Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Will Have Impact on Business as well as Consumer Bankruptcies

On March 10, 2005, the United States Senate voted in favor of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Bill) (S. 256) which amends Title 11 of the United States Code (the Bankruptcy Code). The Bill was then referred to the United States House of Representatives (H.R. 685) and approved without amendment on April 14, 2005. The Bill was signed by President Bush on April 20, 2005.

Although the Bill has received much press and criticism for its effect on consumers, the Bill will have a significant impact on commercial bankruptcy cases in ways that have not received much publicity. We have cited certain relevant provisions of the Bill and set forth the changes to existing commercial bankruptcy law.

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1. **Modification to Section 341 - Meetings of Creditors**

The Bill amends section 341 of the Bankruptcy Code to authorize the court, upon request of a party in interest, to dispense with the requirement that the U.S. Trustee convene a meeting of creditors or equity security holders if the debtor has filed a prepackaged plan, i.e. one for which acceptances have been solicited before the commencement of the case.

Bankruptcy Code section 341, incorporating the proposed language of the Bill, provides in pertinent part:

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

(b) The United States trustee may convene a meeting of any equity security holders.

* * *

(e) Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

2. **Modification to Provisions Relating to Official Committee of Unsecured Creditors**

The Bill amends section 1102 of the Bankruptcy Code to require the inclusion on a committee of a creditor that is a "small business concern." This may be done after notice and a hearing, upon a showing that the creditor is representative of small business creditors who in the aggregate comprise a "disproportionately large" portion of the total claims against the debtor.

The Bill also modifies a committee's responsibilities. Section 1102 is amended to require the committee to (i) affirmatively provide access to certain creditors who are not committee members, and (ii) solicit and receive comments from such creditors. The committee may also be ordered by a court to provide additional disclosure. Obviously, these responsibilities will most likely be handled by committee counsel.

Bankruptcy Code section 1102, incorporating the proposed language of the Bill, provides:

(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may

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appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

* * *

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

* * *

(3) A committee appointed under subsection (a) shall–

(A) provide access to information for creditors who–

(i) hold claims of the kind represented by that committee; and

(ii) are not appointed to the committee;

(B) solicit and receive comments from the creditors described in subparagraph (A); and

(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

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3. Limitation on Extensions to Time to Assume or Reject a Nonresidential Leases of Real Property

One provision that will have a very significant impact on large retail bankruptcy cases is the proposed limitation on extensions to assume or reject nonresidential real property leases. The Bill amends section 365(d)(4) by limiting the Court's authority to grant extensions of the time to assume or reject a lease. Prior to the amendment, trustees (or debtors in possession) had 60 days to decide whether to assume or reject, and this time period could be extended for "cause" which has been liberally construed. The amendment provides a 120-day period to assume or reject, which may be extended one time for cause, for an additional 90 days. Each subsequent extension can only be granted upon written consent of the lessor.

Bankruptcy Code section 365(d)(4), incorporating the proposed language of the Bill, provides:

(4) ~~Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title,~~

(A) Subject to subparagraph (B), ~~if the trustee does not assume or reject~~ an unexpired lease of nonresidential real property under which the debtor is the lessee ~~within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is~~shall be deemed rejected, and the trustee shall immediately surrender ~~such~~ that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of–

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

4. Expansion of Ordinary Course of Business Defense to Preference Actions

The "ordinary course of business" defense of section 547(c)(2) of the Bankruptcy Code currently has three distinct requirements: the transfer must be (i) in payment of a

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debt incurred by the debtor in the ordinary course of business, (ii) made in the ordinary course of business of the debtor and transferee, and (iii) made according to ordinary business terms. The Bill expands the defense such that transfers in payment of a debt incurred in the ordinary course of business may either be made in the ordinary course of business or made according to ordinary business terms. This merging of the so called "objective" and "subjective" tests will likely have a significant effect on the prosecution of preference cases. Defendants will no longer have to show that payments are made in the ordinary course of business, and at the same time, are made according to ordinary business terms in the relevant industry.

Bankruptcy Code section 547(c), incorporating the proposed language of the Bill, provides in pertinent part:

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) ~~in payment of a debt incurred by the debtor~~made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made ~~in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made~~ according to ordinary business terms;

5. Additions to Limitations on Avoidance Powers

The Bill amends section 546 of the Bankruptcy Code to exempt from avoidance a warehouseman's lien for costs incidental to the storage and handling of certain goods.

Additionally, the amendment limits the trustee's avoidance powers with respect to transfers made by or to a master netting participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case.

Bankruptcy Code section 546, incorporating the proposed language of the Bill, provides in pertinent part:

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer ~~under a swap agreement~~, made by or to a swap participant or financial participant, ~~in connection with a swap agreement~~ under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(~~g~~h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7-209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7-209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b), the trustee may not avoid a transfer made by or to a master netting participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

6. Amendment to Provisions on Compensation

The Bill includes another factor by which a court determines the amount of reasonable compensation to be paid to estate professionals under section 330 of the Bankruptcy Code. Pursuant to the amendment, the court must consider whether the professional is board certified, or has otherwise demonstrated skill and experience in the field of bankruptcy.

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Bankruptcy Code section 330(a), incorporating the proposed language of the Bill, provides in pertinent part:

(3)~~(A)~~ In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

* * *

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and expertise in the bankruptcy field; and

* * *

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

7. Modification to Plan Solicitation Provisions

The Bill creates an exception to the provisions governing solicitation of votes under section 1125 of the Bankruptcy Code to permit solicitation of a vote from a holder of a claim or interest if (i) the solicitation complies with applicable non-bankruptcy law and (ii) it was made before commencement of the case in a manner complying with applicable nonbankruptcy law. This provision makes clear that compliance with bankruptcy law prepetition is not necessary if other applicable law governing a solicitation, such as securities laws, is complied with during the prepetition solicitation.

Bankruptcy Code section 1125, incorporating the proposed language of the Bill, provides in pertinent part:

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

* * *

(g) Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was

solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

8. Limitation on Extensions of Exclusivity

Section 1121(d) of the Bankruptcy Code authorizes the court to modify the debtor's exclusive periods in which to file a plan and solicit acceptances. The Bill amends section 1121(d) to limit the court's authority to extend these periods. Under the amendment, the court (i) may not extend the debtor's exclusivity to file a plan beyond a date that is 18 months after the date of the order for relief, and (ii) may not extend the debtor's solicitation period beyond a date that is 20 months after the date of the order for relief.

Bankruptcy Code section 1121(d), incorporating the proposed language of the Bill, provides in pertinent part:

(d) (1) Subject to subparagraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

9. Amendment to Definition of "Disinterested Person"

In a change which is a boon to many of the larger investment banks, the Bill amends the definition of "disinterested person" to remove the disqualification of the debtor's pre-bankruptcy investment banker or attorney of such investment banker.

Bankruptcy Code section 101(14), incorporating the proposed language of the Bill, provides in pertinent part:

(14) "disinterested person" means a person that--

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not ~~an investment banker for any outstanding security~~, within 2 years before the date of the filing of a petition, a director, office or employee of the debtor; and

~~(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;~~

~~(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and~~

~~(E)~~(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor ~~or an investment banker specified in subparagraph (B) or (C) of this paragraph~~, or for any other reason;

10. Amendment to Procedures for Appointing a Trustee

The Bill amends section 1104(b) of the Bankruptcy Code to include procedures for the appointment of a trustee. The Bill also amends section 1104 of the Bankruptcy Code to require the U.S. Trustee to move for appointment of a trustee if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or the debtor's public financial reporting.

Additionally, the Bill authorizes the court to appoint a trustee or examiner if doing so is in the best interests of creditors and the estate, and there are grounds to dismiss or convert the case under Bankruptcy Code section 1112.

Bankruptcy Code section 1104, incorporating the proposed language of the Bill, provides in pertinent part:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.; or

(3) if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or examiner is in the best interests of creditors and the estate.

(b)(1) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(2) (A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)—

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (d) shall terminate.

(C) The court shall resolve any dispute arising out an election described in subparagraph (A).

* * *

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor’s chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor’s public financial reporting.

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11. Modifications to Provisions on Utilities Services

The Bill amends section 366 of the Bankruptcy Code to define the term "adequate assurance" for a utility service. The court will now have limited discretion in determining what constitutes adequate assurance. Indeed, the amendments specifically provide that an administrative expense priority may no longer be deemed adequate assurance. The court can no longer consider (i) the absence of security before the petition date, (ii) the debtor's timeliness of payments prior to the petition date, or (iii) availability of the administrative expense priority.

Bankruptcy Code section 366, incorporating the proposed language of the Bill, provides:

(a) Except as provided in subsectionsubsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

(c) (1)(A) For purposes of this subsection, the term 'assurance of payment' means—

(i) a cash deposit;

(ii) a letter of credit;

(iii) a certificate of deposit;

(iv) a surety bond;

(v) a prepayment of utility consumption; or

(vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

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(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

(3) (A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider—

(i) the absence of security before the date of the filing of the petition;

(ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or

(iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

12. Expanded Wage Priority

The Bill increases the amount of wages that qualify for priority treatment pursuant to Bankruptcy Code section 507(a) to $10,000 for each individual or corporation (an increase from $4,925), earned within 180 days before the date of the filing of the petition (an increase from 90 days). The Bill also grants domestic support obligations a first priority under section 507(a). As a result, wages are now afforded a fourth priority under section 507(a).

Bankruptcy Code section 507(a)(4), incorporating the proposed language of the Bill, provides in pertinent part:

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims, but only to the extent of ~~$4,925~~ $10,000 for each individual or corporation, as the case may be, earned within ~~90~~ 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;

13. Amendment to Avoidance of Fraudulent Transfers Provisions

The Bill amends section 548 of the Bankruptcy Code by extending the avoidance period from one year to two years. Additionally, transfers to or for the benefit of an insider under an employment contract and not in the ordinary course of business are now avoidable.

Bankruptcy Code section 548, incorporating the proposed language of the Bill, provides in pertinent part:

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within ~~one year~~ 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; ~~or~~

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

* * *

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within ~~one year~~ 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

* * *

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741 or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; ~~and~~

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

14. Amendment to Provisions on Insurance Benefits to Retired Employees

The Bill modifies section 1114 of the Bankruptcy Code to require the court, on motion of a party in interest, to order reinstatement of retiree benefits if the debtor modified them during the 180-day period prior to filing, and was insolvent on the date of modification (unless the court finds that the balance of equities clearly favors such modification).

Bankruptcy Code section 1114(l), incorporating the proposed language of the Bill, provides in pertinent part:

(l) If the debtor, during the 180-day period ending on the date of the filing of the petition—

(1) modified retiree benefits; and

(2) was insolvent on the date such benefits were modified; the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

15. New Definitions for Financial Contracts

The Bill includes new definitions in section 101 of the Bankruptcy Code for "forward contracts," "financial institutions," "financial participants," "forward contract merchant," "master netting agreement," "repo participant," "repurchase agreement,"

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"securities clearing agency," "securities self regulatory organization," and "swap agreement." Additionally, the definitions of "securities contract" and "commodities contract" in sections 741 and 761 are amended. These definitions are pertinent to various provisions throughout the Bankruptcy Code relating to financial contracts, including the provisions governing exceptions to the automatic stay under section 362, the setoff provisions of section 553, and the liquidation, termination or acceleration of financial contract provisions of sections 555, 556, 559, 560, and 561.

Bankruptcy Code sections 101, 741, and 761, incorporating the proposed language of the Bill, provide in pertinent part:

§ 101.

(22) ~~the~~ The term "financial institution" means--

(A) ~~(i)~~ a Federal reserve bank, or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator, or entity is acting as agent or custodian for a customer in connection with a securities contract (as defined in section 741 ~~of this title, the~~) such customer; or

(B) ~~(ii)~~ in connection with a securities contract, (as defined in section 741 ~~of this title,~~) an investment company registered under the Investment Company Act of 1940~~; and;~~

~~**(B)** includes any person described in subparagraph (A) which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991;~~

(22A) The term "financial participant" means

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period; or

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(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991);

(25) The term "forward contract" means –

(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination ~~thereof or option thereon;~~of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in sub-paragraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562;

(26) The term "forward contract merchant" means a ~~person whose~~ Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity~~,~~ (as defined in section 761~~(8) of this title,~~) or any similar good,

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article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;

(38A) The term “master netting agreement”—

(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and

(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a);

(38B) The term “master netting agreement participant” means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor;

(46) The term "repo participant" means an entity that, ~~on~~ at any ~~day during the period beginning 90 days~~ time before ~~the date of~~ the filing of the petition, has an outstanding repurchase agreement with the debtor;

(47) The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—

(A) means—

(i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such

certificates of deposit, eligible bankers'’ acceptances, or securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' ~~acceptances, or securities as described above~~ acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than ~~one~~ 1 year after such ~~transfers~~ transfer or on demand, against the transfer of funds;

(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);

(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or

(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

(B) does not include a repurchase obligation under a participation in a commercial mortgage loan;

(48) The term “securities clearing agency” means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A.

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(48A) The term "securities self regulatory organization" means either a securities association registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities Exchange Commission under section 6 of the Securities Exchange Act of 1934.

(53B) The term "swap agreement"—

(A) means--—

(Ai) an any agreement, (including the terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement in such agreement, which is—

(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap agreement, currency option, any other similar agreement (including, and basis swap;

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

(III) a currency swap, option, future, or forward agreement;

(IV) an equity index or equity swap, option, future, or forward agreement;

(V) a debt index or debt swap, option, future, or forward agreement;

(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

(VIII) a weather swap, weather derivative, or weather option;

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(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that—

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into ~~any of the foregoing);~~an agreement or transaction referred to in this subparagraph;

~~(B) any combination of the foregoing; or~~

~~(C) a master agreement for any of the foregoing together with all supplements;~~

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but

not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000;

§ 741

(7) "securities contract"

(A) means—

(i) a contract for the purchase, sale, or loan of a security, ~~including an option for the purchase or sale of a security,~~a certificate of deposit, ~~or~~ a mortgage loan or any interest in a mortgage loan, a group or index of securities (including any, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(ii) any option entered into on a national securities exchange relating to foreign currencies~~, or the guarantee of any settlement of cash or securities by or to a securities clearing agency~~;

(iii) the guarantee by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or

sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(iv) any margin loan;

(v) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;

(vi) any combination of the agreements or transactions referred to in this subparagraph;

(vii) any option to enter into any agreement or transaction referred to in this subparagraph;

(viii) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi) or (vii); or

(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

§ 761

(4) "commodity contract" means--

(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

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(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; ~~or~~

(E) with respect to a commodity options dealer, commodity option;

(F) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

(G) any combination of the agreements or transactions referred to in this paragraph;

(H) any option to enter into an agreement or transaction referred to in this paragraph;

(I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or

(J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562;

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16. Additional Exceptions to the Automatic Stay

The Bill adds provisions to Bankruptcy Code section 362(b) (which sets forth exceptions to the automatic stay imposed by section 362(a)) pertinent to commercial bankruptcies. Under new section 362(b)(25), a self regulatory organization in the exercise of its regulatory powers may commence and continue an investigation and may enforce an order or decision that is not for monetary sanctions, despite the filing of a petition.

Additionally, under new section 362(b)(27), a master netting agreement participant may offset a mutual debt and claim under a "master netting agreement" (see definitional changes).

Bankruptcy Code section 362(b), incorporating the proposed language of the Bill, provides in pertinent part:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

* * *

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institution~~s~~, financial participant or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institution~~s~~, financial participant, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant or financial participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, under the control of or due from such repo participant

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or financial participant to margin, guarantee, secure or settle repurchase agreements;

* * *

(17) under subsection (a) of this section, of the setoff by a swap participant, or financial participant of any mutual debt and claim under or in connection with any one or more swap ~~agreement~~ agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant or financial participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by, pledged to, under the control of, or due from such swap participant or financial participant to margin, guarantee, secure, or settle any swap agreement; ~~or~~

* * *

(25) under subsection (a), of–

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

* * *

(27) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such

agreements or against cash, securities, or other property held by, pledged to, under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

17. Liquidation, Termination, or Acceleration of Financial Contracts

The Bill preserves the rights of contract parties to liquidate, and clarifies the right to terminate or accelerate, securities contracts (section 555), commodities or futures contracts (section 556), repurchase contracts (section 559), and swap agreements (section 560).

Additionally, the Bill adds a new section 561 of the Bankruptcy Code to preserve rights to terminate liquidate, or offset under a master netting agreement and across contracts (including in connection with cases under the new chapter 15).

Bankruptcy Code sections 555, 556, 559, 560 and the new section 561, incorporating the proposed language of the Bill, provide as follows:

§ 555. Contractual right to liquidate, terminate or accelerate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, financial participant, or securities clearing agency to cause the liquidation, termination, or acceleration of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), national securities exchange, a national securities association, ~~or~~ a securities clearing agency a contract market designated under the Commodity Exchange Act, a

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derivatives transaction execution facility registered under the Commodity Exchange Act, a or a board of trade (as defined in the Commodity Exchange Act), or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.

§ 556. Contractual right to liquidate, terminate or accelerate a commodities contract or forward contract

The contractual right of a commodity broker, financial participant, or forward contract merchant to cause the liquidation, termination or acceleration of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a ~~clearing organization or contract market~~ derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

§ 559. Contractual right to liquidate, terminate or accelerate a repurchase agreement

The exercise of a contractual right of a repo participant or financial participant to cause the liquidation, termination, or acceleration of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant or financial participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase

agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, or a securities clearing agency, and a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

§ 560. Contractual right to liquidate, terminate, or accelerate a swap agreement

The exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination, or acceleration of a one or more swap agreements because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with any swap agreementthe termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice..

§ 561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts; proceedings under chapter 15

(a) Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the

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termination, liquidation, or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more (or the termination, liquidation, or acceleration of one or more)—

(1) securities contracts, as defined in section 741(7);

(2) commodity contracts, as defined in section 761(4);

(3) forward contracts;

(4) repurchase agreements;

(5) swap agreements; or

(6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b)(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a) except to the extent that the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor and traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility

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registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a).

(3) No provision of subparagraph (A) or (B) of paragraph (2) shall prohibit the offset of claims and obligations that arise under—

(A) a cross-margining agreement or similar arrangement that has been approved by the Commodity Futures Trading Commission or submitted to the Commodity Futures Trading Commission under paragraph (1) or (2) of section 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission; or

(B) any other netting agreement between a clearing organization (as defined in section 761) and another entity that has been approved by the Commodity Futures Trading Commission.

(c) As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

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18. New Provision on Commodity Broker Liquidations

The Bill adds a new section 767 of the Bankruptcy Code, entitled "Commodity Broker Liquidations," making clear that the exercise of rights under forward contracts, swaps or the like does not affect the priority of any resulting unsecured claim.

New section 767 provides as follows:

> **§ 767. Commodity broker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants.**
>
> Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, financial participant, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

19. New Provision on Stockbroker Liquidations

The Bill adds a new section 753 of the Bankruptcy Case, entitled "Stockbroker Liquidations," making clear that the exercise of rights under forward contracts, swaps or the like does not affect the priority of any resulting unsecured claim.

New section 753 provides as follows:

> **§ 753. Stockbroker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants**
>
> Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, financial participant, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

20. Preservation of Offset Rights of Non-Debtor Parties to Financial Contracts

The Bill amends the setoff provisions of section 553 of the Bankruptcy Code to preserve the setoff rights of: (i) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency under a commodity contract, forward contract, securities contract, regarding margin payments (under section 362(b)(6)); (ii) a repo participant or financial participant, under repurchase

agreements regarding margin payments (under section 362(b)(7)); (iii) a swap participant or financial participant under a swap agreement regarding margin payments (under section 362(b)(17)); (iv) a master netting agreement participant, under a master netting agreement regarding margin payments (under section 362(b)(27)); (v) a party to a securities contract under section 555; (vi) a party to a commodities contract or forward contract under section 556; (vii) a party to a repurchase agreement under section 559; (viii) a party to a swap agreement under section 560; and (ix) a party to a master netting agreement under section 561.

Bankruptcy Code section 553, incorporating the proposed language of the Bill, provides in pertinent part:

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that--

(1) the claim of such creditor against the debtor is disallowed;

(2) such claim was transferred, by an entity other than the debtor, to such creditor--

(A) after the commencement of the case; or

(B)(i) after 90 days before the date of the filing of the petition; and

(ii) while the debtor was insolvent (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561); or

(3) the debt owed to the debtor by such creditor was incurred by such creditor--

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561).

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(~~14),~~ 17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to

the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of--

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

21. Expansion of Rule 9011

The Bill recommends that courts broaden the application of Rule 9011 of the Federal Rules of Bankruptcy Procedure (which is identical to Rule 11 of the Federal Rules of Civil Procedure) so that attorneys will have a duty to make a reasonable inquiry to verify the accuracy of information in all documents submitted to a court or to a trustee, not simply documents that are signed by an attorney. This language expressly includes schedules and statements of financial affairs, which are generally not signed by attorneys. The attorney has a duty to make a reasonable inquiry and verify that the information in the documents is (a) well grounded in fact; and (b) warranted by existing law.

Under existing law, attorneys were only held to the Bankruptcy Rule 9011 standards for documents signed by attorneys.

22. Cure of Nonmonetary Defaults

The Bill alters the requirements for the assumption of a defaulted executory contract or unexpired lease pursuant to Bankruptcy Code section 365(b) by providing that a trustee is no longer required to cure certain nonmonetary defaults. If it is impossible for the trustee to cure defaults by performing nonmonetary acts at and after the time of assumption, the trustee need not cure those defaults. However, if a default arises from a failure to operate in accordance with a nonresidential real property lease, then the trustee must cure the default when the lease is assumed, including any damages related to the breach.

The Bill also makes corresponding changes to Bankruptcy Code section 1124(2) with respect to the requirements that a plan must meet to avoid impairing a class of claims or interests. The changes requires that a plan, to avoid impairment, must compensate a claim holder for any actual pecuniary loss incurred by such holder resulting from a failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to certain requirements.

Bankruptcy Code sections 365(b)(1) and 1124(2), incorporating the proposed language of the Bill, provide in pertinent part:

§ 365(b)(1).

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease of the debtor, the trustee may not assume such contract or lease unless, at the time of the assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

§ 1124(2).

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor

or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

23. Key Employee Retention Plans And Wage Claims

Section 503(b) of the Bankruptcy Code is amended to incorporate NLRB awards. The more significant amendment, however, is the addition of Bankruptcy Code section 503(c), which establishes the standard for the approval of retention bonus plans, often referred to as "KERP" programs.

The details of KERP programs vary dramatically, but they generally provide for bonuses to certain employees for remaining with the company during the chapter 11 process. Before the Bill, debtors sought approval of KERP programs based upon the common-law "necessity" doctrine and Bankruptcy Code section 105(a). The Bill substantially increases the applicable legal standard for approval of such bonuses.

Bankruptcy Code section 503(c)(1) provides that that a debtor seeking approval of a retention bonus program must prove that: (a) the employee in question has a bona fide job offer with similar or superior compensation; (b) the services are essential to the business's survival; and (c) that the retention bonuses do not exceed certain benchmarks related to bonuses for all employees. This amendment serves to combat the perception and/or reality that the retention bonus programs primarily benefit insiders and upper management.

A similar rationale applies to severance payments to insiders. To obtain approval of severance payments pursuant to Bankruptcy Code section 503(c)(2), the debtor must establish that the payment is part of a regular, prepetition program and must also comply with certain financial benchmarks related to severance pay provided to nonmanagement employees. Finally, the Bill provides for a catch-all provision in Bankruptcy Code section 503(c).

The Bill will test many of the current assumptions concerning the need for KERP bonuses or similar programs. Although the Bill does not ban such programs per se, the standard of proof that a debtor must meet may be found prohibitive.

Bankruptcy Code section 503, incorporating the proposed language of the Bill, provides in pertinent part:

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including—

(i) wages, salaries and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligations made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

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(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officer, managers, or consultants hired after the date of the filing of the petition.

24. Modifications to Standards for Approving Disclosure Statement and Plan Confirmation

The Bill provides several modifications to the provisions of the Bankruptcy Code related to plans and disclosure statements for debtors filing as small businesses. The change to Bankruptcy Code section 1125(a)(1) allows courts flexibility in determining what constitutes adequate information in light of the circumstances of the particular case. Interestingly, some changes, including the proposed change to Bankruptcy Code section 1125(a)(1), apply to all chapter 11 cases, not just cases that qualify to be treated as a small business.

The Bill also revamps the process of solicitation and confirmation process for a debtor case that qualifies as a small business pursuant to Bankruptcy Code section 1121(e). It provides the small business debtor with several options for confirming a plan of reorganization, including: (i) filing a plan that also serves as a disclosure statement; (ii) using certain standardized forms for disclosure statements; and (iii) combining the hearing on the plan and disclosure statement.

Bankruptcy Code section 1125(a), incorporating the proposed language of the Bill, provides in pertinent part:

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, ~~that would enable~~ including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical ~~reasonable~~ investor typical of the holders of claims and interests in the case

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that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information; and

* * *

(f) Notwithstanding subsection (b), in a ~~case in which the debtor has elected under section 1121(e) to be considered a~~ small business case—

(1) the court may conditionally determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;

(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and

(3) (A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing

(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement ~~as long as~~ if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the hearing on confirmation of the plan; and

(C) the ~~a~~ hearing on the disclosure statement may be combined with ~~the~~ a hearing on confirmation of a plan.

25. Adoption of New Chapter 15

One of the most significant changes proposed in the Bill is the introduction of new Chapter 15, which provides a framework for foreign debtors or trustees seeking recognition of foreign bankruptcy proceedings in United States bankruptcy courts. The introduction of new Chapter 15 will replace Bankruptcy Code section 304, which currently governs the treatment of foreign proceedings. Chapter 15 is based upon the Model Law on Cross-Border Insolvency, which was promulgated by the United Nations Commission for International Trade Law ("UNCITRAL"). For ease of reference, the provisions of new Chapter 15 are attached hereto as Exhibit A.

Under Bankruptcy Code section 1515 a U.S. bankruptcy court will recognize a foreign insolvency proceeding if the foreign representative files a petition accompanied by: (i) a judicial decision commencing such foreign proceeding and appointing the foreign representative; (ii) a certificate of the foreign court affirming the existence of the foreign proceeding and appointment of the foreign representative; or (iii) in the event (i) and (ii) are not available, such other evidence that the court will deem satisfactory of the existence of the foreign proceeding and appointment of the foreign representative.

After filing the petition, the bankruptcy court will enter an order recognizing the foreign proceeding pursuant to Bankruptcy Code section 1517 after notice and a hearing if the following elements are satisfied: (i) the foreign proceeding is either "main" or "nonmain;"[1] (ii) the foreign representative is a person or body; and (iii) the petition meets the requirement of Bankruptcy Code section 1515. The granting of recognition can be denied if the action "would be manifestly contrary to the public policy of the United States."

The foreign representative can also seek provisional relief from the bankruptcy court after filing the petition pursuant to Bankruptcy Code section 1515, but before the bankruptcy court has entered an order for relief pursuant to Bankruptcy Code section 1517. Such relief will be granted if the foreign representative can show that the relief is "urgently needed to protect the assets of the debtor or the interests of creditors" based upon the standards for granting an injunction used by United States courts. Generally speaking, most forms of relief that a trustee or debtor in possession could obtain under the Bankruptcy Code (including the right to sell property free and clear of liens) are available to foreign representatives.

Pursuant to new Bankruptcy Code section 1521, the potential relief granted by an order granting recognition of a foreign proceeding must be necessary to protect the assets of the debtor or interests of its creditors and includes, among other things:

- **(i) staying the commencement of continuation of actions concerning the debtor's assets, rights, obligations or liabilities, including execution against the debtor's assets or preventing the transfer of assets;**
- **(ii) providing for discovery;**
- **(iii) providing for the administration of the debtor's assets; and**
- **(iv) any other relief available to a trustee under the Bankruptcy Code.**

---

[1] A "main proceeding" is a foreign proceeding pending in the country where the foreign debtor has its main place of business. A "nonmain" proceeding is a foreign proceeding that is not a main proceeding, but pending in a country where the foreign debtor does business.

After obtaining recognition, the foreign representative may sue or be sued in U.S. courts. In addition, upon obtaining recognition, the foreign debtor must comply with certain sections of the Bankruptcy Code including Bankruptcy Code sections 361, 362 and 363.

After granting recognition, bankruptcy courts can also provide foreign representatives with "additional assistance." The meaning of additional assistance under chapter 15 is unclear, but it appears that it would permit the bankruptcy courts to use the case law under Bankruptcy Code section 304 to provide relief beyond that allowed under Bankruptcy Code section 1521. Additional assistance will be granted by bankruptcy courts where such additional assistance, consistent with the principles of comity, will assure: (i) just treatment of holders of claims against the debtor; (ii) protection of U.S. holders of claim against prejudice and inconvenience in processing of such holders' claims; (iii) prevention of preferential or fraudulent transfers; (iv) distributions substantially in accordance with the order used by the Bankruptcy Code; and (v) provision of a fresh start to individual debtors.

26. Tax Provisions

A. TREATMENT OF CERTAIN LIENS

The Bill amends section 724 of the Bankruptcy Code to provide special treatment for tax liens on real or personal property of an estate in a chapter 7 proceeding by requiring the trustee to exhaust the unencumbered assets of the estate and recover certain costs and expenses from property securing an allowed secured claim before subordinating the tax lien. In particular, the amendments would provide greater protection for holders of ad valorem tax liens on real or personal property by excluding such tax liens from the general ordering rules under section 724(b) governing distributions with respect to property securing tax liens.

Bankruptcy Code section 724, incorporating the proposed language of the Bill, provides in pertinent part:

> (b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
>
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1) (except that such expenses, other than claims for wages, salaries, or commissions that arise after the date of the filing of the

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petition, shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

* * *

(e) Before subordinating a tax lien on real or personal property of the estate, the trustee shall—

(1) exhaust the unencumbered assets of the estate; and

(2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.

(f) Notwithstanding the exclusion of ad valorem tax liens under this section and subject to the requirements of subsection (e), the following may be paid from property of the estate which secures a tax lien, or the proceeds of such property:

(1) Claims for wages, salaries, and commissions that are entitled to priority under section 507(a)(4).

(2) Claims for contributions to an employee benefit plan entitled to priority under section 507(a)(5).

B. DETERMINATION OF TAX LIABILITY

The Bill amends Bankruptcy Code section 505 to provide greater protection to holders of claims for ad valorem taxes on real or personal property by removing issues regarding the amount or legality of such taxes from the jurisdiction of the bankruptcy court if the applicable non-bankruptcy law statute of limitations has expired.

Amended section 505 would also require the clerk of each district to maintain a listing under which a governmental entity responsible for the collection of taxes within such district may designate an address for service of requests and describe where further information for filing such requests may be found.

Bankruptcy Code section 505, incorporating the proposed language of the Bill, provides in pertinent part:

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether

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or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction be-fore the commencement of the case under this title; or

(B) any right of the estate to a tax refund, before the earlier of

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request; or

(C) the amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.

(b)(1)(A) The clerk shall maintain a list under which a Federal, State, or local governmental unit responsible for the collection of taxes within the district may

(i) designate an address for service of requests under this subsection; and

(ii) describe where further information concerning additional requirements for filing such requests may be found.

(B) If such governmental unit does not designate an address and provide such address to the clerk under subparagraph (A), any request made under this subsection may be served at the address for the filing of a tax return or protest with the appropriate taxing authority of such governmental unit.

(2) A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax at the address and in the manner designated in paragraph (1). Unless such return is fraudulent, or contains a material misrepresentation, the estate, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax--

C. FILING OF PROOFS OF CLAIM OR INTEREST

This Bill amends section 501 of the Bankruptcy Code to provide that a claim for a debtor's liability for fuel tax which is filed by the base jurisdiction designated under the International Fuel Tax Agreement shall be allowed as a single claim.

Bankruptcy Code section 501, incorporating the proposed language of the Bill, provides in pertinent part:

> (e) A claim arising from the liability of a debtor for fuel use tax assessed consistent with the requirements of section 31705 of title 49 may be filed by the base jurisdiction designated pursuant to the International Fuel Tax Agreement (as defined in section 31701 of title 49) and, if so filed, shall be allowed as a single claim.

D. RATE OF INTEREST ON TAX CLAIMS

The Bill adds a new section 511 to the Bankruptcy Code, providing that applicable nonbankruptcy law governs the rate of interest to be paid on tax claims.

New section 511 provides:

> (a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.
>
> (b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

E. PRIORITIES

The Bill amends section 507(a)(8) of the Bankruptcy Code, which accords eighth priority to allowed unsecured claims of government units, generally to provide for tolling of time periods applicable under the section to take into account certain events. These events would include stays of proceedings in a prior bankruptcy case, and the pendency of hearings or appeals during which a governmental unit is prohibited from collecting a tax under applicable nonbankruptcy law.

Bankruptcy Code section 507(a)(8), incorporating the proposed language of the Bill, provides in pertinent part:

(a) The following expenses and claims have priority in the following order:

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts — for a taxable year ending on or before the date of the filing of the petition —

(i) ~~for a taxable year ending on or before the date of the filing of the petition~~ for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days , plus any time plus 30 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to such tax that was made within 240 days after such assessment that tax was pending , before the date of the filing of the petition; or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

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An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

F. EFFECT OF CONFIRMATION

The Bill amends section 1141 of the Bankruptcy Code to provide that confirmation of a bankruptcy plan does not discharge a corporate debtor from any debt for: (i) money or credit obtained by false representation owed to a domestic governmental unit or to a person as the result of an action filed with respect to certain claims against the Federal or a State government; or (ii) a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat such tax.

Bankruptcy Code section 1141, incorporating the proposed language of the Bill, provides in pertinent part:

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

* * *

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person

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as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

G. AUTOMATIC STAY

This Bill amends section 362 of the Bankruptcy Code to: (i) limit the automatic stay of U.S. Tax Court proceedings to prepetition taxes, and (ii) provide that the automatic stay does not prohibit a governmental unit from setting off an income tax refund with respect to a prepetition period against an income tax liability for a prepetition period.

Bankruptcy Code section 362, incorporating the proposed language of the Bill, provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

* * *

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

* * *

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in

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which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

H. CONFIRMATION OF PLAN

The Bill amends section 1129 of the Bankruptcy Code to provide, as a prerequisite for confirmation of a Chapter 11 bankruptcy plan that includes tax claims, that the plan require the debtor to make regular cash installment payments that pay such claim in full over a maximum of 5 years following the date of the order for relief.

Bankruptcy Code section 1129, incorporating the proposed language of the Bill, provides in pertinent part:

(a) The court shall confirm a plan only if all of the following requirements are met:

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six ~~years after the date of~~ assessment of such claim, of a ~~value, as of the effective date of the plan, equal to the allowed amount of such claim~~ . regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b));

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

I. STATUTORY LIENS

Under section 6323 of the Internal Revenue Code, a lien imposed by the Internal Revenue Service on tangible personal property purchased at retail is not valid against a purchaser in the ordinary course of the seller's business, unless at the time of purchase the purchaser intends the purchase to (or knows the purchase will) hinder, evade, or defeat the collection of any federal tax. The amendment to section 545 of the Bankruptcy Code denies the avoidance of statutory tax liens in the case of the latter type of purchaser described above.

Bankruptcy Code section 545, incorporating the proposed language of the Bill, provides in pertinent part:

> The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
>
> (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law.

J. TAX LIABILITY

The Bill amends section 960 of the Federal Judicial Code to require officers and agents conducting any business under court authority to pay all Federal, State, and local taxes when due in the course of business, unless it is a property tax secured by a lien against estate property which is abandoned by the bankruptcy trustee, or payment of the tax is excused under a specific bankruptcy law. In a case pending under chapter 7, the amendment would permit payment of tax to be deferred if the tax was not incurred by a trustee appointed under chapter 7, or the court makes a finding of probable insufficiency of funds.

28 U.S.C. § 960, incorporating the proposed language of the Bill, provides in pertinent part:

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

(b) A tax under subsection (a) shall be paid on or before the due date of the tax under applicable nonbankruptcy law, unless—

(1) The tax is a property tax secured by a lien against property that is abandoned under section 554 of title 11, within a reasonable period of time after the lien attaches, by the trustee in a case under title 11; or

(2) payment of the tax is excused under a specific provision of title 11.

(c) In a case pending under chapter 7 of title 11, payment of a tax may be deferred until final distribution is made under section 726 of title 11, if—

(1) the tax was not incurred by a trustee duly appointed or elected under chapter 7 of title 11; or

(2) before the due date of the tax, an order of the court makes a finding of probable insufficiency of funds of the estate to pay in full the administrative expenses allowed under section 503(b) of title 11 that have the same priority in distribution under section 726(b) of title 11 as the priority of that tax.

K. ALLOWANCE OF ADMINISTRATIVE EXPENSES

The Bill amends section 503 of the Bankruptcy Code to provide that taxes treated as allowed administrative expenses include both unsecured and secured taxes, and property taxes whether liability for the tax is in rem, in personam, or both. Amended Section 503 also provides that a governmental unit need not file a request for payment of administrative expenses relating to a tax liability or tax penalty.

Bankruptcy Code section 503, incorporating the proposed language of the Bill, provides in pertinent part:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

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(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

L. DETERMINATION OF SECURED STATUS

The Bill amends section 506 of the Bankruptcy Code to allow a trustee to recover from property securing a claim the payment of all ad valorem property taxes relating to the property.

Bankruptcy Code section 506, incorporating the proposed language of the Bill, provides in pertinent part:

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property .

M. DISTRIBUTION OF PROPERTY OF THE ESTATE

The Bill amends section 726 of the Bankruptcy Code to require as a condition for payment of tardily filed priority tax claims that they be filed either before the trustee commences distribution, or ten days following the mailing to creditors of the summary of the trustee's final report, whichever is earlier.

Bankruptcy Code section 726, incorporating the proposed language of the Bill, provides in pertinent part:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of—

(A) the date that is 10 days after mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

N. POSTPETITION DISCLOSURE AND SOLICITATION

The amendment to section 1125 of the Bankruptcy Code redefines "adequate disclosure," for chapter 11 postpetition disclosure and solicitation purposes, to include full discussion of the potential material Federal and State tax consequences of the plan to the debtor and to a hypothetical investor that is representative of the holders of claims or interest in the case.

Bankruptcy Code section 1125, incorporating the proposed language of the bill, provides in pertinent part:

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical reasonable investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate

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information need not include such information about any other possible or proposed plan;

O. SPECIAL PROVISIONS RELATED TO TREATMENT OF STATE AND LOCAL TAXES

The Bill replaces existing section 346 of the Bankruptcy Code with the provisions set forth below. In general, amended section 346 simplifies and clarifies the state and local income tax consequences of a bankruptcy filing by conforming such consequences to federal tax consequences. As a result, it is clear, for example, that for state and local tax purposes, as is the case for Federal tax purposes, a separate taxable estate is created in the case of an individual bankruptcy filing, but no separate estate is created in the case of a bankruptcy filing by a partnership debtor.

Bankruptcy Code section 346, incorporating the proposed language of the Bill, provides in pertinent part:

(a) Whenever the Internal Revenue Code of 1986 provides that a separate taxable estate or entity is created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of such estate shall be taxed to or claimed by the estate, a separate taxable estate is also created for purposes of any State and local law imposing a tax on or measured by income and such income, gain, loss, deductions, and credits shall be taxed to or claimed by the estate and may not be taxed to or claimed by the debtor. The preceding sentence shall not apply if the case is dismissed. The trustee shall make tax returns of income required under any such State or local law.

(b) Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a debtor under this title, and the income, gain, loss, deductions, and credits of an estate shall be taxed to or claimed by the debtor, such income, gain, loss, deductions, and credits shall be taxed to or claimed by the debtor under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by the estate. The trustee shall make such tax returns of income of corporations and of partnerships as are required under any State or local law, but with respect to partnerships, shall make such returns only to the extent such returns are also required to be made under such Code. The estate shall be liable for any tax imposed on such corporation or partnership, but not for any tax imposed on partners or members.

(c) With respect to a partnership or any entity treated as a partnership under a State or local law imposing a tax on or measured by income that is a debtor in a case under this title, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of any income, gain, loss, deduction, or credit of a partner or member that is distributed, or considered distributed, from such partnership, after the commencement of the case, is gain, loss, income, deduction, or credit, as

the case may be, of the partner or member, and if such partner or member is a debtor in a case under this title, shall be subject to tax in accordance with subsection (a) or (b).

(d) For purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor in a case under this title shall terminate only if and to the extent that the taxable period of such debtor terminates under the Internal Revenue Code of 1986.

(e) The estate in any case described in subsection (a) shall use the same accounting method as the debtor used immediately before the commencement of the case, if such method of accounting complies with applicable nonbankruptcy tax law.

(f) For purposes of any State or local law imposing a tax on or measured by income, a transfer of property from the debtor to the estate or from the estate to the debtor shall not be treated as a disposition for purposes of any provision assigning tax consequences to a disposition, except to the extent that such transfer is treated as a disposition under the Internal Revenue Code of 1986.

(g) Whenever a tax is imposed pursuant to a State or local law imposing a tax on or measured by income pursuant to subsection (a) or (b), such tax shall be imposed at rates generally applicable to the same types of entities under such State or local law.

(h) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld or collected was paid.

(i)(1) To the extent that any State or local law imposing a tax on or measured by income provides for the carryover of any tax attribute from one taxable period to a subsequent taxable period, the estate shall succeed to such tax attribute in any case in which such estate is subject to tax under subsection (a).

(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) to the extent consistent with the Internal Revenue Code of 1986.

(3) The estate may carry back any loss or tax attribute to a taxable period of the debtor that ended before the date of the order for relief under this title to the extent that—

(A) applicable State or local tax law provides for a carryback in the case of the debtor; and

(B) the same or a similar tax attribute may be carried back by the estate to such a taxable period of the debtor under the Internal Revenue Code of 1986.

(j)(1) For purposes of any State or local law imposing a tax on or measured by income, income is not realized by the estate, the debtor, or a successor to the debtor by reason of discharge of indebtedness in a case under this title, except to the extent, if any, that such income is subject to tax under the Internal Revenue Code of 1986.

(2) Whenever the Internal Revenue Code of 1986 provides that the amount excluded from gross income in respect of the discharge of indebtedness in a case under this title shall be applied to reduce the tax attributes of the debtor or the estate, a similar reduction shall be made under any State or local law imposing a tax on or measured by income to the extent such State or local law recognizes such attributes. Such State or local law may also provide for the reduction of other attributes to the extent that the full amount of income from the discharge of in debtedness has not been applied.

(k)(1) Except as provided in this section and section 505, the time and manner of filing tax returns and the items of income, gain, loss, deduction, and credit of any taxpayer shall be determined under applicable nonbankruptcy law.

(2) For Federal tax purposes, the provisions of this section are subject to the Internal Revenue Code of 1986 and other applicable Federal nonbankruptcy law.

P. Debtor's Duties

The Bill amends section 521 of the Bankruptcy Code to (i) permit a taxing authority to petition the court to convert or dismiss a case if the debtor fails to timely file a tax or return or obtain an extension, and (ii) if the debtor does not file the return or obtain an extension within 90 days thereafter, direct the court to convert or dismiss the case.

Bankruptcy Code section 521, incorporating the proposed language of the Bill, provides in pertinent part:

(j)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the

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taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under the paragraph, the court shall convert or dismiss the case, whichever is in the best interest of creditors and the estate.

27. Municipal Bankruptcies

The Bill clarifies that a voluntary case under chapter 9 is commenced by the filing of a petition under chapter 9 by an entity that may be a debtor under that chapter and that commencement of such a case constitutes an order for relief under chapter 9 of the Bankruptcy Code.

Bankruptcy Code sections 921(d) and 301, incorporating the proposed language of the Bill, provides in pertinent part:

§ 921. Petition and Proceedings Relating to Petition.

(d) If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter notwithstanding section 301(b).

§ 301. Voluntary Cases.

(a) A voluntary case under a chapter of this title is commenced by the filing with the Bankruptcy Court of a petition under such chapter by an entity that may be a debtor under such chapter.

(b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

28. Healthcare and Employee Benefits

This Bill amends the Bankruptcy Code to incorporate several new provisions for handling bankruptcies involving various health care entities. The Bill places new responsibilities on health care debtors.

A. DEFINITION OF HEALTH CARE BUSINESS

The Bill contains several new definitions for use in new sections of the Bankruptcy Code. These new definitions expressly do not affect who may be a debtor under section 109(b) of the Bankruptcy Code.

Bankruptcy Code section 101, incorporating the proposed language of the Bill,

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provides in pertinent part as follows:

(27A) "health care business"—

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes--

(i) any--(I) general or specialized hospital; (II) ancillary ambulatory, emergency, or surgical treatment facility; (III) hospice; (IV) home health agency; and (V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any--(I) skilled nursing facility; (II) intermediate care facility; (III) assisted living facility; (IV) home for the aged; (V) domiciliary care facility; and (VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living;

(40A) 'patient' means any individual who obtains or receives services from a health care business;

(40B) 'patient records' means any written document relating to a patient or a record recorded in a magnetic, optical, or other form of electronic medium;

B. STORAGE OF PATIENT RECORDS

New section 351 requires the following procedures for debtors in possession or trustees who wish to dispose of patient records if they cannot afford to pay for storage of patient records in the manner required by law: (i) publication of notice in one or more newspapers notifying patients and insurance carriers of the intent to destroy patient records and the right of patients and insurance carriers to claim such records, (ii) holding the records for at least 365 days after publication, (iii) after the 365 day period has run, requesting permission from Federal agencies to deposit the patient records, and (iv) providing the manner for destruction of such records.

New section 351 provides as follows:

> If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law, the following requirements shall apply:
>
> (1) The trustee shall—
>
> (A) promptly publish notice, in 1 or more appropriate newspapers, that if patient records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and
>
> (B) during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records.
>
> (2) If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified mail, at the end of such 365-day period a written request to each appropriate Federal agency to request permission from that agency to deposit the patient records with that agency, except that no Federal agency is required to accept patient records under this paragraph.
>
> (3) If, following the 365-day period described in paragraph (2) and after providing the notification under paragraph (1), patient records are not claimed by a patient or insurance provider, or request is not granted by a Federal agency to deposit such records with that agency, the trustee shall destroy those records by--

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(A) if the records are written, shredding or burning the records; or

(B) if the records are magnetic, optical, or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.

C. ADMINISTRATIVE EXPENSE CLAIM FOR CLOSING HEALTH CARE BUSINESS

The Bill also provides a new administrative expense claim for certain expenses related to closing a health care business. The amendment will include as an administrative expense the costs of closing a health care business, whether incurred by a debtor-in-possession, a trustee, a Federal agency or a department or agency of a state or division of a state. These costs or expenses include the cost incurred in disposing of patient records (new section 351) or transferring patients to a new health care business (new section 704(a)(12)).

Bankruptcy Code section 503(b), incorporating the proposed language of the Bill, provides in pertinent part:

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

D. APPOINTMENT OF PATIENT OMBUDSMAN

The Bill provides for new Bankruptcy Code section 333, which requires the court to appoint an ombudsman to monitor the quality of patient care and to represent the interests of the patients of a health care business debtor (unless the court determines the appointment to be unnecessary). This amendment spells out the method for appointment of the ombudsman, details the duties of the ombudsman (monitor the quality of patient care (including interviewing patients and physicians)), report to the court in sixty (60) day intervals regarding the quality of patient care, if patient care is declining or being materially compromised, file a motion or written report immediately, and granting the ombudsman access to patient records while maintaining confidentiality), and provides that the ombudsman is a professional person subject to the Bankruptcy Code's requirements regarding employment, disclosures and compensation.

New section 333 provides:

(a) (1) If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

(2) (A) If the court orders the appointment of an ombudsman under paragraph (1), the United States trustee shall appoint 1 disinterested person (other than the United States trustee) to serve as such ombudsman.

(B) If the debtor is a health care business that provides long-term care, then the United States trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending to serve as the ombudsman required by paragraph (1).

(C) If the United States trustee does not appoint a State Long-Term Care Ombudsman under subparagraph (B), the court shall notify the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending, of the name and address of the person who is appointed under subparagraph (A).

(b) An ombudsman appointed under subsection (a) shall--

(1) monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians;

(2) not later than 60 days after the date of appointment, and not less frequently than at 60-day intervals thereafter, report to the court after notice to the parties in interest, at a hearing or in writing, regarding the quality of patient care provided to patients of the debtor; and

(3) if such ombudsman determines that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised, file with the court a motion or a written report, with notice to the parties in interest immediately upon making such determination.

(c) (1) An ombudsman appointed under subsection (a) shall maintain any information obtained by such ombudsman under this section that relates to patients (including information relating to patient records) as confidential information. Such ombudsman may not review confidential patient records unless the court approves such review in advance and imposes restrictions on such ombudsman to protect the confidentiality of such records.

(2) An ombudsman appointed under subsection (a)(2)(B) shall have access to patient records consistent with authority of such ombudsman under the Older Americans Act of 1965 and under non-Federal laws governing the State Long-Term Care Ombudsman program.

E. Exception To Automatic Stay For Secretary of HHS

The Bill amends Bankruptcy Code section 362(b) to incorporate a new exception to the automatic stay. This amendment provides that it is not a violation of the automatic stay for the Secretary of Health and Human Services to exclude the debtor from participation in medicare or any other Federal health care program.

New Bankruptcy Code section 362(b), incorporating the proposed language of the Bill, provides:

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

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Exhibit A: Chapter 15 - Ancillary and Other Cross Border Cases

Section 1501. Purpose and scope of application

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(b) This chapter applies where—

(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

(2) assistance is sought in a foreign country in connection with a case under this title;

(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to—

(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

Section 1502. Definitions

For the purposes of this chapter, the term—

(1) 'debtor' means an entity that is the subject of a foreign proceeding;

(2) 'establishment' means any place of operations where the debtor carries out a nontransitory economic activity;

(3) 'foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding;

(4) 'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) 'foreign nonmain proceeding' means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment;

(6) 'trustee' includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title;

(7) 'recognition' means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; and

(8) 'within the territorial jurisdiction of the United States', when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

Section 1503. International obligations of the United States

To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.

Section 1504. Commencement of ancillary case

A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

Section 1505. Authorization to act in a foreign country

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

Section 1506. Public policy exception

Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

Section 1507. Additional assistance

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Section 1508. Interpretation

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

Section 1509. Right of direct access

(a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.

(b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—

(1) the foreign representative has the capacity to sue and be sued in a court in the United States;

(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

(3) a court in the United States shall grant comity or cooperation to the foreign representative.

(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

(e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

Section 1510. Limited jurisdiction

The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.

Section 1511. Commencement of case under section 301 or 303

(a) Upon recognition, a foreign representative may commence—

(1) an involuntary case under section 303; or

(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

(b) The petition commencing a case under sub-section (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

Section 1512. Participation of a foreign representative in a case under this title

Upon recognition of a foreign proceeding, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

Section 1513. Access of foreign creditors to a case under this title

(a) Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.

(b) (1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor.

(2) (A) Subsection (a) and paragraph (1) do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title.

(B) Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein.

Section 1514. Notification to foreign creditors concerning a case under this title

(a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(b) Such notification to creditors with foreign addresses described in subsection (a) shall be given individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letter or other formality is required.

(c) When a notification of commencement of a case is to be given to foreign creditors, such notification shall—

(1) indicate the time period for filing proofs of claim and specify the place for filing such proofs of claim;

(2) indicate whether secured creditors need to file proofs of claim; and

(3) contain any other information required to be included in such notification to creditors under this title and the orders of the court.

(d) Any rule of procedure or order of the court as to notice or the filing of a proof of claim shall provide such additional time to creditors with foreign addresses as is reasonable under the circumstances.

Section 1515. Application for recognition

(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by—

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

Section 1516. Presumptions concerning recognition

(a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.

(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.

(c) In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.

Section 1517. Order granting recognition –

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.

(d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

Section 1518. Subsequent information

From the time of filing the petition for recognition of a foreign proceeding, the foreign representative shall file with the court promptly a notice of change of status concerning—

(1) any substantial change in the status of such foreign proceeding or the status of the foreign representative's appointment; and

(2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.

Section 1519. Relief that may be granted upon filing petition for recognition

(a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

(1) staying execution against the debtor's assets;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that,

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by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

(b) Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.

(c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(n) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

Section 1520. Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;

(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and

(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

(b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.

(c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

Section 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) (The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17), or (27) of section 362(b) or pursuant to section 362(n) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

Section 1522. Protection of creditors and other interested persons

(a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under sub-section (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.

(b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.

(c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.

(d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

Section 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

Section 1524. Intervention by a foreign representative

Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party.

Section 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.

(b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.

Section 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives

(a) Consistent with section 1501, the trustee or other person, including an examiner, authorized by the court, shall, subject to the supervision of the court, cooperate to the maximum extent possible with a foreign court or a foreign representative.

(b) The trustee or other person, including an examiner, authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a foreign court or a foreign representative.

Section 1527. Forms of cooperation

Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including—

(1) appointment of a person or body, including an examiner, to act at the direction of the court;

(2) (communication of information by any means considered appropriate by the court;

(3) coordination of the administration and supervision of the debtor’s assets and affairs;

(4) approval or implementation of agreements concerning the coordination of proceedings; and

(5) coordination of concurrent proceedings regarding the same debtor.

Section 1528. Commencement of a case under this title after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

Section 1529. Coordination of a case under this title and a foreign proceeding

If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) If the case in the United States pending at the time the petition for recognition of such foreign proceeding is filed—

(A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and

(B) section 1520 does not apply even if such foreign proceeding is recognized as a, foreign main proceeding.

(2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding—

(A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and

(B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

Section 1530. Coordination of more than 1 foreign proceeding

In matters referred to in section 1501, with respect to more than 1 foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

(1) Any relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.

(2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.

(3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

Section 1531. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.

Section 1532. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received."

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