on “gross income” as defined by the Internal Revenue Code. Such definition, the Working Group concluded, possessed several distinct advantages over any other. First, a bright-line definition would minimize judicial discretion and litigation over which debtors are subject to “separate-track” treatment, since gross income is a reliable figure, verifiable against a debtor’s tax return. Second, the definition would have the salutary effect of encouraging businesses to file their tax returns, as non-filers would be automatically subject to special-track treatment.

A number of people appearing before the Commission criticized a definition based on gross income, arguing that it (a) would sweep in too many debtors,¹⁶⁰⁹ (b) was an inaccurate indicator of case complexity,¹⁶¹⁰ or (c) was a poor predictor of

¹⁶⁰⁶ At least one empirical study has found that Chapter 11 debtors systematically underreport their liabilities on the face sheet of the bankruptcy petition. Jennifer C. Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 333-34 (1996) (Finding that liabilities are erroneously reported in Chapter 11 and 13 cases twice as often as in Chapter 7 filings.).

¹⁶⁰⁷ See OFFICIAL FORM 6 of the United States Bankruptcy Code; see also FED. R. BANKR. P. 9011.

¹⁶⁰⁸ George H. Singer, “Discussion Summary, June 20, 1996 Working Group Meeting on ‘Small Business’ Bankruptcy” (July 1, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission).

¹⁶⁰⁹ E.g., Philip J. Hendel, “Letter Regarding the Small Business Reorganization Proposal” (Jan. 24, 1997) (setting forth the position of the ABI Small Business Subcommittee of the Business Reorganization Committee). The author notes that the Working Group’s gross income test is too liberal. “Experience shows that gross income has little relation to the complexity of a case.” *Id.*

¹⁶¹⁰ E.g., Kenneth Klee, “Electronic Mail Message Regarding the Small Business Working Group’s Proposed Reform” (Oct. 29, 1996) (arguing that a gross revenue test “[w]ill snag several

creditor participation in bankruptcy cases.¹⁶¹¹ Under a gross income definition, for example, General Motors Corporation could fall under the "small business" rules if it suffered anemic sales combined with a high cost of goods sold.

A similar, but alternative definition considered by the Working Group was a gross revenue test based on the debtor's income tax return. This definition, the Working Group reasoned, had comparable advantages to a straightforward gross-income test, but would not inadvertently capture large businesses, start-up and high tech corporations, research and development companies, and the like. The Working Group has rejected a gross revenue test, however, in favor of a debt-based definition, similar to the current Bankruptcy Code definition of "small business,"¹⁶¹² but set at a higher amount of \$10 million or less.¹⁶¹³

Other definitions considered but rejected by the Working Group include: (i) number of employees, which was rejected out of fear that it would be manipulated pre-petition in order to escape the new separate-track requirements and (ii) number of creditors, which was rejected because no satisfactory bright-line could be crafted.

The Commission recommends that choice of treatment as a "small business" debtor under the Bankruptcy Code should not be optional. If as a policy matter, Congress decides that small business debtors merit special treatment under the Bankruptcy Code, all debtors who meet the definition of "small business" should be subject to the same special track. Otherwise, the separate track will not likely be used. Few debtors will elect to expedite their Chapter 11 cases or submit to greater supervision by the court and U.S. Trustee. The unpopularity of the 1994 amendments

large illiquid businesses . . . Many businesses operate through borrowings and trade credit that leave them with virtually no gross revenues for years. Examples include large land developers and research and development start up companies").

¹⁶¹¹ See e.g., Terrance L. Stinnett, "Letter from Goldberg, Stinnett, Meyers & Davis Regarding the Small Business Working Group Proposals" (Nov. 22, 1996); see also Gary White, "Letter to Chairman Williamson from the National Association of Credit Management" (Dec. 2, 1996) ("The \$10 million income test proffered by the Commission would qualify over 91% of all business bankruptcy filings as small businesses.").

¹⁶¹² 11 U.S.C. § 101(51C) defines a "small business" as:

[A] person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000.

¹⁶¹³ This higher dollar figure was decided upon to ensure that the definition captures a high percentage of debtors.

to the Bankruptcy Code concerning "small business" debtors, which have been largely ignored¹⁶¹⁴, confirms this hypothesis. Moreover, the mandatory nature of the separate-track treatment minimizes judicial discretion in determining "fast track" eligibility, thereby avoiding litigation.¹⁶¹⁵

2.5.2 *Flexible Rules for Disclosure Statement and Plan*

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed;

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which, if used and completed accurately in all material respects, would be presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, creditors and other parties in interest for reasonably complete information to arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, e.g., those setting deadlines for filing plans.

¹⁶¹⁴ See Philip J. Hendel, "Position Paper to the National Bankruptcy Review Commission Proposing Expanded Use of Chapter 13 to Include Closely Held Corporations and Other Business Entities" (December 17, 1996) ("[The new statutory scheme relating to small business is not mandatory. These provisions have been all but ignored by counsel for debtors, primarily because the period of time provided for exclusivity and filing of plans are constricted when compared to Chapter 11 treatment]").

¹⁶¹⁵ Stephen H. Case & Jennifer C. Frasier, "Discussion Summary, October 18, 1996, Plenary Session on 'Small Business Bankruptcy Act' (Oct. 31, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission).

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

Comments. One of the central features of Chapter 11, and a major achievement of the Bankruptcy Reform Act of 1978, is the great flexibility it permits in fashioning a plan of reorganization. A plan may include virtually anything upon which the debtor and its creditors agree. A second central feature of Chapter 11 is its strong disclosure requirements. In soliciting acceptances of a plan, the plan proponent must provide creditors and equity holders all information a typical investor would require to cast an informed vote regarding the plan. In exchange for this securities-law-type disclosure, the plan proponent gets broad protection from suits brought under the securities laws.

These disclosure concepts lead to three aspects of Chapter 11 practice that increase cost and delay. In each Chapter 11 case, the debtor's counsel typically drafts the plan of reorganization and a long, prospectus-type disclosure statement from scratch. In most cases, the court conducts a hearing regarding the adequacy of disclosure before the plan is submitted to creditors.¹⁶¹⁶ The disclosure hearing often results in litigation that frequently has more to do with final bargaining about the contents of the plan than the adequacy of disclosure.

The complexity detailed above may be appropriate in large cases. The large debtor's financial and operational problems are generally complex, requiring a specially tailored plan of reorganization. Detailed disclosure is appropriate. Moreover, the transaction costs of disclosure, although high in absolute terms, are usually a small percentage of the large amount of debt, income, and assets at stake in large Chapter 11 cases.

In small Chapter 11 cases, however, the drafted-from-scratch plan, the prospectus-type disclosure statement, and the separate disclosure hearing are more of a costly burden than an aid for cost-effective reorganization.¹⁶¹⁷ The small Chapter

¹⁶¹⁶ Under current law relating to small business debtors, the disclosure hearing and confirmation hearing can be combined in cases involving small business debtors in which the debtor elects to be treated as a small business. 11 U.S.C. § 105(d) (1994). Very few such debtors so elect, probably because the election shortens the debtor's plan exclusivity period and requires the debtor to file a plan within 160 days of filing the petition. See 11 U.S.C. § 1121(e), 1125(f) (1994).

¹⁶¹⁷ See, e.g., The Honorable Robert D. Martin, "Letter to Stephen H. Case Regarding the Bankruptcy Review Commission Small Business Working Group" (Nov. 8, 1996) ("I would submit that there would be little loss to the integrity of the system if disclosure statements were done away with altogether."); see also The Honorable Geraldine Mund, "Letter to George Singer Regarding the September 7, 1996 Small Business Proposal" (Nov. 22, 1996); James Lawniczak, "Electronic Mail Message Regarding Judge Robert Martin's Proposals," (I . . . agree with Judge Martin that the

11 case simply cannot support the high costs of this process. Debtor's counsel is often left with the choice of submitting a poorly drafted plan and a perfunctory disclosure statement, or creating legal fees greater than the debtor can bear. The Commission even heard anecdotal evidence that the expected expense of drafting a plan and disclosure statement dissuades some businesses genuinely in need of rehabilitation from filing under Chapter 11 to begin with.

Accordingly, as more fully explained below, two keystones of the Working Group's Proposal are (1) the promulgation of easy-to-use, standard forms for disclosure statements and Chapter 11 plans for small business cases;¹⁶¹⁸ and (2) granting the court broader discretion to combine the disclosure and confirmation hearings in all small business cases or waive the filing of a disclosure statement altogether in appropriate cases. Lifting onerous disclosure requirements is an important step forward in making Chapter 11 more efficient for small businesses.

Therefore, the Working Group proposes several Recommendations. First, the courts, after notice and a hearing, should have the power to waive or modify the disclosure requirements to adapt them as appropriate on a case-by-case basis.¹⁶¹⁹ Second, the Rules Committee should promulgate standard-form disclosure statements and plans of reorganization for small business debtors.¹⁶²⁰

In small Chapter 11 cases, the drafted-from-scratch, prospectus-type disclosure statement and separate disclosure hearing are not cost-effective. The high costs of this process are simply greater than most debtors can bear, and do not yield information to creditors that could not otherwise be provided by use of a standard form. Indeed, standard forms increase the likelihood that all required topics will be covered, as they are easier to use than custom-created documents.¹⁶²¹ To minimize a debtor's inadvertent failure to disclose significant information, the standard forms would provide a blank for other material information critical to making a decision on

disclosure statement be simplified. . .").

¹⁶¹⁸ The Commission recommends that these standard forms be designed to facilitate the collection and dissemination of accurate and comprehensive data and statistics.

¹⁶¹⁹ Although courts already have power to modify the disclosure statement and plan confirmation process under 11 U.S.C. § 105(d)(2)(B), this power would be both expanded and modified to require that the small business debtor file and confirm a plan of reorganization within, respectively, 90 and 150 days.

¹⁶²⁰ These forms should be compatible with current statistical database systems and designed to facilitate the collection of reliable data.

¹⁶²¹ See The Honorable Elizabeth L. Perris, "Letter to John Gose Regarding the Chapter 11 Special Track" (Feb. 18, 1997).

how to vote.¹⁶²² For all relevant compliance purposes, including compliance with applicable securities laws, these standard forms would serve as “safe harbors” for debtors electing to file them, but would not preclude any debtor from deviating from the forms, as long as the alternate filing complied with applicable requirements.

Competing Considerations. Virtually no opposition to the foregoing Proposals was expressed during the process by which the foregoing Recommendation was developed. It might be argued that relaxation of disclosure requirements might encourage some debtors to play “hide the ball”, where present law does not allow it. However, the Commission believes that the benefits of expense reduction and faster emergence from Chapter 11 outweigh these risks.

2.5.3 Reporting Requirements

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules Committee shall be called upon to adopt, with a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as monthly operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

- a. the debtor’s profitability, i.e., approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;**
- b. what the reasonably approximate ranges of projected cash receipts and cash disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;**

¹⁶²² *Id.* Such forms have been successfully created and used in the District of Oregon.

- c. **how approximate actual cash receipts and disbursements compare with results from prior reports;**
- d. **whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not, what the failures are, how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and**
- e. **such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.**

A major objective of the Commission has been to improve techniques for early identification of those debtors which have a reasonable probability of succeeding in Chapter 11 and those which do not. Under present practice, fulfillment of this objective is sometimes difficult because basic business data about the enterprise are often not available. The majority, but not all, of bankruptcy jurisdictions require the prompt and regular filing of useful financial reports. Furthermore, while some courts have held that a debtor's failure to file monthly operating reports or other essential financial documentation constitutes cause to dismiss or convert a Chapter 11 case,¹⁶²³ nothing in the Bankruptcy Code or Rules expressly requires routine financial reporting during the pendency of a proceeding.¹⁶²⁴ Thus, the Commission proposes to amend

¹⁶²³ See *In re Tornheim*, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995)(concluding that, although not specifically enumerated, the debtor's failure to file monthly operating reports as required by the United States trustee may constitute cause for dismissal), *appeal dismissed*, 1996 WL 79333 (S.D.N.Y. 1996); *In re Great American Pyramid Joint Venture*, 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992) (failure to file monthly operating report).

¹⁶²⁴ Fed. R. Bankr. P. 2015 imposes only the following minimal duties on the Chapter 11 debtor to keep records, make reports, and give notice of its bankruptcy filing. The duties are imposed at the discretion of the court and, apart from the unlikely possibility of dismissal or conversion under section 1112(b), there are no sanctions for failure to comply with the rule:

- (a) Trustee or Debtor in Possession. A trustee or debtor in possession shall (1) . . . if the court directs, in a Chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; . . . (4) as soon as possible after the

the Bankruptcy Code or Rules to expressly require the periodic filing of financial and other reports, such as monthly operating reports, and the filing of schedules and statements within thirty days postpetition. Such reporting will assist the U.S. Trustees and the court in determining the appropriateness of dismissal or conversion of a case.¹⁶²⁵

Competing Considerations. It may be argued that the expense and burden of enlarged reporting will impose a “break-the-back” additional burden on the small, entrepreneurial enterprise seeking to recapitalize in Chapter 11. The Commission concedes that the requirement, if adopted, would impose additional burdens. These burdens may well result in the failure of some Chapter 11 cases. However, the conclusion behind the Recommendation is that once the debtor has elected to seek protection, it should live in a fishbowl so that all can assess the quality of its performance. Also, requiring additional reporting, while expensive and burdensome, especially for the very small business, may well impose and discipline that will assist rehabilitation, not to mention a possibly salutary education-in-management experience for entrepreneurs in Chapter 11.

commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor . . . ; (5) in a Chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the United States trustee a statement of disbursements made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter. . .

- (d) **Transmission of Reports.** In a Chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trustees. . .

FED. R. BANKR. P. 2015 (1991).

¹⁶²⁵ The Association of Insolvency Accountants (“AIA”) supports requiring debtors to submit uniform operating reports; however, the AIA has proposed that the focus on cash flow statements be on cash flow from operating activities of the business (EBITDA—earnings before interest, taxes, depreciation and amortization). The AIA also proposes that the reports clearly distinguish cash flows from operations from those related to liquidation and other nonoperating, extraordinary activities. Simple schedules of cash receipts do not take into account any estimate of the administrative obligations being incurred by the debtor. See Grant W. Newton, “Letter from the Association of Insolvency Accountants to the Bankruptcy Review Commission” (not dated).

2.5.4 Duties of the Debtor in Possession

The debtor is required to:

- a. append to the voluntary petition or, in an involuntary case, to file within three days after the order for relief, either (A)(i) its most recent balance sheet, statement of operations and cash-flow statement and (ii) its most recent federal income tax return or (B) a statement made under penalty of perjury that no such financial statements have been prepared or that no federal income tax return has been filed or (C) both;
- b. attend meetings, at which the debtor is represented by its senior management personnel and counsel, scheduled by the court, the U.S. Trustee, or the Bankruptcy Administrator including, but not limited to initial debtor interviews, court-ordered scheduling conferences, and meetings of creditors convened under 11 U.S.C. § 341;
- c. file all schedules and statements of financial affairs for small business debtors within the limits set by the Bankruptcy Rules, unless the court, upon notice to the U.S. Trustee and a hearing, grants an extension, which extension or extensions shall not, in any event, exceed thirty (30) days after the order for relief absent extraordinary and compelling circumstances;
- d. comply with postpetition obligations, including but not limited to the duties to: file tax returns, maintain appropriate and reasonable current insurance as is customary and appropriate to the industry, and timely pay all administrative expense tax claims, except those being contested by appropriate proceedings being diligently prosecuted;
- e. create within ten (10) business days of the entry of order for relief (or as soon thereafter as possible in case all banks contacted during the first ten (10) business days decline the business) separate deposit accounts with a bank or banks in which the debtor shall be required to timely deposit, until a plan is confirmed or the case is dismissed or converted or a trustee is appointed, after receipt, all taxes collected or withheld by it for governmental units. In compelling circumstances, the court may dispense with these requirements after notice and a hearing;

- f. allow the U.S. Trustee or its designated representative to inspect the debtor's business premises, books and records at reasonable times on reasonable prior written notice to the debtor.

Comments. When Congress fashioned a consolidated approach to business rehabilitations, an underlying assumption was that debtors-in-possession would work together with active committees of creditors in negotiating a plan of reorganization.¹⁶²⁶ The role of committees was also viewed by Congress to be integral to the "supervision of the debtor in possession" and would serve to "protect their constituents' interests."¹⁶²⁷

Available data, however, indicate that creditors are apathetic in the vast majority of business bankruptcies.¹⁶²⁸ Indeed, national statistics reveal that a committee of creditors was constituted in only 15.3% of the 8,606 pending Chapter 11 cases filed between January 1993 and January 1996.¹⁶²⁹ In other words, 84.7% of Chapter 11 lacked the participation and "supervision" of a creditors' committee that

¹⁶²⁶ See H.R. REP. NO. 595, 95th Cong., 1st Sess. 401 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6357 (indicating that committees of creditors and equity security holders "will be the primary negotiating bodies for the formulation of the plan or reorganization"). Congress believed that:

Under the consolidated reorganization chapter, the procedure will be a combination of features of current Chapters X and XI. *There will be at least one committee in each case.* Because unsecured creditors are normally the largest body of creditors and most in need of representation, the bill *requires* that there be a committee of unsecured creditors.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 235 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6195 (emphasis added). *But see* Richard B. Levin, "Letter to Stephen H. Case regarding the NBRC Small Business Working Group Proposal" (April 15, 1997)(citing the House Committee Report which noted that "[t]he notion of creditor control, while still theoretically sound, has failed in practical terms. Creditor control in bankruptcy cases is a myth.").

¹⁶²⁷ See *supra* note 1626. See also 11 U.S.C. § 1102 (1978) (amended)(providing that "the court *shall* appoint a committee of creditors holding unsecured claims")(emphasis added).

¹⁶²⁸ SENATE COMM. ON THE JUDICIARY, 103D CONG., REPORT ON S.540 at 43 (Oct. 28, 1993).

¹⁶²⁹ SUMMARY BY CIRCUIT OF CREDITOR COMMITTEE DATA, EXECUTIVE OFFICE OF UNITED STATES TRUSTEES (February 21, 1996). *Accord* LINDA E. STANLEY, Chapter 11 STATISTICS BY BUSINESS TYPE & YEAR, DEVELOPED BY THE SAN FRANCISCO OFFICE OF U.S. TRUSTEE, Oct. 18, 1996 (reporting that a creditors' committee was appointed in only 6 out of 119 Chapter 11 cases (5%) filed in the Northern District of California in 1995. In only 20 % of these cases was counsel to the committee appointed).

Congress envisioned would be a cornerstone to a consolidated chapter .¹⁶³⁰ The fusion of the previous relief Chapters has thus not resulted in the contemplated joint administration of the bankruptcy estate by debtors and creditors, but rather has led to a system dominated far too often by the exclusive and largely unsupervised direction of the debtor-in-possession.¹⁶³¹

Lack of creditor participation does not necessarily mean that creditors are satisfied with the manner in which Chapter 11 cases progress. In small cases, individual creditors often have too little at stake to justify the cost of active participation in the Chapter 11 case. Thus, creditors' lack of participation often reflects an unwillingness to "throw good money after bad," rather than an endorsement of the present system. As more fully explained below, for purposes of administrative supervision, the reforms proposed by the Commission substitute the U. S. Trustee for absent creditors.¹⁶³²

The foregoing considerations therefore indicate that the express statutory duties imposed on the debtor ought to be strengthened and made explicit.

Competing Considerations. It may be argued that these duties are both unnecessary and overly rigid and excessive. They are, it may be contended, unnecessary because existing law allows the U.S. Trustee and the court adequate latitude to monitor and supervise Chapter 11 cases. As the courts and the U.S. Trustee grow in quality and experience, which the Commission believes has been their consistent record over the years, then the statutory "strait jacket" proposed above will be a hindrance to wise administration of Chapter 11 cases, not a benefit. In addition, opponents of the Proposal may contend that there are too many duties and that the expense of compliance will itself cause the failure of some or many Chapter 11 cases. Lastly, some of the requirements that are imposed in the early days and weeks of the case will, it may be argued, unwisely divert the attention of the debtor's management and professionals from focusing on the business and the jobs it provides, for the sake of "mere compliance" which itself does little or nothing to address the critical problems of saving distressed business enterprises.

¹⁶³⁰ See *supra* notes 1625-1626 and accompanying text; see also, The Honorable A. Thomas Small, *Chapter 11: A Growing Cash Cow. Some Thoughts on How to Rein in the System*, 1 AM. BANKR. INST. L. REV. 331 (1993)

¹⁶³¹ See Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code (Second Installment)*, 57 AM. BANKR. L.J. 247 (1983).

¹⁶³² J. James Jenkins, "Letter to the Commission regarding the Small Business Proposal" (April 14, 1997) (recognizing the importance of the U.S. Trustee in cases lacking creditor supervision).

2.5.5 Deadlines for Plan Filing and Confirmation

In small business cases only, require that the disclosure statement, if any, and plan must be filed within 90 days after the entry of order for relief, unless extended as permitted below. During this 90-day period, only the debtor may file a plan unless on request of a party in interest made during this period and after notice and a hearing, the court, for cause, orders otherwise. In small business cases only, require the plan to be confirmed within 150 days after the entry of order for relief, unless extended as permitted below.

In addition to simplifying the disclosure process, the Commission recommends that Congress reduce cost and delay by requiring the debtor to promptly file and confirm a plan of reorganization on an expedited basis. Reducing time spent in Chapter 11 has a predicted effect of reducing the direct and indirect costs of administering a Chapter 11 case, and thereby preserving assets for distribution to unsecured creditors.¹⁶³³

To ensure that the court promptly concludes the plan-confirmation process, the Commission recommends that the court rule on the plan within sixty days of the date on which the plan was filed.¹⁶³⁴ Allowing the court sixty days to make a ruling appropriately balances the important need for creditors to receive notice of the plan confirmation hearing and adequate time to review the plan and prepare objections and the need to reduce delay in the plan confirmation process.

Competing Considerations. Ninety days, it may be argued, is not a reasonable amount of time to allow the debtor to develop a feasible plan,¹⁶³⁵ which can often not be developed until one or more events occur, such as negotiating terms for restructuring secured debts, finding a new source of capital, or decreasing the vacancy

¹⁶³³ *But see* Jim Kakalik, *Just, Speedy and Inexpensive? Summary of Main Findings*, 5 FACTS & TRENDS, RAND INSTITUTE FOR CIVIL JUSTICE (April 1997) (finding that reducing time to disposition through case-management procedures has a limited role in reducing litigation costs).

¹⁶³⁴ *See* 11 U.S.C. § 362(e)(1994) (requiring the court to rule on a request to modify the stay within thirty days).

¹⁶³⁵ Existing Chapter 12 also requires the debtor to file a plan no later than 90 days after the order for relief. 11 U.S.C. § 1221 (1994). *But see*, The Honorable Geraldine Mund, "Letter to the National Bankruptcy Review Commission Regarding the Proposal of the Small Business Working Group Dated March 27, 1997" (May 13, 1997) ("It seems to take about 45 days for the 341(a) hearing, and I believe that 90 days is simply too short for the debtor to prepare a quality product. I found that 120 days was more reasonable.").

rate of rental properties.¹⁶³⁶ Moreover, early in a Chapter 11 case, the debtor is preoccupied with schedules to prepare, motions to employ professionals, cash collateral motions, and the like.¹⁶³⁷ Finally, a debtor whose books and records have not been properly maintained may need several months to develop a plan which complies with the Bankruptcy Code's confirmation requirements.¹⁶³⁸ Also, it may be contended, the short fuse for plan confirmation does not take adequate account of the need for time-consuming negotiations with creditors and the vagaries of time, such as weather and vacation season in the summer.

The Commission has concluded, however, that the opportunity for extensions, discussed below, is an adequate safety valve for these concerns.

2.5.6 *Burden of Proof for Extensions of Deadlines*

Permit extensions of the deadlines for filing and approving disclosure statements, if any, and filing and confirming plans of reorganization only if the debtor, having duly noticed and appeared at the necessary extension hearing conducted and ruled upon prior to the expiration of the deadline, if any, and having carried the burdens of coming forward and persuasion, demonstrates by a preponderance of the evidence that it is more likely than not to confirm a plan of reorganization within a reasonable time. No such deadline may be extended unless a new deadline is imposed at the time the extension is granted. The Bankruptcy and Judicial Codes will require the U.S. Trustee, as the case may be, to be a recipient of notice of extension hearings and to participate actively therein, in order to assure, to the maximum extent feasible, that the interests of the public are protected when determinations are made as to whether small business debtors receive extensions and have proven by a preponderance of the evidence that it is more likely than not that they will confirm a plan within a reasonable time.

Comments. Some debtors who will be able to successfully emerge from Chapter 11 will need extensions of the disclosure statement and plan filing deadlines. These deadlines are not intended to derail valid reorganization efforts, but rather to

¹⁶³⁶ Terrance L. Stinnett, "Letter from Goldberg, Stinnett, Meyers & Davis Regarding the Small Business Working Group Proposals" (Nov. 22, 1996).

¹⁶³⁷ E.g., William C. Beall, "Letter from Beall & Burkhardt to the National Bankruptcy Review Commission Regarding the Small Business Working Group Proposal" (Jan. 13, 1997).

¹⁶³⁸ *National Bankruptcy Review Commission: Hearings Before the Working Group on Small Business Bankruptcy* (Sept. 19, 1996) (testimony of Judge Lisa Hill Fenning).

achieve early dismissal or conversion of those cases which have no genuine prospect of confirming a plan, and therefore no business benefitting from the protections of Chapter 11. To implement this concept, the Commission proposes that debtors requiring deadline extensions must bear the burden of proof to establish entitlement thereto by a "more likely than not" standard.

This standard is not thought to be highly onerous. It would require any debtor needing an extension to bear the burden of coming forward and of persuasion to establish, by a preponderance of the evidence, that the debtor has more than a fifty percent chance of confirming a plan. A frame of reference for the court to use in making this finding would be whether in a hypothetical sample of fifty cases substantially similar to that before the court, at least twenty-six would confirm a plan.

Competing Considerations. Some may contend that the standard of proof, even when set low at the "preponderance" standard will be too onerous for some businesses to meet. It may also be contended that so many businesses will need extensions that the courts will become highly clogged with Chapter 11 extension hearings.

The Commission has concluded, however, that the benefits of a statutory mandate to "make it or get out" will provide a salutary discipline to the process, which will discourage many debtors with no reasonable prospects for viability from filing to begin with, thus reserving the precious time of the courts for cases where the facts justify the need for judicial attention.

2.5.7 Scheduling Conferences

Require the bankruptcy court to promptly conduct at least one on-the-record scheduling hearing, on notice to the U.S. Trustee and the debtor's 20 largest unsecured creditors to be sure that the deadlines discussed above are met except that no such hearing is required if an agreed order is filed by the debtor and U.S. Trustee and approved by the court after notice and hearing. The court shall also conduct such other scheduling hearings and status conferences as it deems fit and proper. Whenever possible, these hearings shall be scheduled in conjunction with other mandatory events so as to minimize to the most reasonable practicable extent, the time of debtor personnel spent in court and at official meetings.

Comments. Whether to require the court to hold at least one status conference has sparked controversy. Proponents of a mandatory, on-the-record status conference agree with the Commission that such a conference would quicken

the pace for disposition of a Chapter 11 plan¹⁶³⁹ by involving the power and prestige of the court and the authority inherent in court orders.¹⁶⁴⁰

Data from the Central District of California support required conferences.¹⁶⁴¹ In a study of Chapter 11 cases filed over a six-year period, Judge Bufford found that case management techniques of one judge, the Honorable Geraldine Mund,¹⁶⁴² (applied to 81.2% of Chapter 11 cases), which did *not* include a judicial status conference, shortened by 24.1% the time to confirmation of a plan; reduced by 44.1% the time to conversion to a case under another Chapter ; and shortened by 53.4% the time to dismissal of a typical nonviable Chapter 11 case.¹⁶⁴³ In a more expansive study of the case management techniques of six judges, Marcy J.K. Tiffany, U.S. Trustee for Region XVI, challenged Judge Bufford's conclusions, attributing a portion of delay reduction to general case management techniques, a portion to judicial status conferences, and the another part to the active role of the U.S. Trustee.¹⁶⁴⁴ According to Ms. Tiffany's data, *the most dramatic decreases in the days to dismissal of a Chapter 11 case resulted from a combination of U.S. Trustee motions and judicial status conferences.*¹⁶⁴⁵

A number of commentators, however, including one member of the Commission, have challenged these conclusions, arguing that status conferences are

¹⁶³⁹ See, e.g., American College of Bankruptcy, "Questionnaire Based on Focus Group Reports" (Jan. 31, 1997); see also Terrance L. Stinnett, "Letter from Goldberg, Stinnett, Meyers & Davis Regarding the Small Business Working Group Proposals" (Nov. 22, 1996); see also Jim Kakalik, *Just, Speedy and Inexpensive? Summary of Main Findings*, 5 FACTS & TRENDS, RAND INSTITUTE FOR CIVIL JUSTICE (April 1997) (finding that case-management procedures have a substantial effect on time to disposition, but a limited role in reducing litigation costs).

¹⁶⁴⁰ See The Honorable Elizabeth L. Perris, "Letter to John Gose Regarding the Chapter 11 Special Track" (Feb. 17, 1997) ("One of the purposes of the scheduling conference is to inventory the impediments to confirmation and to set deadlines for the debtor to act to remove those deadlines. Such deadlines may include, without limitation, the filing of past-due prepetition tax returns, the commencement of litigation, or the filing of a claim objection.").

¹⁶⁴¹ See The Honorable Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 AM. BANKR. INST. L.R. 85 (1996).

¹⁶⁴² Judge Mund followed the process developed by the Honorable A. Thomas Small, described below.

¹⁶⁴³ *Id.* at 85, 113-14.

¹⁶⁴⁴ Marcy J.K. Tiffany, *Fast Track, Statistics and Delay Reduction: A Comparative Analysis* at 18-20 (unpublished manuscript on file with the author and the National Bankruptcy Review Commission)(Oct. 11, 1996).

¹⁶⁴⁵ *Id.* at 20-21.

an administrative duty that should be performed by U.S. Trustees, rather than resource-strapped judges.¹⁶⁴⁶ One commentator, the Honorable A. Thomas Small, supported his criticism of mandatory status conferences with data from Chapter 11 cases filed in the Eastern District of North Carolina from October, 1992 to October, 1996. Based on these data, Judge Small concludes that Chapter 11 cases can be effectively managed without "elaborate and expensive conferences."¹⁶⁴⁷ Rather than hold routine status conferences to expedite the processing of Chapter 11 cases, Judge Small, like Judge Mund, implements several simple procedures: (i) entry of an order at the outset of the case setting a plan confirmation deadline; (ii) conditional approval of the disclosure statement; and (iii) a combined hearing on the disclosure statement and plan confirmation.¹⁶⁴⁸

There is no question that Judge Small and his colleagues expeditiously and successfully administer Chapter 11 cases in their district. For example, Judge Small's data reveal a remarkably high confirmation rate of 68.3%, and a quick confirmation speed of 7 months, as opposed to a 12.5 month confirmation speed in the Central District of California. With respect to *dismissed* Chapter 11 cases, the average speeds from filing to dismissal in the Eastern District of North Carolina and the Central District of California are comparable at, respectively, 5.6 months and 5.3 months. Thus, with respect to confirmation and dismissal speeds, one possible conclusion is that status conferences are irrelevant to effective case management.

Comparison of *conversion* speeds, however, reveals that Chapter 11 cases in the Central District of California are dismissed at a significantly faster pace, 5 months, than are Chapter 11 filings in the Eastern District of North Carolina, where the conversion speed is 9 months. Interestingly, prior to implementation of judicial status conferences and the increased activity of the U.S. Trustee in the Central District of California, the "conversion speed" of Chapter 11 cases in the Central District of California was also nine months. Thus, it would appear from these limited samples that status conferences can significantly reduce delay in at least one class of Chapter 11 debtors, *i.e.*, those which should have filed Chapter 7 at the outset.

Based on the data as well as anecdotal evidence, the Commission has concluded that judges should be required to promptly hold at least one on-the-record status conference for Chapter 11 debtors.¹⁶⁴⁹ No status conference would be

¹⁶⁴⁶ *E.g.*, National Bankruptcy Review Commission: Plenary Hearings (Feb. 21, 1997)(testimony of The Honorable Robert E. Ginsberg).

¹⁶⁴⁷ The Honorable A. Thomas Small, "Letter to Stephen H. Case and the National Bankruptcy Review Commission Regarding the Small Business Proposal" (Feb. 21, 1997).

¹⁶⁴⁸ The Honorable A. Thomas Small, *supra* note 1569.

¹⁶⁴⁹ *See* The Honorable Elizabeth L. Perris, "Letter to John Gose Regarding the Chapter

required however, if the debtor and U.S. Trustee were able to file an agreed scheduling order with the court prior the judicial scheduling conference. The status conference or the agreed order will serve an important function of inventorying any impediments to confirmation and scheduling the resolution of those impediments early in the proceeding.

Competing Considerations. Most of the competing considerations are discussed at length in the preceding text. Also, the Association of Insolvency Accountants advocates a status conference held no more than 30 days postpetition to ascertain whether the business is viable.¹⁶⁵⁰

2.5.8 *Serial Filer Provisions*

Provide in the Bankruptcy Code that, with respect to any debtor (or any entity which has succeeded to substantially all the debtor's assets or business) which files a second case while another case is pending in which such debtor is the (or one of the) debtor(s) or in the event that it again becomes a debtor in a Chapter 11 case within two years after an order of dismissal of a Chapter 11 case in which it was the debtor has become a final order or a Chapter 11 plan has been confirmed, shall not be entitled to the section 362(a) stay unless, after it has become a debtor, it bears the burdens of coming forward and of persuasion, by a preponderance of the evidence, that (1) the new case has resulted from circumstances beyond the control of the debtor not foreseeable at the time the first case was filed and (2) it is more likely than not that it will confirm a feasible plan, but not a liquidating plan, within a reasonable time. In cases involving such debtors when the owners have transferred the business to a new legal entity, owned and arranged by them, the section 362(a) stay would apply on filing but would be lifted on a verified, ex parte motion of the U.S. Trustee, with the right to have it reimposed upon a showing of (1) and (2) above. The Federal Rule of Civil Procedure governing injunctions applies to the court's award of a stay to the debtor.

Comments. The Commission has considered problems that might be created if certain debtors, e.g. those whose cases were dismissed owing to failure to prove entitlement to extensions, simply refile a Chapter 11 case. Unregulated, seriatim refilings would completely undermine the purpose of the small business rules. The

11 Special Track" (Feb. 18, 1997).

¹⁶⁵⁰ See Grant W. Newton, "Letter from the Association of Insolvency Accountants to the Bankruptcy Review Commission" (undated).

Commission has concluded that a stringent prohibition on re-filing is not justified, however, since genuine changes in circumstances may have occurred to justify another trip to the courthouse. Accordingly, the Commission proposes a limited rule, applicable only to small business debtors who file a second case while the first case is pending or in the event that the it again becomes a debtor in a Chapter 11 case within two years after an order of dismissal in the prior case has become a final order or a plan has been confirmed. In these cases, the debtor would be denied the protection of the section 362(a) stay unless, after it becomes a debtor, it bears the burdens of coming forward and of persuasion, by a preponderance of the evidence, that (1) the new case has resulted from circumstances beyond the control of the debtor and (2) the debtor is more likely than not to confirm a Chapter 11 plan, other than a liquidating plan, within a reasonable time. In cases involving such debtors when the owners have transferred the business to a new legal entity, owned and managed by them, the section 362(a) stay would apply on filing but would be lifted on verified, *ex parte* motion of the U.S. Trustee or any party in interest, with the right to have it reimposed upon a demonstration of (1) and (2) above. The Federal Rule of Civil Procedure governing injunctions would apply to the court's award of a stay to the debtor.¹⁶⁵¹

Competing Considerations. It may be argued that the incidence of repeat small business filers is too trivial in amount to justify the attention it gets in the foregoing Proposal. Moreover, like other provisions of the Commission, it may be contended, the serial-filing requirement is simply too onerous for the American economy in times of severe financial distress, when many sound businesses might need repeated opportunities to file.

2.5.9 Expanded Grounds for Dismissal or Conversion and Appointment of Trustee

a. Modify section 1112 for to read as follows:

- (b)(1) Except as provided in subsection (c) of this section or in section 1104(a)(3) of this title, on request of a party in interest or the U.S. Trustee, and after notice and a hearing, the court shall convert a case under this chapter to a case under Chapter 7 of this title or shall dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, where movant establishes cause, except that such relief shall not be granted if the debtor or another party in interest objects and establishes both:**

¹⁶⁵¹ FED. R. CIV. P. 65.

- (A)** that it is more likely than not that a plan will be confirmed within a time as fixed by this title or by order of the court; and
 - (B)** if the cause is an act or omission of the debtor:
 - (i)** that there exists a reasonable justification for the act or omission; and
 - (ii)** that the act or omission will be cured within a reasonable time fixed by the court not to exceed thirty days after the court decides the motion unless the movant expressly consents to a continuance for a specific period of time or there are compelling circumstances beyond the control of the debtor which justify an extension.
- (2)** For purposes of this subsection, cause includes:
- (A)** substantial or continuing loss to or diminution of the estate;
 - (B)** gross mismanagement of the estate;
 - (C)** failure to maintain appropriate insurance;
 - (D)** unauthorized use of cash collateral harmful to one or more creditors;
 - (E)** failure to comply with an order of the court;
 - (F)** failure timely to satisfy any filing or reporting requirement established by this title or by applicable rule;
 - (G)** failure to attend the section 341(a) meeting of creditors or an examination ordered under Bankruptcy Rule 2004;
 - (H)** failure timely to provide information or attend meetings reasonably requested by the U.S. Trustee or;
 - (I)** failure timely to pay taxes due after the order for relief or to file tax returns due after the order for relief;
 - (J)** failure to file or confirm a plan within the time fixed by this title or by order of the court; and
 - (K)** failure to pay any fees or charges required under Chapter 123 of title 28.
- (3)** The court shall commence the hearing on any motion under this subsection within 30 days after filing of the motion, and shall decide the motion within 15 days after commencement of the hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

b. Additional Grounds for Appointment of Trustee

Add the following new section to 11 U.S.C. § 1104:

- (a)(3) where grounds exist to convert or dismiss the case under section 1112 of this title, but the court determines that the appointment of a Chapter 11 trustee is in the best interests of creditors and the estate.**

Comments. Perhaps the most difficult problem in reforming Chapter 11 for small business cases is to find a way to identify both promptly and reliably those cases that have no genuine prospects for reorganization. It is important to preserve and protect the benefits of Chapter 11 to those debtors with genuine rehabilitation prospects. It is also important to limit the exceptional privileges of Chapter 11 to those cases in which creditors and the public benefit thereby.

Under current law it is easy to file a non-meritorious Chapter 11 case, but sometimes hard to remove such a case from Chapter 11. A business about to file bankruptcy is strongly encouraged to file under Chapter 11, whether or not it has any genuine prospect for rehabilitation. This is so because a Chapter 11 debtor gets the benefit of a special form of preliminary injunction, the automatic stay, while keeping control of all its assets, without making any initial showing of likelihood of confirming a plan of reorganization. In all other fields of American law, a party seeking preliminary injunctive relief must establish a likelihood of prevailing on the merits.¹⁶⁵² Chapter 11 reverses this usual burden of proof by imposing a heavy burden on a party seeking to dismiss a Chapter 11 case, convert it to Chapter 7, or appoint a Chapter 11 trustee. Many courts have held that any such action against the debtor-in-possession is an "extraordinary remedy."¹⁶⁵³ This reversal of the ordinary burden of proof is not justified by the aggregate success of Chapter 11 cases. As noted previously, only about fifteen percent of Chapter 11 cases result in confirmation of a plan.¹⁶⁵⁴

The Proposal adopts a burden of proof halfway between existing Chapter 11 practice and the burden of proof imposed on nondebtor litigants seeking injunctive relief against creditor action. A debtor could continue to file under Chapter 11 and get the benefit of the automatic stay without making any initial showing of likelihood

¹⁶⁵² *E.g.*, *Rodriguez v. United States*, 66 F.3d 95, 97 (5th Cir. 1995), *cert. denied*, ___ U.S. ___ 116 S.Ct. 1058 (1996).

¹⁶⁵³ *E.g. In re Fisher & Son, Inc.*, 70 B.R. 7, 8 (S.D. Ohio 1986)

¹⁶⁵⁴ *See supra* note 1549 and accompanying text.

of confirming a plan. If the debtor failed to meet certain benchmarks while in Chapter 11, however, the burden would shift to the debtor to establish a likelihood of confirming a plan within a reasonable period of time.

Section 1112(b) of the Bankruptcy Code, which governs conversion or dismissal of a Chapter 11 case, already establishes a number of benchmarks of likely failure.¹⁶⁵⁵ The Commission recommends adding additional benchmarks to the current non-exhaustive list of ten examples of "cause" enumerated in section 1112(b). The party seeking conversion or dismissal (a creditor or the U.S. Trustee) would be required to show a material act, omission, or event identified in amended section 1112 as "cause" for conversion or dismissal. Moreover, if the moving party met this initial burden of proof, the burden would then shift to the debtor to show: (1) adequate justification or excuse for any act or omission of the debtor constituting "cause," (2) that any such act or omission will be corrected promptly; and (3) that it is more likely than not that the debtor will confirm a plan within a reasonable period of time. If the debtor failed to establish this burden, the case would be converted or dismissed, or a Chapter 11 trustee appointed.¹⁶⁵⁶ The many witnesses who testified before the Commission helped identify the benchmarks that indicate likely failure of the Chapter 11 case or that otherwise justify requiring the debtor to show that confirmation of a plan is likely.

A debtor who continues to incur losses postpetition should be watched very closely by the U.S. Trustee and the bankruptcy judge. Not only do postfiling losses make reorganization less likely, but they also diminish the assets available to pay creditors. Section 1112 now provides for conversion or dismissal where there are continued postpetition losses and the moving party establishes that there is no reasonable likelihood of reorganization.¹⁶⁵⁷ Additional "causes" for conversion should include losses that are either continued or otherwise "significant," and once such losses are established, the burden should fall upon the debtor to show that reorganization is likely.

Providing for dismissal or conversion of a debtor which is unable to perform certain basic duties, such as failing to disclose financial information, is appropriate

¹⁶⁵⁵ Section 1112(b), as originally codified, set forth nine examples of cause for conversion or dismissal of a Chapter 11 case. LAWRENCE P. KING, 7 COLLIER ON BANKRUPTCY ¶ 1112.04[5], 1112-30, 48-49 (15th ed. 1996).

¹⁶⁵⁶ Section 1104 would also be amended to provide that the court could order the appointment of a Chapter 11 trustee where grounds to convert or dismiss exist but the court determines that appointment of a Chapter 11 trustee is in the best interests of the estate.

¹⁶⁵⁷ See 11 U.S.C. § 1112(b)(1) (1994).

because such debtor is unlikely to survive as an on-going concern.¹⁶⁵⁸ Failure to enforce reporting obligations harms both debtors, who may not learn valuable accounting skills, but it also deprives creditors of important economic information about the debtor which is needed to evaluate the feasibility of the debtor's plan. From a public policy perspective, it is only fair to require debtors, who enjoy the privilege of a broad injunction, to disclose information to creditors and the court.¹⁶⁵⁹

Once a debtor files a Chapter 11 petition, the automatic stay protects the debtor from actions by creditors, and allows the debtor a breathing spell during which to reorganize its affairs in an orderly manner, under the supervision and protection of the court. In these circumstances, the debtor should be able to comply with basic obligations of its business, such as filing tax returns¹⁶⁶⁰ and maintaining current insurance. Debtors who are unable to meet their minimal obligations under protected circumstances are also unlikely to be able to do so once their daily activities return to normal. Indeed, witnesses noted a high anecdotal correlation between failure to (i) file postpetition tax returns, (ii) pay postpetition taxes,¹⁶⁶¹ or (iii) maintain current

¹⁶⁵⁸ *National Bankruptcy Review Commission: Plenary Hearings* (Feb. 21, 1997)(testimony of Commissioner Jay Alix) at 111.

¹⁶⁵⁹ See, DISCUSSION OUTLINE, NEW MONTHLY OPERATING REPORT REQUIREMENTS UNITED STATES BANKRUPTCY COURT--NORTHERN DISTRICT OF CALIFORNIA, Jan. 1, 1995. This outlines explains the dual purpose of the monthly operating report:

The first [purpose] is to provide factual information to the creditors, the judges, and the Office of the United States Trustee regarding the financial progress of the debtor. The operating report is designed to provide a broad overview of the progress of the debtor toward effectuating a plan.

The second purpose is to benefit the debtor. The reason many businesses find themselves in Chapter 11 is that they lack financial discipline and/or financial expertise. By having the operational report due monthly, the debtor is forced to stop and review the financial occurrences of the past month. By having the operating report in a comparative format, hopefully the debtor will begin to view the current months trends in context to the prior months.

¹⁶⁶⁰ 28 U.S.C. § 960 provides as follows:

Tax Liability. Any officers or agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation

¹⁶⁶¹ Some courts have held that failure to pay postpetition taxes may constitute cause to convert or dismiss under section 1112(b). See, e.g., *Berryhill v. United States (In re Berryhill)*, 189 B.R. 463, 466 (N.D. Ind. 1995).

insurance and failure to confirm a plan of reorganization.¹⁶⁶² In addition there was a consensus among the witnesses that it is reasonable to require a Chapter 11 debtor-in-possession to meet these obligations in return for the protections of Chapter 11. As noted above, failure to meet these obligations would not result in automatic conversion, dismissal, or appointment of a trustee, but would require the debtor to show that it was likely to confirm a plan within a reasonable time.

The Working Group has received considerable anecdotal data supporting its conclusion that numerous debtors, suffering from cash shortages, finance their day-to-day operations by using cash withheld from employee paychecks or sales-tax revenues, or other like "trust fund" taxes, to pay bills and provide the business with working capital. This chronic problem is often witnessed by Chapter 7 trustees in cases converted from Chapter 11.¹⁶⁶³

The Commission proposes to remedy this abuse by requiring all small business debtors to establish, promptly after the petition is filed, segregated bank accounts for timely deposit of tax funds withheld or collected from third parties after the commencement of the case. This requirement will not pose problems for well managed debtors who, in or out of Chapter 11, would never use third-party tax funds for working capital. The Working Group's proposed requirements would thus stop the practice of using government money for unauthorized business loans.

Competing Considerations. As to expanded grounds for conversion and dismissal, opponents of the Recommendation may contend that they are unnecessary, that existing law is adequate and that the new statute, if enacted, would encourage too much unwise and unnecessary litigation from creditors.

As to expanded grounds for appointment of Chapter 11 trustees, in small business cases, it may be contended, the enactment has no meaning because Chapter

¹⁶⁶² See Philip J. Hendel, "Position Paper to the National Bankruptcy Review Commission Proposing Expanded Use of Chapter 13 to Include Closely Held Corporations and Other Business Entities" (Dec. 17, 1996) ("When no creditors' committees are formed in smaller cases, a substantial administrative burden is imposed on the United States Trustee to monitor these cases in the public interest. Unfortunately, there are the cases that frequently present compliance problems such as non-payment of taxes, failure to file accurate or timely reports, failure to report cancellation of insurance, etc. . . There are usually substantial administrative fees and expenses that have been paid to the professionals.").

¹⁶⁶³ E.g., J. James Jenkins, "Letter to the Commission regarding the Small Business Proposal" (April 14, 1997) (noting that in the typical converted small Chapter 11 case there is no cash, wages are unpaid, payroll and sales taxes are unpaid, valuable property has been foreclosed upon, sold or is missing, employees are disgruntled, there may be allegations of theft, assumed executory contracts have created increased postpetition claims, professional fees are unpaid, tax returns are delinquent, and there are pre-planned foreclosures or other transactions which are benefitting insiders).

11 trustees do not function well in small business cases; those small business cases which need trustees, it may be contended, are almost always going to be converted to Chapter 7.

2.5.10 *Enhanced Powers of the United States Trustee and Bankruptcy Administrator*

Add a new subclause (e) to 11 U.S.C. § 341, and amend 28 U.S.C. § 586 (the general statute governing the powers and duties of the U.S. Trustee) and the Manual for Bankruptcy Administrators,¹⁶⁶⁴ (governing the duties of Bankruptcy Administrators) to require U.S. Trustees in every small business debtor case (except where they, in their reasonable discretion determine that the conduct enumerated below is not advisable in the circumstances):

(1)(a) to conduct an initial debtor interview (“IDI”) with the debtor as soon as practicable after the entry of order for relief but prior to the first meeting scheduled under Bankruptcy Code § 341(a). At the IDI, the U.S. Trustee shall, at a minimum, begin to investigate the debtor’s viability, inquire about the debtor’s business plan, explain the debtor’s obligations to file monthly operating reports and other required reports, attempt to develop an agreed scheduling order, and inform the debtor of other Chapter 11 obligations;

(b) when determined by the U.S. Trustee to be appropriate and advisable, to visit the appropriate business premises of the debtor and ascertain the general state of the debtor’s books and records and verify that the debtor has filed its tax returns. This visit should take place in connection with or reasonably promptly after the IDI (wherever possible, these events shall be combined with other events so as to minimize to the most reasonable practicable extent the amount of time of debtor personnel spent in court and at official meetings); and

(c) to review and monitor diligently on a continuous basis each debtor’s activities, with a view to identifying as promptly as possible those debtors which do not pass the

¹⁶⁶⁴ Section 302(d)(3)(I) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, 100 Stat. 3119, 3123, provides the statutory authority for the Judicial Conference of the United States to establish the bankruptcy administrator program.

test of being more likely than not to be able to confirm a Chapter 11 plan within a reasonable time; and

(2) in cases where, upon the basis of continuing review, monitoring or otherwise, the U.S. Trustee finds material grounds for any relief under Bankruptcy Code § 1112, to move the court promptly for relief.

Although many U.S. Trustees actively, carefully, and professionally supervise Chapter 11 debtors in possession and ensure prompt disposition of Chapter 11 proceedings, no statute imposes any clear duty to do so. The Commission has proposed to remedy this deficiency in several ways.

To expedite the identification of cases that are unlikely to reorganize and expedite the administration of small business cases, the U.S. Trustee will play a more active role throughout the Chapter 11 proceeding. At case commencement, the U.S. Trustee will be called upon to hold an "initial debtor interview" ("IDI") with the debtor. The IDI is an informal forum, attended by the debtor and, if applicable, the debtor's attorney, the general purpose of which is to familiarize the debtor with its Chapter 11 obligations and the role of the U.S. Trustee, and to familiarize the U.S. Trustee with the debtor's case. The IDI also provides an opportunity for the U.S. Trustee and the debtor to jointly review the accuracy of the debtor's schedules and statements, determine the debtor's reorganization "game plan," and agree to a scheduling order. In advance of the IDI, the U.S. Trustee will require the debtor to create a debtor-in-possession bank account, including separate deposit accounts for taxes collected or withheld by the debtor for governmental units, and to obtain current insurance for the debtor's business.

In appropriate cases, the U.S. Trustee will visit and inspect the debtor's business premises. It is intended that the U.S. Trustee has discretion about which debtors to visit and when. The Commission considers this flexibility important. In fulfilling its duties, the U.S. Trustees will develop standards and guidelines about how and when to use their resources in conducting visitations in order to maximize the benefits of this effort. The U.S. Trustee will diligently review and monitor small business debtors to ensure compliance with required financial reporting.

Competing Consideration. As to enlarging the powers of the U.S. Trustee the following competing considerations are among the most often advocated. First it is contended that, despite good intentions, ability, hard work and dedication, the staff of the U.S. Trustee program is never going to have the sophisticated business experience necessary make the subtle judgments necessary to determine which businesses "live" or "die" in Chapter 11. Second, it is contended that in times of budgetary restraint, the Congress can not be expected to appropriate the necessary funds for the U.S. Trustee program to adequately perform its duties.

The Working Group initially considered recommending appointment of an independent examiner, accountant, "licensed insolvency officer,"¹⁶⁶⁵ or other business viability expert.¹⁶⁶⁶ At the outset, the idea of an experienced expert assessing the debtor's business viability had great appeal. In particular, the members of the Working Group were impressed by the excellent procedures employed in the United Kingdom which has a licensing program for persons who administer insolvent estates.¹⁶⁶⁷ Implementing a similar requirement in the Bankruptcy Code would have codified the notion that business analysis is as important in bankruptcy or even more important than litigation and other legal analysis, especially at the beginning of a case.¹⁶⁶⁸ Nonetheless, this Proposal received almost no support.¹⁶⁶⁹

Critics argued that a "monitoring agent" would duplicate the roles already served by bankruptcy judges, U.S. Trustees, Bankruptcy Administrators, and panel trustees. In addition, opponents predicted that appointing monitoring agents would create an army of unneeded professionals, whose credibility and effectiveness would be undermined by perceptions of agents as stereotypical "government

¹⁶⁶⁵ The Working Group has heard testimony that the United Kingdom insolvency system benefits from the participation of licensed insolvency experts. These professionals work in the private sector, are qualified and licensed, represent the debtor and work with debtors' management, have business "turnaround" experience, have a duty to creditors, can be sued if negligent, and are temporary officers of the court with a duty to the court. See A. Mark Homan, "Letter to the National Bankruptcy Review Commission Small Business Working Group Describing the UK insolvency licensing regime" (Dec. 23, 1996); see also *Bankruptcy Reform—A Time for the Licensed Insolvency Officer ("LIO")?*, Panel Discussion of the American Bankruptcy Institute (Dec. 1, 1995).

¹⁶⁶⁶ Stephen H. Case & George H. Singer, "Preliminary Staff Proposals of the Working Group on Partnerships, Small Business, and Single-Asset Realty" (July 2, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission).

¹⁶⁶⁷ See A. Mark Homan, "Letter to the National Bankruptcy Review Commission Small Business Working Group Describing the UK insolvency licensing regime" (Dec. 23, 1996).

¹⁶⁶⁸ *National Bankruptcy Review Commission: Plenary Hearings 35-37* (Jan. 22 1997) (testimony of the Honorable Robert D. Martin, Chief Bankruptcy Judge of the Western District of Wisconsin) (describing the superior skills of accountants over lawyers to assess economic viability).

¹⁶⁶⁹ Stephen H. Case, Jennifer C. Frasier & George H. Singer, "Discussion Summary, September 19, 1996, Working Group on 'Small Business' Bankruptcy" (Oct. 8, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission). But see Grant W. Newton, Association of Insolvency Accountants, "Letter to the Bankruptcy Review Commission," (not dated) (recommending that the U.S. Trustee appoint a small business examiner to determine the debtor's viability. The examiner would have 15-20 days to make a visit to the business premises, complete his or her initial report, and file it with the court and the U.S. Trustee).

bureaucrats.”¹⁶⁷⁰ Furthermore, the appointment of monitoring agents would add an unwelcome new layer of costs onto an already expensive process.¹⁶⁷¹

After extensively investigating the purposes and operation of the U.S. Trustee and Bankruptcy Administrator programs,¹⁶⁷² the Commission has concluded that these programs have enormous potential to systematize early identification and disposition of economically defunct entities. Indeed, efficient procedures for administering Chapter 11 cases already exist in the Bankruptcy Administrator program,¹⁶⁷³ which operates only in Alabama and North Carolina.¹⁶⁷⁴ Despite the lack of any statutory directive to examine or supervise the conduct of debtors in possession, a number of dedicated U.S. Trustees have also added efficiency to the administration of Chapter 11.¹⁶⁷⁵ For example, the efforts of the U.S. Trustees for Regions 16 and 17 have contributed to a steady reduction in the number of days from case commencement to disposition.¹⁶⁷⁶ In San Francisco between January of 1992 and October of 1996, for instance, the median number of days from case commencement to conversion or dismissal has decreased from 10.8 months to 7.5 months.¹⁶⁷⁷

¹⁶⁷⁰ *Id.*

¹⁶⁷¹ Stephen H. Case & George H. Singer, “Working Group Meeting on Small Business & Single-Asset Real Estate” (July 22, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission).

¹⁶⁷² See, e.g., Jennifer C. Frasier, “Discussion Summary, Meeting with the Region XVII of the United States Trustee” (Dec. 6, 1996) (unpublished memorandum on file with the National Bankruptcy Review Commission); see also Stephen H. Case & Jennifer C. Frasier, “Discussion Summary, October 18, 1996, Plenary Session on ‘Small Business’ Bankruptcy” (Oct. 31, 1996) (unpublished memorandum on file with National Bankruptcy Review Commission).

¹⁶⁷³ In the Middle District of Alabama, for example, the number of days from the petition date to conversion or dismissal is only 6.1 months. Dwight H. Williams, “Letter to the National Bankruptcy Review Commission” (Dec. 5, 1996) (enclosing Chapter 11 data for the Middle District of Alabama for 1995).

¹⁶⁷⁴ Detailed guidelines for Bankruptcy Administrators are set forth in the *Manual for Bankruptcy Administrators*, Judicial Conf. Regulations and Director’s Guidelines for Bankruptcy Administrators (April 20, 1994).

¹⁶⁷⁵ The work of the U.S. Trustees also subject to detailed guidelines which are set forth in the *United States Trustee Manual* (Oct. 1996).

¹⁶⁷⁶ Marcy J.K. Tiffany, *Fast Track, Statistics, and Delay Reduction: A Comparative Analysis* (Oct. 1996) (unpublished article on file with the National Bankruptcy Review Commission) (analyzing case disposition rates for the Central District of California from 1989-1994. The author concludes that the administrative activities implemented by the United States Trustee significantly contributed to delay reduction in administration of Chapter 11 cases).

¹⁶⁷⁷ Linda E. Stanley, “Letter to the National Bankruptcy Review Commission” (Nov. 14,

The Commission believes that augmenting the statutory duties of the debtor-in-possession, described herein, combined with expansion of the U.S. Trustees' statutory duties and an affirmation of the procedures guiding Bankruptcy Administrators will provide an effective substitute for inactive creditors. For this reason, and concerns over the costs of alternative Proposals, the Working Group rejected its initial proposal to recommend appointment of independent viability experts in small business Chapter 11 cases.

1996) (enclosing Chapter 11 data for San Francisco from January 1992 to October 1996).