

# Legislative Update

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## NBC Proposes Revisions to Chapter 15 of the Bankruptcy Code

**Editor's Note:** On Aug. 20, 2018, the National Bankruptcy Conference (NBC), which is comprised of approximately 60 of the nation's leading bankruptcy judges, professors and practitioners, submitted a letter (hereinafter referred to as "the Letter") to Reps. Tom Marino (R-Pa.) and David Cicilline (D-R.I.) of the Subcommittee on Regulatory Reform, and Sens. Chuck Grassley (R-Iowa) and Dianne Feinstein (D-Calif.) of the Committee on the Judiciary, regarding amendments that the NBC proposed to chapter 15 of title 11 of the U.S. Bankruptcy Code. The Letter is available at [drive.google.com/file/d/1DIfvi1wP9vQHfugAk1rcsPChmhw6VDX1/view](https://drive.google.com/file/d/1DIfvi1wP9vQHfugAk1rcsPChmhw6VDX1/view).



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Chapter 15 of the Bankruptcy Code was enacted by Congress to adopt the Model Law on Cross-Border Insolvency that was promulgated by the United Nations Commission on International Trade Law (UNCITRAL). According to the NBC, its proposed amendments to chapter 15 correct judicial interpretations of certain provisions in chapter 15 that differ from the intent of the drafters, adopts clarifications made by UNCITRAL in its Guide to Enactment and Interpretation of the

Model Law on Cross-Border Insolvency, and fixes omissions and inadequate cross-references in the Bankruptcy Code as to chapter 15. In response to the NBC's proposed amendments, counsel to the House and Senate Judiciary Committees have asked the NBC to provide comments from insolvency-oriented organizations to the NBC's proposed amendments.

ABI's International Committee held a call open to its committee members on Sept. 6 at 12:30 EST, where individual members shared their thoughts and expressed their views on the NBC's proposed amendments. Although there was general consensus concerning many of the NBC's recommendations on the committee call, a few recommendations provoked lively discussion among the participants.

For example, a number of participants commented on the NBC's recommended amendment to § 305 of the Bankruptcy Code, which would permit bankruptcy courts to abstain from chapter 7 or 11 cases where the debtor's COMI is outside of the U.S. and the bankruptcy court cannot exercise effective control over the debtor or its assets.

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### Proposed Amendments

Section	Proposed Amendment
11 U.S.C. § 103(a)	Include sections "305, 306, 556, 560, 561, and 562 of this title, and any section of this title specifically made applicable by a section of chapter 15 applies in a case under chapter 15." See Letter at 2.
11 U.S.C. § 103(k)	Section 103(k) should include "section 1505, 1511, 1513, 1514, 1523, 1531, and 1532 to apply in all cases under this title, and sections 1509 and 1510 apply whether or not a case under this title is pending." See Letter at 4.
11 U.S.C. § 109(a)	Specify the chapters to which section 109(a) applies and that specifically include that chapter 15 is not on that list. See Letter at 4-6.
11 U.S.C. § 303	Failure to amend section 303 was a drafting error and should be corrected to reflect that "[a]n involuntary case against a person commenced by filing with the bankruptcy court a petition under chapter 7 or 11 of the title ... [may be made] by foreign representative if the debtor is the subject of a foreign proceeding that has been recognized under section 1517." See Letter at 7.
11 U.S.C. § 305	The NBC proposes that "there should be a clear statutory basis for the dismissal of cases involving debtors whose center of main interests (COMI) is outside of the United States when those cases either conflict with the purposes of chapter 15 or involve a debtor or assets over which the court does not have effective control." See Letter at 10. The revision to section 305(a) would include subsection 2(C), which would state: "(C) the debtor's center of main interests is not the United States and the court does not exercise effective control over either the debtor or the debtor's material assets." See Letter at 11.
11 U.S.C. § 306	Section 306 should be amended to add references to sections 301 and 302. See Letter at 11.
11 U.S.C. § 1502(4) and (5)	The NBC recommends amending the verb tense in sections 1502(4) and 1502(5). See Letter at 15.

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Certain participants expressed concern that such an amendment would make it harder for entities that otherwise qualify to be debtors under § 109 of the Bankruptcy Code to file for chapter 7 or 11.

No recommendation garnered more attention than the proposed amendments to §§ 1502(a)(4) and (5) and 1517(b) of the Bankruptcy Code concerning the time at which the COMI of a debtor is determined. Several participants expressed concern that the NBC's recommendation that COMI be determined as of the date of the commencement of the foreign proceeding (as opposed to the commencement of the chapter 15 proceeding) would have a detrimental impact on the practice of foreign provisional liquidators and would impede the ability of practitioners to effectuate appropriate "COMI-shifting" in furtherance of value-maximizing restructurings.

While the NBC has requested ABI to provide comments, it is ABI's policy not to take any position or advocate for any amendments to the Bankruptcy Code. However, the individual ABI members (and the law firms or organizations to which they belong) are free to comment and take positions on their own. The International Committee encourages individual ABI members to provide written comments to the NBC regarding the proposed amendments. The NBC has requested that comments be provided to them quickly so that they can proceed with identifying legislative sponsors that will introduce the proposed amendments.

Comments should be sent to Reps. Marino and Cicilline of the House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and Sens. Grassley and Feinstein of the Senate Committee on the Judiciary. **abi**

### Proposed Amendments (continued)

11 U.S.C. § 1517(b)	The NBC proposes that section 1517(b) should be amended so that such a "foreign proceeding" shall be recognized as a foreign main proceeding if, " <b>when the foreign proceeding was commenced, the debtor had the center of its main interests in the foreign country where the proceeding was commenced;</b> or (2) as a foreign nonmain proceeding if, <b>when the foreign proceeding was commenced, the debtor had an establishment within the meaning of section 1502 in the foreign country where the proceeding was commenced.</b> See Letter at 16.
11 U.S.C. § 1511 and 28 U.S.C. § 1408	An addition to 28 U.S.C. § 1408 and deletion of subsection 1511(b). Existing 28 U.S.C. § 1408 would become subsection (a), and a new subsection (b) would be added to 28 U.S.C. § 1408. See Letter at 16.
28 U.S.C. § 1334(c) and 11 U.S.C. § 103(a)	The proposed revision for section 1334(c) is to "limit section 1334(c) to its original narrowly intended purpose of assuring that chapter 15 petitions, as applications for recognition, must be heard and granted or denied...." See Letter at 19.
11 U.S.C. § 1517(a)	Include the following: "[s]ubject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if ... (2) <b>person or body</b> applying for recognition is a foreign representative...." See Letter at 20.
11 U.S.C. §§ 101(24), 1520, 1521 and 1523	Sections 101, 1520 and 1521 should be amended to remove any ambiguity or problems due to the reference to section 549 in section 1520(a)(2) and the omission of the section 550 remedy in section 1521. See Letter at 21. As such, the NBC also recommends that the definition of "foreign representative" be amended to reflect the changes suggested for sections 1520(a)(2) and 1521. See Letter at 22. The Letter also recommends that section 1523 should be amended "to provide explicitly that the look-back period for avoidance proceedings brought under U.S. law by or on behalf of a foreign representative should be measured from the date of the filing of the foreign proceeding." See Letter at 23-24.

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