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CONCURRENT SESSION

2019

The Honorable Mike Ferguson

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- Leader of BakerHostetler's Federal Policy team
- Provides clients with public policy consulting and lobbying services in Congress, Trump Administration
- Former Member of Congress, 2001-2009
- Served on House Financial Services Committee and House Energy and Commerce Committee
- Leader on healthcare, telecommunications and financial services policies

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BANKRUPTCY LEGISLATION 2019 AND 2020

FAMILY FARMER RELIEF ACT
HAVEN ACT

FRIDAY, DECEMBER 6, 2019
11:00 A.M.

By: Donald L. Swanson of Koley Jessen P.C., L.L.O.
Don's Blog: mediatbankry.com

KOLEY JESSEN
ATTORNEYS

"Family Farmer Relief Act of 2019" says:

"Section 101(18) of title 11, United States Code, is amended by striking '$3,237,000' each place that appears and inserting '10,000,000'."

The number has been adjusting with inflation since 1986. Here's how:

Sec. 101(18) says, "The term 'family farmer' means . . . aggregate debts do not exceed:

- "$4,411,400" (as of 4/1/2019)
- "$4,153,150" (on 1/1/2019)
- "$3,237,000" (set by BAPCPA in 2005)
- "$1,500,000" (set at Chapter 12 enactment in 1986)

YESTERDAY

TODAY

"Farm bankruptcies are in a state of crisis and we, too, sympathize with the plight of the American farmer. Nevertheless, the solution proposed by the [Eighth Circuit Court of Appeals] is contrary to the Bankruptcy Code and a long line of case law [on the absolute priority rule]."

Northwest Bank Worthington v. Ahlers, 485 U.S. 197, 209 (1988).

Debt Limit Comparisons

$10,000,000 for Chapter 12 Farmer

$2,725,625 for Chapter 11 Small Business

$1,677,125 Chapter 13 Consumer

$1,257,850 secured + $419,275 unsecured

Haven Act

Honoring **A**merican **V**eterans in **E**xtreme **N**eed Act of 2019

- Allows middle class veterans to file Chapter 7, instead of being stuck for three to five years in Chapter 13

Haven Act Technicalities:

- Haven Act excludes veteran benefits from calculation of "current monthly income" under § 101(10A)
- "Current monthly income" is used to calculate the "means test" for Chapter 7 eligibility under § 707(b)(2)
- A consumer's income had better be pretty-darn close to the poverty line to qualify for Chapter 7

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Don Swanson has devoted his legal career to helping businesses and their owners deal with financial stress – on all sides.

Don has helped hundreds of businesses resolve financial issues without filing bankruptcy. He has, for example, received a great settlement offer from a primary creditor within a few minutes (literally) of filing a bankruptcy petition. But when required, Don has helped many businesses gain relief through bankruptcy.

He has represented many committees (both official and ad hoc) in bankruptcy to maximize recovery from scarce assets. For example, Don led the charge to organize and represent an ad hoc Committee for hundreds of creditors in a $1.5 billion Chapter 11 ethanol case and, because of that capacity, held an ex officio position with the Official Committee in that case.

Don has also helped creditors maximize value and minimize loss in many hundreds of cases. For example, he represented a Trustee in a debtor's Chapter 7 case that scheduled millions of dollars of claims, few assets, and a "no-asset" status, and achieved a 100% distribution to all creditors.

Don publishes a blog on bankruptcy and mediation topics at www.mediatbankry.com. He has helped promote mediation as a dispute resolution tool in bankruptcy – both locally and nationally. Don chairs the Nebraska Bankruptcy Court Mediation Committee and led the charge to get local mediation rules adopted. He also serves on the leadership team for the Mediation Committee of the American Bankruptcy Institute.

116TH CONGRESS
1ST SESSION

S. 897

To amend title 11, United States Code, with respect to the definition of "family farmer".

IN THE SENATE OF THE UNITED STATES

MARCH 27, 2019

Mr. GRASSLEY (for himself, Ms. KLOBUCHAR, Mr. JOHNSON, Mr. LEAHY, Mr. TILLIS, Ms. SMITH, Ms. ERNST, and Mr. JONES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 11, United States Code, with respect to the definition of "family farmer".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family Farmer Relief Act of 2019".

SEC. 2. DEFINITION OF FAMILY FARMER.

Section 101(18) of title 11, United States Code, is amended by striking "$3,237,000" each place that term appears and inserting "$10,000,000".

116TH CONGRESS
1ST SESSION

S. 679

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

IN THE SENATE OF THE UNITED STATES

MARCH 6, 2019

Ms. BALDWIN (for herself, Mr. CORNYN, Mr. TESTER, Mr. ISAKSON, Mr. JONES, Mr. TILLIS, Mrs. FEINSTEIN, Ms. ERNST, Mr.LEAHY, Mr. GRASSLEY, Ms. SMITH, Mr. CRAMER, Mr. DURBIN, Mr. MORAN, Ms. KLOBUCHAR, Mr. COTTON, Ms.DUCKWORTH, Mr. RUBIO, Mrs. SHAHEEN, and Mr. ROUNDS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act".

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B) (i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

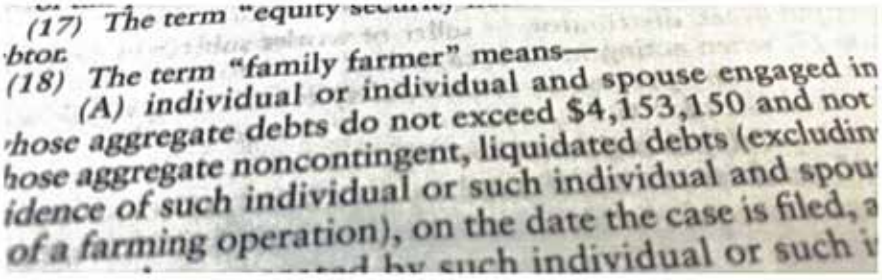
"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

"(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.".

MEDIATBANKRY

On Bankruptcy and Mediation

Chapter 12 Debt Limit Should Be Eliminated



(17) The term "equity security"
(18) The term "family farmer" means—
(A) individual or individual and spouse engaged in
those aggregate debts do not exceed $4,153,150 and not
those aggregate noncontingent, liquidated debts (excludin
idence of such individual or such individual and spou
of a farming operation), on the date the case is filed, a
by such individual or such i

11 U.S.C. § 101(18)(A)

By: Donald L Swanson

Chapter 12 of the Bankruptcy Code exists for the protection of family farms.

However, Chapter 12 has, from the beginning, imposed a debt limit for eligibility [Fn. 1]. This debt limit needs to be eliminated. Here's why.

Family Farms—Then and Now

Back in 1986, at enactment of Chapter 12, the vast majority of farms were owned and operated by members of a single or extended family.

The same is still true today. The differences are that today's farms:

- are owned and operated by later generations of the same families who owned and operated farms back in the 1980s—these are the families who managed to survive as farmers to the present day;
- are much, much larger and operated by fewer people than in the 1980s—farming has progressed from intense labor with small equipment in 1980s to limited labor with huge equipment, computers and GPS precision today; and
- have much, much larger amounts of debt than in the 1980s—today's capital requirements for farm land, equipment and inputs dwarf those of the 1980s.

Corporate Farms & Chapter 12 Eligibility—Then and Now

Back in the 1980s, corporate farms existed—*i.e.*, farms owned by investors who were unrelated to each other. But those farms failed to qualify for Chapter 12 relief because of "family" requirements for eligibility. Such "family" requirements include these [*see* § 101(18)]:

(i) "individual or individual and spouse" must be "engaged in a farming operation,"

(ii) More than 50% ownership must be "by one family" or "the relatives of the members of such family," and

(iii) "such family or such relatives" must "conduct the farming operation."

Corporate farms exist today, as well, but these farms fail to meet the "family" eligibility requirements for Chapter 12—just like the 1980s.

It is these "family" requirements that are the essence of Chapter 12 eligibility.

Reasons for Debt Limits on Eligibility?

It's difficult to see or understand the reasons for a debt limit on Chapter 12 eligibility.

Keeping family farmers, with large amounts of debt, out of Chapter 12 may have made sense back in the 1980s when nearly all family farms were small—and those with more than $1.5 million of debt were a rarity.

But in today's world, every family farm, where the family makes its primary living from farming, is large. Multi-millions of dollars of debt are common for such farms—even the smaller ones.

The debt limit confuses large family farms with corporate farming.

Debt Limit Makes No Sense Today

The debt limit for Chapter 12 eligibility no longer makes sense. Here's why:

The goal of Chapter 12 is to provide effective bankruptcy relief for family farmers; and

A family farm is identified by its "family" character—not by the amount of its debt.

Back in 1986, when Chapter 12 was adopted, there were lots of small farms operated by career farmers. That reality translated into lots of people living in rural America. But those days are gone. And the small, career farms are gone as well.

Today, small farms are owned and operated by part-time or hobby farmers—people with other sources of income. And these people are unlikely to qualify for Chapter 12, because of such eligibility requirements as these:

(i) 50% of gross income must come from farming;

(ii) 50% of debts must arise from farming; and

(iii) farm assets must comprise more than 80% of all assets.

So . . . if small, non-career farms don't qualify for Chapter 12, who is it we are trying to help? The answer is obvious: it's the career farms that qualify as family farms, regardless of size. And these farms—all of them—can have large, even staggering, amounts of debt.

Inequities of the Debt Limit

Consider this family farm:

Four brothers have been running a farming operation, using a single corporation. All four are career farmers, and each owns 25% of the corporation. The corporation has $12 million of debt, which each brother has personally guaranteed. The corporation is in financial trouble, is in default on its primary debts, and is insolvent.

–Hypothetical # 1

One brother, over the years, has acquired land and machinery in his own name. He wants to leave the family farming operation and farm his own land. And he wants to utilize Chapter 12 to deal with the debt he has guaranteed. But he can't because the amount of his guaranteed debt makes him ineligible.

–What is fair or equitable or defensible about that?

–Hypothetical # 2

The brothers want to reorganize their farming operation under Chapter 12. But they can't because it has $12 million of debt. Never mind that the total debt averages $3 million per brother (which is within the current eligibility limit)—but the eligibility statute is too blunt to allow for such distinctions.

–What is fair or equitable or defensible about that?

The four brothers, in the two hypotheticals above, are precisely the family farmers that Chapter 12 is designed to help. But it is precisely these people who can't use it because of the debt limit. There is something wrong with that.

A Policy Choice for Congress

–A Sentence to Liquidation

Chapter 12 exists because Chapter 11 did not work for farmers in the 1980s. Back then, a Chapter 11 filing was, in effect, a sentence to liquidation — and this has not changed in the intervening decades.

So, using the debt limit, today, to keep a family farm out of Chapter 12 and requiring Chapter 11, instead, is a sentence to liquidation of the family farm.

Is this really what Congress wants? Does Congress truly intend that the four brothers, in the hypotheticals above, should be required to liquidate, instead of using Chapter 12 to reorganize —solely because of their debt amount?

–A Brain and Talent Drain

If the four brothers, in the hypotheticals above, are required to liquidate in Chapter 11, rather than reorganize in Chapter 12, what's the benefit of that? The answer is this: there is none.

On the contrary, there is great value for rural communities in retaining entrepreneurs and family farms.

An alternative is to have the same land managed by someone living in Lincoln or Omaha or Des Moines or Iowa City, who employs hired hands to do the labor. That alternative would accomplish a significant drain of human resources out of our rural communities.

–Is that what Congress wants to accomplish by a debt limit on Chapter 12?

The Debt Limit is an Arbitrary Number

Here's how we got to today's debt limit amount for Chapter 12 eligibility:

–Debt limit of $1,500,000 was established in 1986 at enactment of Chapter 12;

–Thereafter, the $1.5 million number adjusted periodically to reflect changes in the Consumer Price Index [Fn. 2];

–Debt limit of $3,237,000 was established in 2005 at enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act—this number appears to be the $1.5 million 1986 amount, adjusted with the Consumer Price Index; and

–Today's debt limit is $4,153,150 — this is nothing more than the 2005 amount, as adjusted with the Consumer Price Index.

–Meaningless Number and Concept

So . . . we are living today with an eligibility number established more than three decades ago, adjusted only for inflation. This is a meaningless number. Farming has changed drastically in the meantime—far beyond mere adjustments for inflation.

But more fundamentally, the very concept of a debt limit for eligibility is arbitrary.

Who's to say that a family farmer with $4.09 million of aggregate debt is deserving of Chapter 12 relief, while someone with $4.16 is not? Or someone with $10.5 million is not? Or someone with $15 million is not?

If a farm is truly a family enterprise, Chapter 12 relief should be available. After all, if Congress went to all the trouble to create a bankruptcy remedy for family farmers, why seek to prevent its use by an arbitrary and meaningless number?

Conclusion

Chapter 12 exists to help family farmers. And we should no longer exclude family farmers from Chapter 12 by an arbitrary and meaningless debt limit.

Footnote 1: Chapter 12 eligibility standards, for a family farm, are identified in 11 U.S.C. § 101(18)-(21).

Footnote 2: Adjustment for inflation, using the Consumer Price Index, is required by 11 U.S.C. § 104.

** If you find this article of value, please feel free to share. If you'd like to discuss, let me know.

Published by mediatbankry

My name is Donald L. Swanson (please call me "Don"). I'm an attorney in Omaha, Nebraska, and am a shareholder in the law firm of Koley Jessen P.C., L.L.O. I've been practicing business bankruptcy law for more than three decades and represent all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. I have extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, I have a decades-long background in resolving multi-party disputes while representing committees and trustees. View all posts by mediatbankry

November 15, 2018
Bankruptcy

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MEDIATBANKRY

On Bankruptcy and Mediation

Congress Needs to Help Family Businesses in Financial Stress — Not Punish Them!

A market economy (photo by Marilyn Swanson)

By: Donald L. Swanson

We live and work in a market economy, here in these United States. The market is our economic judge: it validates—or invalidates—business decisions, and it picks winners and losers.

The market is an efficient, impartial and unbiased judge. But it is also cruel and unforgiving.

The result is that many businesses succeed. And many succeed for a very long time.

But most fail over time—sooner or later. Many fail at the beginning. Others are successful for a while but then fall on hard times and go out of business. That's life in our market economy: the opportunity for success . . . and the risk of failure.

We applaud business success

Here in these United States, we applaud success. And we count on our businesses, both large and small, to be successful. Our economy depends upon business success: people need to be employed, taxes need to be paid, services need to be provided. And it is the successful businesses that provide funds to make life work.

But what about business failures

There is a down side. Business failures are also with us . . . as are financial tragedies for individuals involved. Such are the unavoidable consequence of our market economy.

We don't do well, here in these United States, with business failure. When, for example, a family business goes under, the owners and operators face personal loss, both financially and to their reputations. It's a devastating experience.

Bankruptcy laws

Bankruptcy laws are our way of dealing with business failure.

You'd think that a prosperous nation thriving on a market economy would make generous provision for those who risk everything and are judged harshly by the market.

But we don't. What we do, instead, is treat them harshly . . . with disrespect . . . and punishment. Our bankruptcy laws pile on and kick them while they're down.

–Seriously! That's what our bankruptcy laws do.

Our bankruptcy laws may provide well for, (i) large businesses with lots of passive owners, and (ii) consumers. But our bankruptcy laws are particularly disdainful of failed family businesses and their owners—and especially those who were once successful.

–Seriously! That may be hard to believe. But it's true.

Two examples of disdain for family businesses—and potential corrections

Here are two examples from bills currently wending their way through the U.S. Senate.

–Small Business Reorganization Act

First. The Small Business Reorganization Act (S. 1091). You'd think this Act is proof-positive, if passed, that Congress truly cares about small businesses and those who risk everything to make a business happen. And on the surface, you'd be right: this bill provides much-needed relief for small businesses. And it needs to be enacted immediately—with one change.

Here's the catch: to qualify as a small business under the Act, the debtor must have less than $2.6 million of debt.

Seriously?! What formerly-successful business has that little debt?! Congress apparently wants to protect, based on the $2.6 million limit, only tiny businesses—not small businesses. Most successful businesses have more debt than that. Heck, the current obligations of many for inventory and trucking and utilities and payroll are probably more then that—without adding in long term obligations for real estate and equipment purchases or leases. Scheesh!

The Small Business Reorganization Act is a great piece of legislation that needs to be enacted at once. But its $2.6 million debt limit needs to go away.

–Family Farm Relief Act

Second. The Family Farm Relief Act (S. 897). In 1986 Congress created Chapter 12 to help family farmers reorganize. There has always been a debt limit on eligibility for Chapter 12. That limit began in 1986 at $1.5 million and has increased with inflation to a current $4.4 million.

The problem is that changes in farming over the past three decades have been greater than inflation. Farming has changed from labor-intensive in the 1980s, with small equipment, to huge equipment and high tech efficiency today. The result is that, (i) today's farm operations are huge, with corresponding high debt amounts, and (ii) the $4.4 million debt limit excludes career family farmers from Chapter 12—maybe all of them.

The $10 million limit being proposed in S. 897 is great. It's at least a far-cry better than $4.4. But why have a debt limit at all for family farmers? If the goal of Chapter 12 is to protect family farms (as opposed to corporate farms owned by a bunch of passive investors), why not include all family farms—not just the smaller ones? Only Congress knows the answer.

Conclusion

Congress has always had a fixation on helping huge businesses and consumers, while punishing family businesses and their owners. Why is this? I don't know.

But the fixation is real. It has always been a problem. It has hurt family businesses and their owners for many decades past. And it needs to go away . . . as soon as possible.

The two items of legislation noted above are perfect vehicles to make that happen.

** If you find this article of value, please feel free to share. If you'd like to discuss, let me know.

Published by mediatbankry

My name is Donald L. Swanson (please call me "Don"). I'm an attorney in Omaha, Nebraska, and am a shareholder in the law firm of Koley Jessen P.C., L.L.O. I've been practicing business bankruptcy law for more than three decades and represent all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. I have extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, I have a decades-long background in resolving multi-party disputes while representing committees and trustees. □ View all posts by mediatbankry

□ **April 25, 2019**
Bankruptcy, Representing Family Businesses

Bankruptcy, Small Business

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MEDIATBANKRY

On Bankruptcy and Mediation

When "Small" is Still Too Big: The Small Business Reorganization Act

By Donald L. Swanson

The Small Business Reorganization Act is now law!

- The House of Representatives passed it on July 25, 2019;
- The Senate passed it on August 1, 2019; and
- The President signed it on August 23, 2019.

This Act is much-needed and long overdue. It provides Chapter 12-type relief for small businesses within Chapter 11. Kudos to everyone for getting it passed!

New legislation is enacted (photo by Marilyn Swanson)

But there is a catch: to qualify for relief under this new Act, a small business must have less than $2.725 million of total debt. This debt limit is exceedingly small. While it should cover most Mom & Pop shops and most start-ups, it excludes most formerly-successful entrepreneurs and their businesses.

By formerly-successful, I mean businesses that had at least a decade of success, during which they expanded substantially. These businesses and their entrepreneurs will rarely meet the $2.725 million debt limit.

Why Not Increase The Limit?

Here's the problem: Congress despises formerly-successful entrepreneurs. It really does! And it always has!

Congress *loves* small businesses and successful entrepreneurs. Politicians love to extol them as crucial to our economy.

But when successful businesses fail, Congress turns on their entrepreneurs fast and hard. It makes no difference to Congress that failure might come from the economy going south or a product becoming obsolete or an industry going in the tank or the entrepreneur's failing health. Formerly-successful entrepreneurs are on Congress's list of most-despised people. Seriously!

This most-despised status has always been true—though it's improving over time. In a 1930's bankruptcy opinion, for example, the U.S. Supreme Court explained some U.S. history on antagonism toward debtors:

- The 1800 Bankruptcy Act was "exclusively in the interest of the creditor" and presumed the debtor's dishonesty;
- Beginning in 1841, an individual could finally file a voluntary bankruptcy to liquidate and obtain a discharge—until then, an "honest but unfortunate" debtor had no opportunity for a "fresh start"; and
- In 1874, a debtor could, for the first time, reorganize—but only with the consent of creditors.

Antagonism toward individual debtors is a historical reality. But over time, that antagonism has softened toward many. In fact, Congress has provided effective bankruptcy relief for everyone but formerly successful entrepreneurs. Such provisions are in the form of:

1. Consumer relief under Chapters 7 and 13;
2. Municipality relief under Chapter 9;
3. Large business relief under Chapter 11; and
4. Now, relief for truly-small businesses under the Small Business Reorganization Act.

Bankruptcy Still Does Not Help Formerly-Successful Entrepreneurs

Yet, there is still no viable bankruptcy relief for a formerly-successful entrepreneur. Consider the plight of a formerly-successful entrepreneur in this hypothetical:

- Entrepreneur's business provides goods and services to a high-tech world. The business prospers mightily, with dozens of employees and tens of millions of dollars of sales each year . . . for more than a decade. But obsolescence sets in. The business cannot adjust, and it fails.
- Meanwhile, Entrepreneur (i) takes a personal income from the business that is substantial, but not huge—nearly-all profits are poured back into the business, (ii) builds a nice (not high-end) home, (iii) drives a used Lexus SUV, (iv) takes cool vacations—but does so rarely, because of work demands, and (v) in all other respects, leads a comfortable-but-modest lifestyle.
- When the business fails, Entrepreneur (a forty-something) has a personal net worth of a couple million dollars, without counting guaranteed business debts that exceed $5 million after liquidation of the business; and flow-through tax liability from liquidation of business assets (held in an LLC) exceeds $2 million.
- Following liquidation of the business, Entrepreneur is working for a different high-tech business and is receiving a good salary.

This Entrepreneur is who Congress truly despises.

I'll try to explain.

You'd think Congress would be eager to protect this Entrepreneur from financial devastation. Why? Because our economy needs to have entrepreneurs make business investments and take entrepreneurial risks. Protecting them from the down-side of such risks is one way to encourage their efforts.

But, no. Congress has always gone the opposite direction. They want to punish an entrepreneur's failure. Apparently, they're still stuck in the 1800's presumption of dishonesty?

Consider the bankruptcy options for our Entrepreneur discussed above:

1. Reorganization under Chapter 13 is not available because Chapter 13 is designed for consumers: no one with more than $1,257,850 of secured debt or $419,275 of unsecured debt is eligible for Chapter 13 relief.
2. A discharge is not possible under Chapter 7 because Entrepreneur is young and capable of earning a substantial income in the future and is, therefore, ineligible for Chapter 7 relief and must file Chapter 11 instead.
3. Creditors hold a veto over confirmation of Entrepreneur's Chapter 11 plan (except in the Ninth Circuit, perhaps), and Entrepreneur cannot get a Chapter 11 plan confirmed.
4. Entrepreneur is ineligible for the small-business relief, newly enacted into law, because total debts exceed $2.725 million.

In other words, Entrepreneur has no viable opportunity for bankruptcy relief. None (except in the Ninth Circuit, perhaps). This is not right!

A Companion Law

At the same time the Small Business Reorganization Act became law, a companion bill also became law: the Family Farmer Relief Act. This Act increases family farm eligibility for Chapter 12 relief from total debts of $4.4 million to $10 million. Ten million dollars sound large-farm-friendly, doesn't it? In a way, yes. But the Act actually retains the despised-group reality. Here's how:

- Chapter 12 contains various standards for qualifying as a "family farmer" (*e.g.*, the farming operation must be owned or operated by an individual and spouse, if one exists, or by one family and its relatives).
- So, what Congress is actually saying in the $10 million eligibility limit is this: we want to help family farms . . . but not large family farms.

Conclusion

Here's hoping Congress will act soon to include formerly-successful entrepreneurs in the relief provided by the Small Business Reorganization Act.

** If you find this article of value, please feel free to share. If you'd like to discuss, let me know.

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My name is Donald L. Swanson (please call me "Don"). I'm an attorney in Omaha, Nebraska, and am a shareholder in the law firm of Koley Jessen P.C., L.L.O. I've been practicing business bankruptcy law for more than three decades and represent all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. I have extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, I have a decades-long background in resolving multi-party disputes while representing committees and trustees. □ View all posts by mediatbankry

□ **September 12, 2019**
Bankruptcy, Representing Family Businesses

Bankruptcy, Family Businesses in Financial Stress

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MEDIATBANKRY

On Bankruptcy and Mediation

The Haven Act: A Great Law That Exposes A Really-Bad Bankruptcy Policy

By: Donald L. Swanson

The Haven Act is short for: "Honoring American Veterans in Extreme Need Act of 2019." It is the law of the land—and has been since August 23, 2019.

The Haven Act does a great and valuable thing for many of our military veterans:

- it allows middle class veterans to file Chapter 7 bankruptcy, instead of being stuck for three to five years in Chapter 13. [Fn. 1]

Why this is important requires explanation. What follows is an attempt to explain.

Exposed defenses at Normandy (photo by Marilyn Swanson)

Some Context – A Really-Bad Policy

During its initial quarter century, the Bankruptcy Code authorized individuals, including those in the middle class of our society, to gain a fresh financial start by filing Chapter 7 bankruptcy. Many people utilized Chapter 7 because of its efficiency: from start to finish, a no-asset Chapter 7 case might last six months or so. And this worked well for its intended purposes.

During that same quarter century, people could also file Chapter 13, instead. But Chapter 13 is anything but efficient: from start to finish, a Chapter 13 case will last three or more years. Many people utilized Chapter 13, anyway, because Chapter 13 offered, (i) an opportunity to preserve a home and other assets, (ii) more favorable discharge provisions than Chapter 7, (iii) the possibility of paying attorney fees over time, instead of up-front, (iv) etc.

But then, a million U.S. citizens filed bankruptcy one year. And Congress became horrified!

Of *greatest* horror, to Congress, is the fact that people in our middle class were filing Chapter 7:

- "Oh, no!!!," Congress exclaimed;
- "We can't have people above the poverty line filing for Chapter 7!!!," Congress insisted;
- "Those middle class people must be abusing the bankruptcy system and their creditors—surely that is their intent!!!," Congress wailed; and
- "That's way too easy and isn't fair to credit card companies and other lenders who promote easy and expensive credit!!!," Congress determined.

And Congress acted on such horror-of-horrors in 2005: Congress passed the "Bankruptcy Abuse Prevention and Consumer Protection Act" (aka, "BAPCPA"). In doing so, Congress enacted some really-bad policies design to punish middle class debtors for their financial sins.

One of those really-bad policies focuses on keeping middle class people out of Chapter 7 and forcing them into Chapter 13.

- It is this really-bad policy of keeping middle class people out of Chapter 7 that the Haven Act abrogates for military veterans.

The Haven Act Exposes How Deplorable the Really-Bad Policy Actually Is!

It's great that our military veterans will be able to file Chapter 7 bankruptcy, despite qualifying as middle class people. It really is!

But the need for getting rid of the really-bad-policy is not limited to our military veterans. *Every consumer debtor* needs a Chapter 7 option. Here are some reasons why.

–Debtors should not be presumed dishonest

One of the great things about enactment of the Bankruptcy Code, back in 1978, is this: it flipped the presumption about debtors.

- Prior to the Bankruptcy Code, individual debtors were presumed to be dishonest—and there was no opportunity to show otherwise;
- The Bankruptcy Code flipped that presumption in 1978—individual debtors were presumed to be honest and deserving of bankruptcy protection and relief, until evidence showed otherwise; but
- In 2005, Congress flipped the presumption for middle class people back to dishonesty and abuse in Chapter 7—with no opportunity to show otherwise.

The Haven Act exposes the deplorable character of the 2005 change. And the same change is needed for everyone else in our middle class.

Consider, for example, people who suffer financial loss because of illness, injury, job loss, a depressed economy, or other misfortunes. Where does Congress get off presuming such people to be dishonest and abusive to the bankruptcy system?!

–Honest and deserving debtors should not be punished

Pushing middle class people out of Chapter 7 and into Chapter 13 is designed for one purpose and one purpose alone: to punish the person who files bankruptcy.

The reality is this, (i) a three to five year payment plan usually provides little-to-no dividend to unsecured creditors—and rarely more than a Chapter 7 would provide, and (ii) is a near-assurance of failure in the bankruptcy (the debtor must survive financially for several years without a rainy-day fund).

The purpose and reality of the really-bad policy isn't to maximize returns to creditors—that doesn't happen. And the purpose isn't to provide an opportunity for a successful fresh start. No. No. No! The purpose and effect of the really-bad policy is to require a few years of penance and punishment for middle class people who file bankruptcy.

But what about the honest-but-unfortunate person who becomes ill, or loses or job, or is affected by a depressed economy, or faces some other misfortune that's imposed upon him/her?

- Shouldn't this person be entitled to an efficient fresh-start process?
- Why subject him/her to a three to five year period of penance and punishment?

–Providers of easy and expensive credit are undeserving of special protections under the Bankruptcy Code

Why Congress chooses to protect the purveyors of easy and expensive credit, at the expense of honest-but-unfortunate debtors, is a mystery.

Why should a business that solicits users of its high-interest credit cards be entitled to tough benefits under the Bankruptcy Code? If such creditors don't want to lose that money, don't extend the easy credit! It's as simple as that.

Congress should not be giving tough bankruptcy protections to the providers of easy and expensive credit!

Conclusion

It's great that the Haven Act is now the law of the land. And here's a huge shout-out to all who worked hard to make it happen—congratulations!!!

But an effect of the Haven Act's enactment is this: it exposes the deplorable character of a really-bad policy enacted by Congress in 2005.

Every person in our entire middle class, here in these United States, should be entitled to the same bankruptcy benefits and protections as those below the poverty line! They should not be subjected to Congress's 2005 idea of punishment and penance.

The Haven Act's benefits need to be extended to all middle class people in these United States!

———————————-

Footnote 1: The Haven Act excludes veterans' benefits from the calculation of "current monthly income" under 11 U.S.C. § 101(10A); and "current monthly income" is used to calculate the "means test" for Chapter 7 eligibility under 11 U.S.C. § 707(b)(2)—*i.e.*, a consumer's income had better be pretty-darn-close to the poverty line, if he/she wants to file Chapter 7.

** If you find this article of value, please feel free to share. If you'd like to discuss, let me know.

Published by mediatbankry

My name is Donald L. Swanson (please call me "Don"). I'm an attorney in Omaha, Nebraska, and am a shareholder in the law firm of Koley Jessen P.C., L.L.O. I've been practicing business bankruptcy law for more than three decades and represent all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. I have extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, I have a decades-long background in resolving multi-party disputes while representing committees and trustees. View all posts by mediatbankry

November 19, 2019
Bankruptcy, Consumer Bankruptcy

Bankruptcy, Consumer Bankruptcy

Small Business Reorganization Act of 2019

Robert J. Keach
Bernstein Shur Sawyer & Nelson

BERN STEIN SHUR

Commission Testimony/Findings:

SME's avoiding chapter 11 because:

- **risk of loss of ownership**
- **cost**
  - **time**
  - **procedural/reporting burdens**
  - **committee counsel/advisor costs**
  - **tactical fights driven by §1129(a)(10), APR, new value elements**

SBRA attempts to address all of these concerns.

- **Intended to give more small businesses a chance at reorganization instead of simply liquidating.**

Core Provisions of SBRA:

- To qualify as a small business debtor, the debtor must be a person or entity engaged in commercial or business activity with aggregate secured and unsecured debts of $2,725,625 or less.
- SARE debtors excluded: debtor who derives substantially all of its gross income from the operation of a single real property cannot elect under Subchapter V.
- No requirement that the debtor remain engaged in the commercial or business activity post-petition, but the debtor must show that at least 50 percent of its pre-petition debts arose from such activities. (Nonetheless, difficult to confirm if not operating post-petition).

Core Provisions (cont'd):

- Small business debtor operates in chapter 11 as a debtor-in-possession.
- Obligated to file schedules and statements.
- The court can remove a small business debtor from debtor-in-possession status for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the commencement of the bankruptcy case or for failure to perform its obligations under a confirmed plan. If that happens, the standing trustee takes over the operation of the debtor's business.

Core Provisions (cont'd):

- Upon electing to file under Subchapter V, the debtor must file a copy of the business's most-recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or a sworn statement that such documents do not exist.
- The SBRA does not specify when the debtor must elect to proceed under Subchapter V.
- Creditor's Committees: unless the court orders otherwise, no creditors committee; creditors committees will be the exception – not the rule – in SBRA reorganizations.

Core Provisions (cont'd):

- Subchapter V cases will have a "standing trustee" appointed by the U.S. Trustee.
- Standing trustee will act as a conduit for plan payments.
- Standing trustee has the authority to investigate the financial affairs of the debtor and object to the allowance of proofs of claim.
- Standing trustee will appear and be heard at plan confirmation; general obligation to "facilitate the development of a consensual plan of reorganization".

Core Provisions (cont'd):

- Standing trustee authorized to operate the debtor's business ONLY if the debtor is removed as a debtor-in-possession; otherwise NOT an operating trustee in any respect.
- Standing trustee is terminated upon "substantial consummation" of the confirmed plan.

Core Provisions (cont'd):

- The goals of Subchapter V are to minimize the time and expense of small business reorganization.
- Within 60 days of the filing, the bankruptcy court shall hold a status conference "to further the expeditious and economical resolution" of the case.
- 14 days prior to the conference, the debtor must file a report detailing the efforts to attain a consensual plan of reorganization.
- Debtor must file plan 90 days after the order for relief.
- The court can extend 90-day plan-filing deadline under "circumstances for which the debtor should not justly be held accountable."

Core Provisions (cont'd):

- Only the debtor is allowed to propose a plan.
- The SBRA need not solicit plan acceptances with a separate disclosure statement. The plan must include a brief history of the business operations of the debtor, a liquidation analysis, and projections with respect to the debtors' proposed payments under the proposed plan.
- Note: An individual who qualifies as a small business debtor can modify a mortgage on his or her principal residence, provided that the mortgage loan was not used to acquire the real property but was used primarily in connection with the debtor's business.

Core Provisions (cont'd):

- Confirmation of a small business debtor plan of reorganization is pursuant to the usual criteria of section 1129(a) of the Bankruptcy Code, with the critical exception that the debtor *does not* need to obtain the acceptance of even one impaired class of creditors. §1129(a)(10) does not apply to the SBRA cram down option.
- The SBRA debtor also has the flexibility to pay administrative claims over the life of the plan.
- Real Cramdown:
  - With respect to secured claims, cramdown is the same as an ordinary business entity chapter 11 case.

Core Provisions (cont'd):

- Equity holders can retain their interests in the business even if the plan does not pay unsecured claims in full, and the APR is not met (because the class did not accept the plan). As long as the plan "does not discriminate unfairly, and is fair and equitable" with respect to impaired unsecured creditors, the court must confirm the plan.
- "Fair and equitable" means only that the SBRA debtor must commit all of its "projected disposable income" (or property of equivalent value) to make payments under the plan for a minimum of three and a maximum of five years.
- The debtor must demonstrate a "reasonable likelihood" that it will be able to make all payments under the plan, and the plan must provide "appropriate remedies, which may include the liquidation of nonexempt assets" to protect creditors if the debtor fails to make plan payments ("Toggle to sale" provision).

Core Provisions (cont'd):

- "Disposable income" means income received by the debtor that is not reasonably necessary to: "ensure the continuation, preservation, or operation of the business."
- If cramdown is pursuant to section 1191(b) (devotion of 3-5 years of disposable income), discharge enters "as soon as practicable" after the debtor completes all payments.
- Discharge does not extend to debts on which the last payment is due after the 3-5 year period (for example, long-term secured debt).

Additional Key Takeaways:

- Elective/Optional; not required to elect Subchapter V.
- The cramdown option is a default (as cramdown was always intended to be)—drives negotiated result.
- Efficiency/Speed/Simplicity/Low Cost.
- Intended to Promote Reorganization; Focus on feasibility.

Implementation Issues:

- The standing trustee
  - transition period – likely appointed case-by-case
  - long term – standing trustees like chapters 12/13
  - NOT an operating trustee
  - "estate neutral"?
  - financial advisor?
  - success may depend on how UST implements and who is selected

- Definition of "Projected Disposable Income"
  - NOI?
  - EBITDA?
  - GAAP?
  - statutory definition may be more favorable than GAAP NOI or EBITDA ("or")
- Reporting
  - critical to define at status conference/flexible (to fit debtor's business); not one size fits all; utilize existing systems if adequate.
  - should be the same as similar non-debtor business, not more detailed
  - should not be burdensome

- Test to Extend 90-day Plan Filing Period
  - pro-restructuring interpretation given purpose of SBRA
  - flexible
  - "purchased" by good faith negotiations
  - default plan simple to file
- Pro-restructuring interpretation expected
- Debt Limit
  - will limit eligible debtors; increase in future? (See Chapter 12 amendment).

Preference Reforms

[§547(b) amended as follows:]

Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property---

[Section 1409(b) of title 28, USC is amended as follows:]

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,300 or a consumer debt of less than $19,250, or a debt (excluding a consumer debt) against a noninsider of less than ~~$12,850~~ $25,000, only in the district court for the district in which the defendant resides.

UCI University of California, Irvine

Dalié Jiménez
Professor of Law

Written Testimony of

Dalié Jiménez
Professor of Law
University of California, Irvine School of Law

Before the:

House Judiciary Subcommittee on

Antitrust, Commercial, and Administrative Law

June 25, 2019

10 a.m.

Rayburn House Office Building, Washington, D.C.

Witness Background Statement

Dalié Jiménez is a Professor of Law at the UC Irvine School of Law where she teaches courses on bankruptcy, consumer financial regulation, and contracts.

Professor Jiménez is one of three principal investigators in the Financial Distress Research Project, a large-scale, longitudinal, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in financial distress. The project has received generous financial support from the National Science Foundation, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the Arnold Foundation, among others.

A member of the American Bankruptcy Institute's Consumer Bankruptcy Commission, Professor Jiménez has published half a dozen articles examining the bankruptcy system, student loans, and student loans in bankruptcy. She also co-leads the Student Loan Law Initiative at UCI Law, a partnership with the Student Borrower Protection Center aimed at spurring more academic research on the issue of student debt.

Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau working on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, was a litigation associate at Ropes & Gray in Boston, and managed consumer protection issues for a Massachusetts state senator.

A *cum laude* graduate of Harvard Law School, Professor Jiménez also holds dual B.S. degrees in electrical engineering/computer science and political science from the Massachusetts Institute of Technology.

Chairman Cicilline, Ranking Member Sensenbrenner, and members of the Subcommittee:

Thank you for the opportunity to speak to you today.

My name is Dalié Jiménez. I am a tenured professor at the University of California, Irvine School of Law, where I teach courses in bankruptcy, consumer financial protection, and contracts. I also co-lead the Student Loan Law Initiative at UCI Law, a project aimed at spurring more academic research on the issue of student debt. The views I express here are my own, however.

Student debt is in the news far more often than any other consumer financial product. And deservedly so. Today, roughly 1 in 5 adults have a student loan.[1]The Federal Reserve Bank of New York estimates that roughly 20%[2] of the outstanding dollars of student loans are delinquent, a proportion that's higher than all other types of consumer credit in the same quarter. The growth in numbers and amount of debt has also been staggering.

We have copious evidence that this debt is dragging down the economy and that people are suffering. Studies link student debt to lower levels of homeownership and car purchases, higher household financial distress, delayed marriage, and lower probability of going to graduate school.[3]

Finally, there is abundant evidence that student debt is increasing gender and racial disparities in this country.[4] Women make up half of the population but owe two-thirds

[1] There are 44.7 million student loan borrowers. The Census Bureau estimates the total US population as 327,167,434 (as of July 1, 2018). Roughly 77.6% of the US population is over 18. Zack Friedman, STUDENT LOAN DEBT STATISTICS IN 2019: A $1.5 TRILLION CRISIS FORBES, https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/ (last visited Jun 23, 2019). U.S. Census Bureau QuickFacts: United States, , https://www.census.gov/quickfacts/fact/table/US/PST045218 (last visited Jun 23, 2019)

[2] The rate reported in the FRBNY charts is 10.9% for the first quarter of 2019. However, they note that "[a]s explained in a 2012 report, delinquency rates for student loans are likely to understate effective delinquency rates because about half of these loans are currently in deferment, in grace periods or in forbearance and therefore temporarily not in the repayment cycle. This implies that among loans in the repayment cycle delinquency rates are roughly twice as high." NEW YORK FEDERAL RESERVE, CENTER FOR MICROECONOMIC DATA, QUARTERLY REPORT ON HOUSEHOLD DEBT & CREDIT (Q1 2019), at 2, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q1.pdf.

[3] *See* AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 3 (2018)(collecting studies). *See also* AMERICAN STUDENT ASSISTANCE, LIFE DELAYED: THE IMPACT OF STUDENT DEBT ON THE DAILY LIVES OF YOUNG AMERICANS (2015), https://www.asa.org/site/assets/files/4646/life_delayed_12-2015.pdf; IRENE LEW, HARVARD UNIVERSITY JOINT CTR. FOR HOUSING STUDIES, STUDENT LOAN DEBT AND THE HOUSING DECISIONS OF YOUNG HOUSEHOLDS (2015), https://www.jchs.harvard.edu/sites/default/files/lew_research_brief_student_loan_11_2015.pdf.

[4] Judith Scott-Clayton, *What accounts for gaps in student loan default, and what happens after*, BROOKINGS (2018), https://www.brookings.edu/research/what-accounts-for-gaps-in-student-loan-default-and-what-happens-after/; Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class*, SOCIOLOGY OF RACE AND ETHNICITY 2332649218790989 (2018), https://doi.org/10.1177/2332649218790989; Susan Adams, WHITE HIGH SCHOOL DROP-OUTS ARE AS LIKELY

of outstanding student loan debt.[5] Department of Education data shows that twelve years after they entered college, the median white borrower had paid down 35% of their original loan balance. [6] In contrast, the median African American's loan balance had grown 113%.[7]

I want to make four main points in my testimony:

(1) student debt is a civil rights issue and is exacerbating inequality;
(2) federal student loans should be dischargeable in bankruptcy;
(3) private student loans do not deserve special treatment in bankruptcy; and
(4) the "moral hazard" arguments against these proposals have no empirical basis.

I. Student Debt is a Civil Rights Issue[8]

Student debt is a civil rights issue. Students of color, especially African American students, disproportionately borrow,[9] borrow larger amounts,[10] do so to attend schools associated with lower graduation rates[11] and worse career outcomes,[12] and default at

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TO LAND JOBS AS BLACK COLLEGE STUDENTS FORBES, https://www.forbes.com/sites/susanadams/2014/06/27/white-high-school-drop-outs-are-as-likely-to-land-jobs-as-black-college-students/.

[5] Women's Student Debt Crisis in the United States: AAUW, https://www.aauw.org/research/deeper-in-debt/ (last visited Jun 14, 2019).

[6] Ben Miller, NEW FEDERAL DATA SHOW A STUDENT LOAN CRISIS FOR AFRICAN AMERICAN BORROWERS, CENTER FOR AMERICAN PROGRESS (2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/.

[7] *Id.*

[8] Portions of this section are borrowed from a draft essay with Jonathan Glater, currently titled "The Civil Rights Case for Student Debt Reform," forthcoming in volume 55.1 of the Harvard Civil Rights-Civil Liberties Journal.

[9] Brandon A. Jackson and John R. Reynolds, *The Price of Opportunity: Race, Student Loan Debt, and College Achievement*, 83 SOCIOLOGICAL INQUIRY 335, 351 (2013).

[10] *Id.* at 351.

[11] This is so because these students disproportionately attend for-profit providers of postsecondary education. Sandra Staklis, Vera Bersudskaya, and Laura Horn, Department of Education National Center for Education Statistics, STUDENTS ATTENDING FOR-PROFIT POSTSECONDARY INSTITUTIONS: DEMOGRAPHICS, ENROLLMENT CHARACTERISTICS, AND SIX-YEAR OUTCOMES 6 (tbl. 1) (2011), https://nces.ed.gov/pubs2012/2012173.pdf. The worse outcomes at for-profit institutions are well documented; *see, e.g.*, David J. Deming, Claudia Golden, and Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. Econ. Perspectives 139, 152-160 (2012) (analyzing higher student loan default rates at for-profit institutions, the lower likelihood of achieving a bachelor's degree at such schools, and the heavier debt burdens borne by students who attend them).

[12] Stephanie Riegg Cellini and Latika Chaudhary, The Labor Market Returns to a For-Profit College Education, National Bureau of Economic Research, Working Paper No. 18343, at 4-5 (2012), at www.nber.org/papers/w18343.pdf (finding that returns to for-profit postsecondary education lag those estimated for students of other types of postsecondary institutions).

higher rates,[13] and have higher unemployment.[14] The decision to make loans a primary way of funding education has had a disparate, negative impact on students who belong to racial and ethnic groups historically subject to explicit, *de jure* and more recently *de facto* discrimination.

Student debt may not have been proposed or developed as a tool of oppression, racial, socioeconomic, or otherwise, but it serves to reinforce preexisting inequality along lines of race and class in at least three ways:

(1) graduates encumbered by debt do not have the same opportunities as their classmates who are not,[15]
(2) students who do not graduate but did borrow confront significantly greater challenges than students who fail to complete but who did not borrow,[16] and
(3) some potential students are so fazed by the prospect of indebtedness that they choose to forego higher education entirely.[17]

Student debt is exacerbating the racial wealth gap.[18] The vast differences persist even among White and African American households with higher education credentials. "White households with a bachelor's degree or post-graduate education (such as with a Ph.D., MD, and JD) are *more than three times* as wealthy as black households with the same degree attainment."[19] What's worse,

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[13] J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera, and Michelle R. Napierski-Prancl, *Factors Associated with Student Loan Default among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 215 (1998).
[14] BLACK UNEMPLOYMENT IS RISING AGAIN, AND TRUMPISM COULD BE PLAYING A ROLE FORBES, https://www.forbes.com/sites/pedrodacosta/2019/05/17/black-unemployment-is-rising-again-and-trumpism-could-be-playing-a-role/ (last visited May 21, 2019).
[15] Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1582 (2015).
[16] This is so because the student borrower who drops out may not enjoy an income boost that would have been associated with completion of a program of study but will still face a repayment obligation.
[17] Some scholars have found that students from some ethnic groups, such as Latinx students and Asian American students, express an aversion to taking on debt to pay for higher education. ALISA F. CUNNINGHAM AND DEBORAH A. SANTIAGO, STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T 18 (2008), http://files.eric.ed.gov/fulltext/ED503684.pdf, *accord* Pamela Burdman, *The Student Debt Dilemma: Debt Aversion As A Barrier To College Access* 9, Center for Studies in Higher Education, University of California, Berkeley (2005), https://cshe.berkeley.edu/sites/default/files/publications/rop.burdman.13.05.pdf (describing lower rates of borrowing by students of Mexican descent).
[18] LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP (Demos) (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf; THOMAS SHAPIRO ET AL., THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE (Institute on Assets and Social Policy) (2013); WILLIAM DARITY JR ET AL., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Samuel DuBois Cook Center on Social Equity) (2018); THE ASSET VALUE OF WHITENESS: UNDERSTANDING THE RACIAL WEALTH GAP DEMOS, https://www.demos.org/research/asset-value-whiteness-understanding-racial-wealth-gap (last visited May 18, 2019); Louise Seamster, *Black Debt, White Debt*, 18 CONTEXTS 30–35 (2019).
[19] (emphasis added). William Darity Jr et al., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Samuel DuBois Cook Center on Social Equity) (2018).

> on average, **a black household with a college-educated head has less wealth than a white family whose head did not even obtain a high school diploma**. It takes a post-graduate education for a black family to have comparable levels of wealth to a white household with *some* college education or an associate's degree.[20]

It is no surprise then that "[twelve] years after entering college, the typical African American student who started in the 2003-04 school year and took on debt for their undergraduate education owed more on their federal student loans than they originally borrowed."[21] And not just a little more: the median African American student owed 13% *more* than what they originally borrowed *twelve years earlier*.[22]

Education is not "the great equalizer" for students of color.[23] A bachelor's degree hardly insulates African American students from loan default: 23% of those in the 2003-04 cohort defaulted in their loans, as compared to 6% of White students and a 9% overall default rate for completers.[24] In fact, African American student borrowers default on their federal student loans at *more than twice* the rate as their white counterparts, irrespective of whether they obtained a bachelor's, associate, or no degree.[25]Professor Abbye Atkinson's bankruptcy research supports these findings. She finds that African Americans with a college degree are just as likely to file for bankruptcy as African Americans without one.[26] The same is not true for White students. She concludes that "while a college diploma may help to insulate college graduates in general and White graduates specifically from financial challenges as represented by bankruptcy filings, for African Americans, a college diploma provides little economic insulation from bankruptcy."[27]

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[20] (emphasis added). William Darity Jr et al., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Samuel DuBois Cook Center on Social Equity) (2018).
[21] Miller, *New Federal Data*, *supra* note 6.
[22] One thought might be that this is due to a larger percentage of dropouts. But one would be wrong: "[r]egardless of whether they graduated or dropped out, the median African American student owed more than they originally borrowed." *Id*. By comparison, African American borrowers who started college in 1995-96 and owed 101 percent a dozen years later." *Id.*
[23] THE DECLINE OF THE "GREAT EQUALIZER" THE ATLANTIC, https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455/ (last visited May 21, 2019); Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOCIAL CURRENTS 199, 200 (2017) ("Student loans, in other words, may allow an increasing number of black students to pursue a college education, but available evidence suggests that this occurs in a context where differential returns yield much lower returns than those experienced by whites.").
[24] *Id; see also* Miller, *New Federal Data*, *supra* note 6.
[25] Forty-nine percent of African American students and 21% of White students who entered college in 2003-04 and took out federal loans defaulted on them. NEW FEDERAL DATA SHOW A STUDENT LOAN CRISIS FOR AFRICAN AMERICAN BORROWERS CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/ (last visited May 18, 2019) (Table 4).
[26] Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICHIGAN JOURNAL OF RACE & LAW 1, 12 (2010).
[27] Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICHIGAN JOURNAL OF RACE & LAW 1, 12 (2010).

Given these disparities, it is not surprising that we have abundant evidence of large—and rapidly growing—racial disparities in who has student debt and how much they owe.[28] "By the time they are in their fourth year of study, 90% of African American and 72% of LatinX undergraduate students have acquired student loan debt, as compared to 66% of white students.[29] Four years after earning a bachelor's degree, black graduates in the 2008 cohort held $24,720 more student loan debt than white graduates ($52,726 versus $28,006), on average."[30]

There is also growing evidence that students of color are treated differently while in repayment. The National Consumer Law Center has found that student loan servicers chose to sue defaulted borrowers at higher rates in communities that have a higher density of people of color.[31] Over 60% of these cases result in a default judgment.[32] Given that communities with higher numbers of people of color generally have less wealth, the higher rate of lawsuits in those communities make little economic sense. The Consumer Financial Protection Bureau has reported the difficulties that many students encounter when attempting to enroll in IDR,[33] and now we also have evidence that borrowers of color enroll in IDR at much lower rates that White borrowers (about half for African American borrowers and one quarter for Latinx borrowers).[34]

Student debt disproportionally and adversely affects communities of color and we must view reforms through a civil rights lens. There are many things Congress could do to reverse this effect, but today I will only speak to the two major reforms being considered by this subcommittee: making all student loans (private and federal) dischargeable in bankruptcy.

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[28] JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION (Brookings) (2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/

[29] https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/. These numbers were based on 2011-12 NPSAS data, which undercounted the total debt load. Department of Education, *2015–16 National Postsecondary Student Aid Study (NPSAS:16) Student Financial Aid Estimates for 2015–16 First Look* at B-29 (2018).

[30] JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION (Brookings) (2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/

[31] MARGARET MATTES & YU, PERSIS, INEQUITABLE JUDGMENTS: EXAMINING RACE AND FEDERAL STUDENT LOAN COLLECTION LAWSUITS (2019), https://www.nclc.org/images/pdf/student_loans/report-inequitable-judgments-april2019.pdf.

[32] *Id.*

[33] SETH FROTMAN, UPDATE FROM THE CFPB STUDENT LOAN OMBUDSMAN: TRANSITIONING FROM DEFAULT TO AN INCOME-DRIVEN REPAYMENT PLAN (MAY 17, 2017), https://www.consumerfinance.gov/data-research/research-reports/update-cfpb-student-loan-ombudsman-transitioning-default-income-driven-repayment-plan/; SETH FROTMAN, CONSUMER FIN. PROT. BUREAU: ANNUAL REPORT OF THE STUDENT LOAN OMBUDSMAN (2015), https://files.consumerfinance.gov/f/201510_cfpb_annual-report-of-the-cfpb-student-loan-ombudsman.pdf.

[34] Kristin Blagg, THE DEMOGRAPHICS OF INCOME-DRIVEN STUDENT LOAN REPAYMENT URBAN INSTITUTE (2018), https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment (last visited May 30, 2019).

II. Federal Student Loans Should Be Dischargeable in Bankruptcy

Our $1.56 trillion in outstanding student loans and rising defaults are symptoms of much larger problems. To wit, the way we fund higher education is broken and we are perhaps harming more than we are helping those who need it the most. Those are structural problems that bankruptcy cannot solve. Bankruptcy, however, is well suited to bring relief to *individuals* suffering greatly under the weight of this system. **I urge this Subcommittee to act to move legislation forward that would make the bankruptcy discharge available to student loan borrowers.**

It is hard to find *anyone* who's happy with the current state of the law around student loan discharges,[35] but I will not rehash the history of how we got here.[36] Instead I want to focus on the problems with the arguments against discharge, how we are failing our student borrowers,[37] and how the bills you are considering today would put us in the right path going forward.

A. Arguments Against Discharge

There are a few arguments against discharging federal student loans in bankruptcy. A typical one posits that the student has benefited from the education at the expense of the creditor and thus they ought to be obligated to repay despite bankruptcy.[38] That argument is specious both because it ignores the public good aspects of education and because it is indistinguishable from an argument against discharging any other kind of government debt in bankruptcy.[39]

Another category of arguments can be described as worries over opportunism, fraud, or moral hazard. In Part IV of this testimony, I show why those arguments are overstated. It

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[35] Katy Stech Ferek, *Judges Wouldn't Consider Forgiving Crippling Student Loans—Until Now*, Wall St. J. (June 14, 2018), https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001. *But see* Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers,* 68 Florida Law Review 377, 379 (2016) ("the widespread pessimism regarding the current undue hardship standard should be tempered.") for a minority view.

[36] The American Bankruptcy Institute Consumer Commission Report has a brief history, as do a number of scholarly articles. AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 3-9 (2018) [hereinafter ABI COMMISSION REPORT]; Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLORIDA LAW REVIEW (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426744 (last visited Oct 14, 2014).

[37] For further discussion of issues with the judicial interpretations of "undue hardship" see Matthew Bruckner, Brook E. Gotberg, Dalié Jiménez, and Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans,* forthcoming in the Colorado Law Review (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366707 (proposing that the Department of Education use their powers to acquiesce to undue hardship discharge under certain limited circumstances).

[38] *Accord* John AE Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. LJ 245, 256 (2006).

[39] Bear in mind that we discharge federal and state tax debts after a 3-4 year period, and federally-guaranteed mortgage debt immediately. 11 U.S.C. § 523(a)(1).

should be noted here that these moral hazard-type arguments are applicable to most other debts dischargeable in bankruptcy.

The most sensible justification for treating federal student loans differently in bankruptcy than say, mortgages or personal loans, is that making these loans dischargeable would compromise the viability of the student loan program.[40] But even then, I do not think this argument holds much water. Its viability requires at least two assumptions: (1) that making any kind of discharge available for federal student loans would precipitate mass bankruptcies that would discharge sizable portions of student loan debt; (2) that the funding of the federal student loan program depends on its solvency.

These are both faulty assumptions. First, even at the height of bankruptcy filings, less than 1.5 million people filed annually; these days it is around 750,000.[41] Compare this to the almost 45 million people who currently have a student loan.[42] The numbers don't add up. If we expected a rush to bankruptcy the likes of which have never been seen,[43] we could design the discharge to slow down that rush by, for example, making loans dischargeable only after some period of time. The second assumption is also flawed. The funding of the federal student loan program is a political question. It does not depend on the fiscal solvency of the program itself, anymore than the funding of the Social Security Trust Fund.[44] The real question (and it's a difficult one) is where do the American people (through their elected representatives) think it is worthwhile to put our dollars. I would argue that higher education is one such place, although we do not necessarily need to do it through loans.

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[40] *Accord* Pottow, *supra* note 38.

[41] In 2018, there were 751,186 nonbusiness bankruptcies. Report F-5A.U.S. Bankruptcy Courts—Business and Nonbusiness Bankruptcy Cases Commenced, by County and Chapter of the Bankruptcy Code,During the 12-Month Period Ending December 31, 2018, https://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_1231.2018.pdf.

[42] *See supra* note 1.

[43] See Part IV for reasons why this is unlikely.

[44] Jim Kavanaugh, *Behind the Money Curtain: A Left Take on Taxes, Spending and Modern Monetary Theory, Counter Punch* (Jan. 22, 2018), https://www.counterpunch.org/2018/01/22/behind-the-money-curtain-a-left-take-on-taxes-spending-and-modern-monetary-theory/; Sean Williams, FACT OR FICTION: SOCIAL SECURITY IS RUNNING OUT OF MONEY? - THE MOTLEY FOOL (2018), https://www.fool.com/retirement/2018/06/15/fact-or-fiction-social-security-is-running-out-of.aspx; Sean Williams, FACT OR FICTION: SOCIAL SECURITY IS RUNNING OUT OF MONEY? THE MOTLEY FOOL (2018), https://www.fool.com/retirement/2018/06/15/fact-or-fiction-social-security-is-running-out-of.aspx.

B. Bankruptcy as the Last Safety Net

In many ways, bankruptcy functions as the last social safety net in a shrinking field of available alternatives.[45] All the evidence points to it being inadequate,[46] and yet even this last resort is unavailable to most student loan debtors.[47] The current system creates almost insurmountable barriers to justice for any but the "luckiest" of student loan debtors.[48] In significant part, this is due an access problem.[49] Few lawyers do this work. Fewer still are willing to take it on without an upfront fee, a challenge for debtors for whom it is an undue hardship to repay the loans. The debtors who most deserve this relief are those least likely to get it.[50]

The plethora of *ex post* schemes that Congress has approved in the last decade are meant to ameliorate the social and economic costs to an individual who lost the educational "bet" when borrowing for education.[51] In theory, they should be working splendidly. Indeed, given that practically all federal student loan borrowers are eligible for some form of IDR, we should have very low levels of defaults. In practice, these interventions are a disaster and we are seeing record levels of preventable defaults.[52] Fixing these issues should be a priority, but it will take time. In the meantime, students who could find relief in bankruptcy are suffering.

I also want to highlight a forgotten but serious deficiency with our courts' current interpretations of the statutory standard. Each of the judicial glosses interpreting "undue

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[45] Jean Braucher, *Consumer Banktuptcy as Part of the Social Safety Net: Fresh Start or Treadmill*, 44 Santa Clara Law Review 29 (2004); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005).

[46] Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL LAW REVIEW 63 (2006).

[47] The numbers are hard to come by, but one study estimates that thirty-two percent of consumers filing for Chapter 7 bankruptcy do so with student loan debt. Mike Brown, EVEN AFTER BANKRUPTCY, STUDENT DEBT STILL REMAINS FOR MANY, LENDEDU (June 11, 2019), https://lendedu.com/blog/student-loans-bankruptcy.

[48] In *A No-Contest Discharge,* we recount the story of Mr. Mosley, a homeless veteran who attempted to discharge his student loans. His discharge was ultimately granted, but only after three years of fighting the Educational Credit Management Corporation, representing the Department of Education. *A No-Contest Discharge, supra* note 37, at 2-4. He is one of the "lucky" ones.

[49] Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLORIDA LAW REVIEW (2014).

[50] Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASHINGTON LAW REVIEW 1115 (2016)(noting that "prior research suggests that individuals who have attained at least an undergraduate degree constitute a greater percentage of bankruptcy debtors who seek to discharge their educational debt than of debtors in the general bankruptcy population.").

[51] Income-Driven Plans, FEDERAL STUDENT AID (2018), /repay-loans/understand/plans/income-driven (last visited Jun 24, 2019); Forgiveness, Cancellation, and Discharge | Federal Student Aid, , https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation; Deferment and Forbearance | Federal Student Aid, , https://studentaid.ed.gov/sa/repay-loans/deferment-forbearance.

[52] CONSUMER FINANCIAL PROTECTION BUREAU, STUDENT LOAN SERVICING 10 (2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf; CONSUMER FINANCIAL PROTECTION BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM (2015), at 10, https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

hardship" focuses on the student and their ability to repay the debt. But this focus on the individual ignores systemic issues that would make repayment *undue*. Students with winning fraud, misrepresentation, or consumer protection claims against their school are not able to use undue hardship to repay their loan because the current framework does not fit that situation. Those students should not be saddled forever with this debt,[53] but as it stands the fact that they were mistreated by a school that accreditors and the Department of Education thought was worthy leaves many with little recourse.[54]

Some of those students may have borrower defense arguments that they can make to the Department of Education, but many will not find relief with that avenue. The Department's borrower defense rule may not cover their situation.[55] Or worse, they may face a Department unwilling to follow its own rules.[56] Under their current authority, the Department of Education could help student loan borrowers who file bankruptcy by deciding not to fight against students who want to discharge their loans in certain situations. Several members of Congress, academics, and the ABI Consumer Commission report have argued that it should do so in certain circumstances.[57]

C. Bills before the Subcommittee and Possible Alternatives

The subcommittee has two bills before it that would remove all student loans from the list of exceptions to bankruptcy discharge, H.R. 2648 and H.R. 770. The Senate is considering a similar bill, S. 1414. These bills are simple and get at the heart of the problem. They treat federal student debt in the same way that we treat mortgages

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[53] As effectively can happen with federal loans given that they do not have a statute of limitations. *See* PUB. L. NO. 102-26, 105 Stat. 123 (Apr. 9, 1991), amending 20 U.S.C. § 1091a. *See also* Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017).

[54] Suing the school or officials who committed the fraud is theoretically an option, but one unlikely to yield monetary relief even if successful.

[55] Improved Borrower Defense Discharge Process Will Aid Defrauded Borrowers, Protect Taxpayers | U.S. Department of Education, , https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers.; *but see Partial Borrower Defense Denials Violate Due Process, Privacy Act: Injunction Sought Against DeVos, Department of Education*, HARVARD PROJECT ON PREDATORY STUDENT LENDING (2018), http://www.legalservicescenter.org/partial-borrower-defense-denials-violate-due-process-privacy-act-injunction-sought-against-devos-department-of-education/.

[56] Data Show No Action on Borrower-Defense Claims | Inside Higher Ed (Apr. 1, 2019), https://www.insidehighered.com/quicktakes/2019/04/01/data-show-no-action-borrower-defense-claims; *Review of Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process* | Oversight.gov (Dec. 8, 2017), https://www.oversight.gov/report/ed/review-federal-student-aids-borrower-defense-repayment-loan-discharge-process; Steven Chung, THE DEPARTMENT OF EDUCATION APPROVED A SHOCKINGLY LOW NUMBER OF FEDERAL STUDENT LOAN FORGIVENESS APPLICATIONS ABOVE THE LAW, https://abovethelaw.com/2018/09/the-department-of-education-approved-a-shockingly-low-number-of-federal-student-loan-forgiveness-applications/.

[57] *See* Press Release, *Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students* (May 16, 2014), https://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling.; ABI Commission on Consumer Bankruptcy Response, https://www.regulations.gov/document?D=ED-2017-OPE-0085-0378; *A No-Contest Discharge*, *supra* note 37.

backed by the Federal Housing Administration or Veterans' Affairs. These bills recognize that for the vast majority of individuals, declaring bankruptcy is declaring failure, and that they do not do this lightly.

I imagine that some members of Congress may be reluctant to vote for such a sweeping change. In that case, I want to comment briefly about a possible compromise. I was a member of the American Bankruptcy Institute Commission on Consumer Bankruptcy. This seventeen-member group was comprised of a diverse group of bankruptcy experts ranging from academics like myself to consumer advocates, judges, trustees, and a fair number of creditor lawyers.[58] The student loan issue was one of the first ones we took up and a supermajority of this group agreed on a set of recommendations.[59] Among other relevant proposals, the Commission recommended limiting the scope of 523(a)(8).[60] Specifically, the recommendations would limit the exception to bankruptcy discharge to educational loans that meet three criteria:

(1) They were made, insured, or guaranteed by a governmental unit (such as a state or the federal government),
(2) They were incurred for the debtor's own education, AND
(3) They first became due less than seven years before the bankruptcy case was filed, regardless of any suspension of payments.

All other "student" loans would be treated like most other debt is treated in bankruptcy—dischargeable if the debtor gets a discharge. A student that obtained a governmental loan could not discharge that loan within seven years of the beginning of repayment unless they could meet the undue hardship standard.

Three major things to highlight to bring the recommendation home: (1) private student loans would be treated like credit cards (as I urge this Committee to do in the next Part of this testimony); (2) parent PLUS loans would be automatically dischargeable, and (3) we would return to the pre-1998 version of this section which made them immediately dischargeable if the loans had been outstanding for 7 years (70% of the typical period of repayment).

I want to note that the ABI Commission proposal would not fix the problems with the undue hardship standard.[61] In particular, it would not fix the issues affecting students who were lied to and fraudulently induced to take out federal loans by their schools. I

[58] Members, American Bankruptcy Institute Commission on Consumer Bankruptcy, https://consumercommission.abi.org/commission-members.
[59] Two-thirds affirmative votes from members were required before a proposal would make it into the Commission Report.
[60] I do not have time to discuss the other statutory proposals and regulatory proposals but I do believe that they work best as a package (in particular the statutory proposals (1)-(4)). *See* . AMERICAN BANKRUPTCY INSTITUTE COMMISSION ON CONSUMER BANKRUPTCY REPORT, *supra* note 36 at 3-5.
[61] To ameliorate some of that, the Commission report had another set of recommendations aimed at judges but that could also be implemented through statute or regulation. AMERICAN BANKRUPTCY INSTITUTE COMMISSION ON CONSUMER BANKRUPTCY REPORT, *supra* note 36 at 2.

view this as a significant problem and so my preference is for one of the aforementioned bills before the committee.

III. Private Student Loans Do Not Deserve Special Treatment

I now turn to the utterly indefensible treatment of private student loans in bankruptcy.[62] Enacting any of the proposals discussed above would also solve the private student loan problem, but it is important to discuss it separately. In 2005, holders of private student loan (PSL) debt received a tremendous gift: the roughly $55.9 billion of student loans originated under a Bankruptcy Code that allowed immediate discharge of those loans suddenly became presumptively nondischargeable.[63] There was no economic justification for this. None.

The only common feature between private and federal student loans is that they are extensions of credit for educational purposes.[64] Unlike with federal loans, private lenders pick and choose their borrowers, adjusting the loan price to the individual borrower.[65] This often results in private loans charging two and three times the federal loan interest rate. In addition, private loan borrowers lack the statutory protections afforded to federal student loan borrowers, posing an even higher risk to their financial well-being.

Since the 2005 amendments to the Bankruptcy Code, private student loan rates have ranged from 0% to almost 20%, depending on perceived borrower risk.[66] Due in large part this risk-based underwriting, private student loans have enjoyed a low default rate over the last decade. The latest PSL default rate is 2.19%.[67] This is far more similar to

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[62] Note that most of the arguments in Part II (particularly II.A and II.B) apply to private loans since they are not treated any differently from federal loans in bankruptcy.

[63] CONSUMER FINANCIAL PROTECTION BUREAU, PRIVATE STUDENT LOANS REPORT Appendix Figure 4, at 17 (2012), https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/.

[64] Note that PSL lenders have sought a very broad reading of 523(a)(8), arguing, despite the statutory language to the contrary, that "'educational benefit' should be read to include any funds that the borrower purports to use to pay educational expenses." Brief of Bankruptcy Scholars as Amici Curiae in Support of Appellees and Affirmance, McDaniel v. Navient Solutions (*In re* McDaniel), No. 18–01445 (10th Cir. Apr. 18, 2019).

[65] The Consumer Banker's Association, a lender member group, attributes the success of private student loans to "… careful underwriting, which is arguably the best consumer protection of all." CBA Statement on Department of Education Student Loan Bankruptcy Request for Information | Consumer Bankers Association (Feb. 21, 2018), https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-department-education-student-loan-bankruptcy-request (last visited Jun 15, 2019).

[66] CFPB PRIVATE STUDENT LOANS REPORT, *supra note* 63, Appendix Figure 2, at 97 (2012), https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/. These were rates at origination, most private student loans are variable-rate, offloading interest rate risk on the borrower. *Id.*

[67] Federal and private loans do not have equivalent definitions of default. I am using here the charge-off rate reported for a large proportion outstanding private student loans as of the third quarter of 2018. *See* DAN FESHBACH ET AL., MEASUREONE: PRIVATE STUDENT LOAN REPORT Q3 2018, at 4 (Dec. 20, 2018), https://docs.wixstatic.com/ugd/0aaff0_0026dfd2506049cb9089731813e32e8f.pdf.; CBA Statement on

credit cards (default rate of 2.5% in the same time period)[68] than to student loans issued by the federal government (10.8% default in a similar time period).[69] Between 2005 and 2011, the nine largest private student lenders reported that only 0.2-1.1% had a borrower or co-borrower who filed bankruptcy.[70]

A few studies have examined the effect of the 2005 bankruptcy amendments on the private student loan market. I describe them below. The top-line summary is clear, **making private student loans nondischargeable *harmed* students**. PSLs are just like any other consumer debt and should be treated accordingly.

In one paper, Xiaoling Ang and I examined loans made just before the 2005 amendments and just after. We found that the immediate effects of making PSLs nondischargeable (comparing the quarter before the law went into effect to the same quarter a year later) was that (1) the average borrower's credit score decreased slightly,[71] (2) loan volumes increased temporarily,[72] and (3) **the costs of the loans increased by an average of 0.35%**.[73]

In a second paper, Alexei Alexandrov and I once again examined the 2005 bankruptcy changes and found that **subprime students "saw little to no savings from the**

Dept. of Education Student Loan Report | Consumer Bankers Association, , https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-dept-education-student-loan-report (last visited Jun 15, 2019).

[68] The number quoted is from the third quarter of 2018. FRB: Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, , https://www.federalreserve.gov/releases/Chargeoff/delallsa.htm (last visited Jun 16, 2019).

[69] National Student Loan Cohort Default Rate Falls | U.S. Department of Education, , https://www.ed.gov/news/press-releases/national-student-loan-cohort-default-rate-falls (last visited Jun 15, 2019).

[70] CFPB PRIVATE STUDENT LOANS REPORT, *supra note* 63.

[71] This indicates a slight expansion in the kinds of borrowers who received credit post-BAPCPA but note "that in terms of less-than-prime borrowers, the credit expansion we observe[d] was modest: the effect on the average credit score was the same as applying for multiple credit cards within a short period." Xiaoling Ang & Jimenez, Dalie, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, *in* STUDENT LOANS AND THE DYNAMICS OF DEBT 211 (2015). Additionally, as Darolia and Ritter note in a study of the same time period, "The increased prevalence of cosigners might be one reason that lenders were willing to extend more credit to less creditworthy borrowers even though dischargeability itself does not appear to affect borrower behavior relative to the behavior of borrowers with only federal student loans." Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUCATION FINANCE AND POLICY 24 (2019), https://www.mitpressjournals.org/doix/abs/10.1162/edfp_a_00285 (last visited Jun 16, 2019).

[72] PSL originations increased after 2005 from 6.6 billion to 7.8 billion in 2006 and a height of 10.1 billion in 2008. After the recession, volumes leveled out at pre-2005 levels (5.6 and 5.7 billion in 2010 and 2011, respectively). See Figure 4 in CFPB PRIVATE STUDENT LOAN REPORT, *supra note* 63 at17.

[73] This is the average increase comparing 2005 v. 2006 (right around the law change). The costs increase even further—to an additional 0.50%—when one compares Q1 2006 and Q1 2007. Xiaoling Ang & Jimenez, Dalie, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, *in* STUDENT LOANS AND THE DYNAMICS OF DEBT 179, 208 (2015).

reduction in bankruptcy protections" in 2005.[74] We also explored the question of whether students would have been more likely to borrow private loans if prices *had decreased* after 2005. We found that students around the prime/subprime cutoff are not sensitive to price and that "even if BAPCPA had lowered interest rates for students with subprime co-borrowers, even by as much as three percentage points, this interest rate decrease would not have resulted in additional students entering the market due to their inelastic demand."[75]

It is important to note that another change after 2005 is that the proportion of private loans with a co-borrower has increased dramatically. PSL co-borrowers can be a parent, spouse, or friend. In co-signing for a loan, they become liable for the full amount, should the main borrower (the student) fail to repay. A cosigner multiplies the possibility of recovery for the lender. In 2005, just over 60% of private loans made for a student to attend an undergraduate institution had a co-borrower. By 2010, that number was over 80%.[76] Today, that number is over 90%.[77] In other words: **when private student loans were dischargeable in bankruptcy, lenders required *fewer* undergraduates get a co-borrower than they do now.** Today, when lenders have the added protection of presumptive nondischargeability, they require almost all loans to have a co-borrower.

The last study examining the 2005 changes looked at "whether private student loan borrowers distinctly adjusted their Chapter 7 bankruptcy filing behavior in response" to the 2005 changes.[78] In other words: The authors note that they could not find evidence of "widespread opportunistic behavior by PSL borrowers" before BAPCPA.[79] They go on to say that they "interpret these findings as a lack of evidence that the moral hazard associated with PSL dischargeability pre-BAPCPA appreciably affected the behavior of student loan borrowers systematically."[80]

It is past time for Congress to end the special treatment for private student lenders. H.R. 885 would do just that and I urge this Committee to report this bill favorably.

IV. The Moral Hazard Arguments Against Discharge Are Grossly Overstated

A common objection to proposals that would make some or all student loans dischargeable in bankruptcy is that they will encourage consumers to 'game' the system.

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[74] Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175, 179 (2017).
[75] *Id.* at 201.
[76] CFPB PRIVATE STUDENT LOANS REPORT, *supra note* 63, at 27.
[77] DAN FESHBACH ET AL., MEASUREONE: PRIVATE STUDENT LOAN REPORT Q3 2018 39 (2018), https://docs.wixstatic.com/ugd/0aaff0_0026dfd2506049cb9089731813e32e8f.pdf.
[78] Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUCATION FINANCE & POLICY 1 (2019), https://doi.org/10.1162/edfp_a_00285.
[79] *Id.* at 28.
[80] *Id.*

That is, won't people just load up on loans, graduate, and file bankruptcy as quickly as possible? This argument is enticing, but it simply doesn't have empirical support.

This objection is rooted in theoretical speculation and "anecdata"—anecdotal evidence passed as representative facts. These stories of individuals behaving badly are shocking but come with no evidence of anything like widespread abuse. There will always be examples of a minority of individuals who do something extreme, or outside the norm.[81] Those outlandish tales make for good stories, but they make terrible policy fodder. I have yet to see anyone produce evidence that these concerns have played out in bankruptcy in any significant numbers. To the contrary, from the very beginning of the student loan discharge exception, there have been little more than anecdotes from those pushing for them and significant evidence that these were not at all representative of the facts.[82]

Instead, we have abundant evidence that the overwhelming majority of individuals file bankruptcy reluctantly and only have all options have failed.[83] As detailed in Part II, we also do not have evidence that the private student loan borrowers acted opportunistically in attempting to discharge their private student loans before the law was changed.[84]

Second, these arguments assume that the only moral hazard we need be concerned with is that of individual borrowers. But we cannot ignore the other players in the system: student loan issuers/creditors and servicers. In the current system, these players yield tremendous power and thus lack market incentives to improve their processes vis-à-vis students.[85] This is especially true of the federal government, which has no statute of limitations on collection, can garnish not only bank accounts but social security, disability, and earned income tax credit income.[86]

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[81] Lulu Garcia-Navarro, Alligators, Drugs And Theft, Oh My! New List Shows Top 10 'Florida Man' Stories, NPR (Mar. 3, 2019), https://www.npr.org/2019/03/03/699832548/alligators-drugs-and-theft-oh-my-new-list-shows-top-10-florida-man-stories.

[82] At the same time that the 94th Congress put up the first barrier to dischargeability of student loans, it asked the Government Accountability Office (GAO) to undertake a study of what was actually happening with student loan discharge. The aim was to find abuses, but in fact "The results of the GAO report indicated that less than one percent of all federally insured and guaranteed educational loans were discharged in bankruptcy." Rafael L Pardo & Michelle R Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 UNIVERSITY OF CINCINNATI LAW REVIEW 405, 422-24 (2005) (recounting the history).

[83] *See, e.g.,* Pamela Foohey, Robert M. Lawless, Katherine M. Porter and Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME LAW REVIEW 219 (2018); Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEORGETOWN LAW JOURNAL 289, 314–15 (2010).

[84] Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUCATION FINANCE AND POLICY 24 (2019), https://www.mitpressjournals.org/doix/abs/10.1162/edfp_a_00285.

[85] Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA LAW REVIEW 1369, 1399 (2008)

[86] Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017).

Third, filing bankruptcy is a significant event and not something most people do lightly. It is expensive,[87] wreaks havoc on a person's credit report which in turn affects the cost and availability of important products like obtaining credit, insurance, living arrangements, and job prospects.[88] It can even affect a person's dating life.[89] These disruptions will impair a credit report for 7-10 years. And of course, the Bankruptcy Code limits how often someone can obtain a bankruptcy discharge.[90] Hypothetical explanations of what might happen if student loans became dischargeable in some fashion typically ignore the real-life consequences of filing bankruptcy.

Finally, the bankruptcy system already has significant tools to curb potential abuses. Since 2005 access to Chapter 7 is limited to those who can pass the means test.[91] Anyone who makes above the median for their household size in their state receives additional scrutiny.[92] In addition, the Bankruptcy Code provides robust tools aimed precisely at ferreting out the opportunistic debtor.[93] It is instructive to note that the overwhelming number of "anecdata" accounts of opportunistic debtors come from bankruptcy court decisions denying those debtor's the bankruptcy discharge.

Arguments about debtor opportunism are convenient rhetorical devices that obfuscate the issues. We should reject hypothetical theories and cherry-picked examples that lump and demonize hardworking people. We've listened to those voices before and they help get us here. Now let's listen to the people.

V. Why Congress Should Take Action Now

The likely consequences of enacting one or more of the proposals I've discussed, or something like the ABI proposal—is a temporary uptick in bankruptcy filings, an increase in social welfare, increased economic activity, and more students going to college.

A temporary uptick in bankruptcy filings is only natural: after all, the main reason we are here is that *people are suffering*.

Private loan borrowers often have trouble negotiating workouts with their creditors. In the last decade, almost half of private loan borrowers are actually co-signers: parents,

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[87] Lois R. Lupica, *The Consumer Bankruptcy Fee Study*, American Bankruptcy Institute Law Review (2012).
[88] Lea Krivinskas Sheppard, *Toward a Stronger Financial History Anti-Discrimination Norm*, 52 Boston College Law Review (2012).
[89] Jodi Helmer, *Looking for Mr. FICO: Singles Using Credit Score to Filter Dates*, CreditCards.com (June 26, 2013), https://www.creditcards.com/credit-card-news/singles-dating-credit_score-1270.php.
[90] 11 U.S.C. §§ 727(a)(8),(9).
[91] Charles J. Tabb and Jillian K. McClelland, *Living with the Means Test*, 31 SOUTHERN ILLINOIS L. J. 463 (2006).
[92] *Id.*
[93] *See, e.g.,* 11 U.S.C. §§ 707(b), 1325(a)(7), 727(a).

grandparents, friends of students. Those borrowers would likely very much welcome relief.

There are over 8 million federal student loan borrowers in default.[94] Many of them do not need to be there, because there is some income-driven repayment or other forgiveness option theoretically available to them under federal law. But laws on the book are not the same as how people experience law and all of the evidence we have is that the Department of Education is failing financially distressed borrowers.

Another (all-but-certain) consequence of enacting one or more of these proposals is an increase in social welfare. It is clear that this issue cuts across parties, age, gender, and even economic status.

Economic activity is also likely to increase. The income freed by a bankruptcy discharge will translate into more spending in the economy. But we are also likely to see indirect effects: as new graduates feel more able to take employment and other risks knowing that—should they need it—there is a safety net available if these risks do not work out. For the same reason we will likely see increased postsecondary enrollment.

We should welcome these outcomes. So long as the Department of Education appropriately manages the schools that receive federal funds,[95] all we would be doing is increasing entrepreneurship and calculated risk-taking. That is in fact one of the lauded functions of our Bankruptcy Code.[96]

Congress should amend the Bankruptcy Code immediately to allow student loans to be treated like credit cards and medical debt—automatically discharged in bankruptcy—and allow bankruptcy judges to use the statutory tools they already have to prevent bad faith filings.

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[94] It's important to remember that 'default' in federal student loans means that a borrower has failed to make payments over a 270-day period.

[95] There is certainly room for improvement on that front. *See, e.g.,* FOR-PROFIT COLLEGE KAPLAN TO REFUND FEDERAL FINANCIAL AID UNDER SETTLEMENT WITH UNITED STATES, https://www.justice.gov/usao-wdtx/pr/profit-college-kaplan-refund-federal-financial-aid-under-settlement-united-states (last visited May 28, 2019); SCHOOL OWNER PLEADS GUILTY TO $2 MILLION BRIBERY SCHEME INVOLVING VA PROGRAM FOR DISABLED MILITARY VETERANS, https://www.justice.gov/opa/pr/school-owner-pleads-guilty-2-million-bribery-scheme-involving-va-program-disabled-military (last visited May 28, 2019); ATTORNEY GENERAL XAVIER BECERRA SUES FOR-PROFIT ASHFORD UNIVERSITY FOR DEFRAUDING AND DECEIVING STUDENTS STATE OF CALIFORNIA - DEPARTMENT OF JUSTICE - OFFICE OF THE ATTORNEY GENERAL, https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and (last visited May 28, 2019).

[96] K. Ayotte, *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 161–185 (2006).

LEGISLATION OF THE

ONE HUNDRED SIXTEENTH CONGRESS

(2019–2020)

CONTENTS

P.L. 116-51 (Eurolled Bill H.R. 2336)

Family Farmer Relief Act of 2019

House Committee Report 116-182

H. R. 2336

One Hundred Sixteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and nineteen

An Act

To amend title 11, United States Code, with respect to the definition of "family farmer".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family Farmer Relief Act of 2019".

SEC. 2. DEFINITION OF FAMILY FARMER.

Section 101(18) of title 11, United States Code, is amended by striking "$3,237,000" each place that term appears and inserting "$10,000,000".

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

116TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
116–182

FAMILY FARMER RELIEF ACT OF 2019

JULY 24, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2336]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2336) to amend title 11, United States Code, with respect to the definition of "family farmer", having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

Purpose and Summary

H.R. 2336, the "Family Farmer Relief Act of 2019," would increase the current debt limit used to determine whether a family farmer is eligible for relief under chapter 12 of the Bankruptcy Code from $4,411,400 to $10,000,000. This bipartisan measure was introduced by Representative Antonio Delgado (D–NY) and currently has 27 cosponsors. H.R. 2336 is supported by the American

89–006

Bankruptcy Institute (ABI)[1] and the American College of Bankruptcy.[2] In addition, the legislation is supported by the American Farm Bureau Federation and the National Farmers Union.[3]

Background and Need for the Legislation

Chapter 12 is a specialized form of bankruptcy relief that addresses the distinct needs of family farmers by giving them the tools, under the protection of bankruptcy, to facilitate their financial rehabilitation.[4] This form of bankruptcy relief permits family farmers who satisfy certain eligibility criteria to reorganize their debts pursuant to a repayment plan under the supervision of a bankruptcy trustee. The special attributes of chapter 12 make it better suited to meet the particularized needs of family farmers in financial distress than other forms of bankruptcy relief, such as chapter 7 (liquidation), chapter 11 (business reorganization), and chapter 13 (individual reorganization).

Originally enacted on a temporary basis in 1986[5] in response to the financial upheaval farmers were facing at that time, chapter 12 was extended on numerous occasions over the years owing to the continued volatility of the agricultural market.[6] Ultimately, chapter 12 was made permanent as part of the 2005 Bankruptcy Amendments.[7] Statistically, chapter 12 is not extensively utilized. For example, of 773,418 bankruptcy cases filed during calendar year 2018, only 498 were filed under chapter 12.[8] In the past ten years, the highest number of chapter 12 cases (723) were filed in 2010.[9]

The Bankruptcy Code, in section 101(18), defines who is eligible to be a family farmer for purposes of chapter 12 in two principal respects. First, the farmer must be engaged in a farming operation[10] and have regular earned income from such operation.[11] Second, the farmer's aggregate amount of debt may not exceed $4,411,400, as currently adjusted for inflation.[12] H.R. 2336, the

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[1] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of Robert J. Keach, American Bankruptcy Institute) [hereinafter Oversight Hearing].

[2] Letter from Marc A. Levinson, Chair, Am. Coll. of Bankr., & Mark D. Bloom, Pres., Am. Coll. of Bankr. to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, & Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (June 14, 2019).

[3] Oversight Hearing, *supra* note 1 (prepared statement of Rep. Antonio Delgado (D–NY)).

[4] Although chapter 12 also pertains to family fishers, H.R. 2336 only pertains to family farmers.

[5] Pub. L. No. 99–554 (1986) (temporarily enacted for seven years).

[6] *See, e.g.*, Pub. L. No. 103–65 (1993) (five-year extension); Pub. L. No. 105–277 (1998) (five-month extension); Pub. L. No. 106–5 (1999) (six-month extension); Pub. L. No. 106–70 (1999) (nine-month extension); Pub. L. No. 107–8 (2001) (approximately two-month extension); Pub. L. No. 107–17 (2001) (approximately five-month extension); Pub. L. No. 107–170 (2002) (approximately two-month extension); Pub. L. No. 107–206 (2002) (eight-month extension); Pub. L. No. 377 (2002) (six-month extension); Pub. L. No. 108–73 (2003) (approximately five-month extension).

[7] Pub. L. No. 109–8, 1001, 119 Stat. 23, 185 (2005).

[8] Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary, Table F–2, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018*, U.S. Courts, https://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2018/12/31.

[9] Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary, Table F–2, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2010, U.S. Courts, https://www.uscourts.gov/sites/default/files/statistics_*import_dir/F02Dec10.pdf.

[10] *See* 11 U.S.C. § 101(18) (2019).

[11] *See* 11 U.S.C. § 101(18) (2019).

[12] 11 U.S.C. § 101(18) (2019). Note that this monetary amount is periodically adjusted every three years pursuant to 11 U.S.C. § 104 (2019). The current figure became effective on April 1, 2019. The prior amount was $4,153,150.

"Family Farmer Relief Act of 2019," would amend section 101(18) to increase the current debt limit to $10,000,000.

As the bill's author, Representative Delgado explained, farmers are "currently facing a fifth year of declining net farm income."[13] In particular, "[p]rices are low, inputs are high, and current trade policies make the future unknown."[14] The increase in the debt eligibility limit effectuated by H.R. 2336 reflects the fact that land and equipment values have increased as well as "the average size of U.S. farming operations."[15] According to the National Farmers Union, the bill "will help more family farmers avoid liquidation or foreclosure, allowing them to stay in operation."[16]

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing was used to consider H.R. 2336: "Oversight of Bankruptcy Law and Legislative Proposals," which was held on June 25, 2019 by the Committee's Subcommittee on Antitrust, Commercial, and Administrative Law.[17] The hearing considered various legislative measures. Of pertinence to H.R. 2336, the following witnesses testified in support of the measure: Representative Antonio Delgado (D–NY), the bill's sponsor; and Robert J. Keach on behalf of the ABI.

Committee Consideration

On July 11, 2019, the Committee met in open session and ordered the bill, H.R. 2336, favorably reported without amendment by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no rollcall votes occurred during the Committee's consideration of H.R. 2336.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the

[13] *Oversight Hearing, supra* note 1 (prepared statement of Rep. Antonio Delgado (D–NY)).
[14] *Id.*
[15] *Id.*; *see* (prepared statement of Robert J. Keach, American Bankruptcy Institute).
[16] *Id.* (quoting the National Farmers Union).
[17] *See generally* Oversight Hearing, *supra* note 1.

Committee has requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 2336 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2336 would assist family farmers in financial distress by increasing the current debt limit used to determine whether a family farmer is eligible for relief under chapter 12 of the Bankruptcy Code $10,000,000.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2336 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Family Farmer Bankruptcy Relief Act of 2019."

Sec. 2. Definition of family farmer. Section 2 amends Bankruptcy Code section 101(18), which defines "family farmer," to increase the maximum debt limit for chapter 12 eligibility purposes to $10,000,000.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 11, UNITED STATES CODE

* * * * * * *

CHAPTER 1—GENERAL PROVISIONS

* * * * * * *

§ 101. Definitions

In this title the following definitions shall apply:

(1) The term "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized.

(2) The term "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is re-

duced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

(7) The term "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case.

(7A) The term "commercial fishing operation" means—

(A) the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or

(B) for purposes of section 109 and chapter 12, aquaculture activities consisting of raising for market any species or product described in subparagraph (A).

(7B) The term "commercial fishing vessel" means a vessel used by a family fisherman to carry out a commercial fishing operation.

(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose.

(9) The term "corporation"—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

(11) The term "custodian" means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

(13A) The term "debtor's principal residence"—

(A) means a residential structure if used as the principal residence by the debtor, including incidental property,

without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.

(14) The term "disinterested person" means a person that—

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

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(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 for any other reason.

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee.

(16) The term "equity security" means—

(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph.

(17) The term "equity security holder" means holder of an equity security of the debtor.

(18) The term "family farmer" means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed [$3,237,000] *$10,000,000* and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed [$3,237,000] *$10,000,000* and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

(19) The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.

(19A) The term "family fisherman" means—

(A) an individual or individual and spouse engaged in a commercial fishing operation—

(i) whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and

(ii) who receive from such commercial fishing operation more than 50 percent of such individual's or

such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) a corporation or partnership—

(i) in which more than 50 percent of the outstanding stock or equity is held by—

(I) 1 family that conducts the commercial fishing operation; or

(II) 1 family and the relatives of the members of such family, and such family or such relatives conduct the commercial fishing operation; and

(ii)(I) more than 80 percent of the value of its assets consists of assets related to the commercial fishing operation;

(II) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for 1 dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such corporation or such partnership; and

(III) if such corporation issues stock, such stock is not publicly traded.

(19B) The term "family fisherman with regular annual income" means a family fisherman whose annual income is sufficiently stable and regular to enable such family fisherman to make payments under a plan under chapter 12 of this title.

(20) The term "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

(21) The term "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

(21A) The term "farmout agreement" means a written agreement in which—

(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property.

(21B) The term "Federal depository institutions regulatory agency" means—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation.

(22) The term "financial institution" means—

(A) a Federal reserve bank, or an entity 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 (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(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 (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, 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) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

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

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or ad-

justment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

(25) The term "forward contract" means—

(A) a contract (other than a commodity contract, as defined in section 761) 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 or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in this section) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination 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 subparagraph (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 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) 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.

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign

state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(27A) The term "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.

(27B) The term "incidental property" means, with respect to a debtor's principal residence—

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

(29) The term "indenture trustee" means trustee under an indenture.

(30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter

13 of this title, other than a stockbroker or a commodity broker.

(31) The term "insider" includes—

(A) if the debtor is an individual—

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

(32) The term "insolvent" means—

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due.

(33) The term "institution-affiliated party"—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act.

(34) The term "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union Act.

(35) The term "insured depository institution"—

(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and

(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection).

(35A) The term "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law.

(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

(38) The term "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments.

(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.

(39) The term "mask work" has the meaning given it in section 901(a)(2) of title 17.

(39A) The term "median family income" means for any year—

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

(40A) The term "patient" means any individual who obtains or receives services from a health care business.

(40B) The term "patient records" means any record relating to a patient, including a written document or a record recorded in a magnetic, optical, or other form of electronic medium.

(41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

(A) acquires an asset from a person—

(i) as a result of the operation of a loan guarantee agreement; or

(ii) as receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of—

(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.

(41A) The term "personally identifiable information" means—

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—

(i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;

(ii) the geographical address of a physical place of residence of such individual;

(iii) an electronic address (including an e-mail address) of such individual;

(iv) a telephone number dedicated to contacting such individual at such physical place of residence;

(v) a social security account number issued to such individual; or

(vi) the account number of a credit card issued to such individual; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—

(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or

(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

(42) The term "petition" means petition filed under section 301, 302, 303 and 1504 of this title, as the case may be, commencing a case under this title.

(42A) The term "production payment" means a term overriding royalty satisfiable in cash or in kind—

(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs.

(43) The term "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee.

(44) The term "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.

(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

(46) The term "repo participant" means an entity that, at any time before 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 guar-

anteed 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 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, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such 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.

(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 and Exchange Commission under section 6 of the Securities Exchange Act of 1934.

(49) The term "security"—
(A) includes—
(i) note;
(ii) stock;
(iii) treasury stock;
(iv) bond;
(v) debenture;
(vi) collateral trust certificate;
(vii) pre-organization certificate or subscription;
(viii) transferable share;
(ix) voting-trust certificate;
(x) certificate of deposit;
(xi) certificate of deposit for security;
(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under section 3(b) of such Act from the requirement to file such a statement;
(xiii) interest of a limited partner in a limited partnership;
(xiv) other claim or interest commonly known as "security"; and
(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but
(B) does not include—
(i) currency, check, draft, bill of exchange, or bank letter of credit;
(ii) leverage transaction, as defined in section 761 of this title;
(iii) commodity futures contract or forward contract;
(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;
(v) option to purchase or sell a commodity;
(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 from the requirement to file such a statement; or
(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered.

(50) The term "security agreement" means agreement that creates or provides for a security interest.

(51) The term "security interest" means lien created by an agreement.

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final

settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

(51B) The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

(51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

(51D) The term "small business debtor"—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

(52) The term "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.

(53) The term "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

(53A) The term "stockbroker" means person—

(A) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities—

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account.

(53B) The term "swap agreement"—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference 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, and basis swap;

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

(VIII) a weather swap, option, future, or forward agreement;

(IX) an emissions swap, option, future, or forward agreement; or

(X) an inflation swap, option, future, or forward agreement;

(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 or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, option, or spot transaction 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 an agreement or transaction referred to in this subparagraph;

(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 Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.

(53C) The term "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.

(56A) The term "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized.

(53D) The term "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

(54) The term "transfer" means—

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

(i) property; or

(ii) an interest in property.

(54A) The term "uninsured State member bank" means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation.

(55) The term "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.

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P.L. 116-169 (Eurolled Bill H.R. 2938)

Honoring American Veterans in Extreme Need Act of 2019 ("HAVEN Act")

House Committee Report 116-169

H. R. 2938

One Hundred Sixteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and nineteen

An Act

To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act".

SEC. 2. DEFINITION OF CURRENT MONTHLY INCOME.

Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

"(ii) excludes—

"(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

"(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

"(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

"(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.".

SEC. 3. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of

PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

U.S. GOVERNMENT INFORMATION GPO

116TH CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT 116–169

HONORING AMERICAN VETERANS IN EXTREME NEED ACT OF 2019

JULY 23, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2938]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2938) to exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

Purpose and Summary

H.R. 2938, the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act," would provide that certain veterans' disability benefits should not be treated as income for purposes of the Bankruptcy Code's means test. This bipartisan measure was introduced by Representative Lucy McBath (D–GA) on May 23, 2019, together with Representative W. Gregory Steube (R–

89–006

FL) as an original cosponsor. The bill is supported by the Veterans of Foreign Affairs, the American Legion, and the Disabled American Veterans.[1] In addition, it is supported by the American Bankruptcy Institute (ABI),[2] the National Association of Consumer Bankruptcy Attorneys (NACBA),[3] the National Conference of Bankruptcy Judges,[4] and the American College of Bankruptcy.[5]

Background and Need for the Legislation

BACKGROUND

Although the Bankruptcy Code as originally enacted in 1978 provided that a chapter 7 case could only be dismissed for "cause," the Code was amended in 1984 to permit the court to dismiss a chapter 7 case for "substantial abuse."[6] This provision, codified in section 707(b) of the Bankruptcy Code,[7] was added "as part of a package of consumer credit amendments designed to reduce perceived abuses in the use of chapter 7."[8] It was intended to respond "to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid their obligations."[9] In 1986, section 707(b) was further amended to allow a United States Trustee to move for dismissal.[10]

Among its various amendments to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[11] included the establishment of a means or needs-based testing mechanism to determine a debtor's ability to repay debts for the purpose of determining whether the filing of the bankruptcy case should be presumed to be abusive. As amended by that Act, section 707(b) of the Bankruptcy Code provides that if a chapter 7 debtor has the ability to repay debts and has no special circumstances, the filing of the debtor's case is presumed to be an abuse and subject to dismissal or conversion to a chapter 13 case based on the debtor's income and various specified expenses, some

[1] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Rep. Lucy McBath (D–GA)).

[2] *See id* (prepared statement of Robert J. Keach, Am. Bankr. Inst.); Am. Bankr. Inst., Final Rep. of the ABI Commission on Consumer Bankruptcy, at 134–35 (2019) [hereinafter ABI Consumer Report].

[3] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Ed Boltz, National Association of Consumer Bankruptcy Attorneys).

[4] Letter from U.S. Bankruptcy Judge John E. Waites, Pres., Nat'l Conf. of Bankr. Judges, to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, & Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (May 31, 2019).

[5] Letter from Marc A. Levinson, Chair, Am. Coll. of Bankr., and Mark D. Bloom, Pres., Am. Coll. of Bankr. to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, & Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (June 11, 2019).

[6] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 312, 98 Stat. 333, 335 (1984).

[7] 11 U.S.C. § 707(b) (2019).

[8] 6 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy § 707.LH[2], at 707–61 (15th ed. rev. 2006).

[9] *Id.* at § 707.04.

[10] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554, § 219, 100 Stat. 3088, 3101 (1986). The United States Trustee Program is responsible for overseeing the administration of bankruptcy cases and private trustees. 28 U.S.C. §§ 581–89a (2019). The Program is overseen by the Executive Office for United States Trustees, which provides policy and management direction to United States Trustees. The Program operates through a system of 21 regions nationwide, except for North Carolina and Alabama. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554 (1986); 28 U.S.C. § 581 n. (2019). With respect to North Carolina and Alabama, the bankruptcy system is administered by a bankruptcy administrator appointed by the Judicial Conference. *Id.*

[11] Pub. L. No. 109–8, 119 Stat. 23 (2005).

of which are determined under Internal Revenue expense standards.[12] The debtor's income, for purposes of this test, is typically determined by calculating the amount of average monthly income the debtor received during the six-month period preceding the filing of the bankruptcy case.[13]

NEED FOR THE LEGISLATION

For purposes of the Bankruptcy Code's means test, Social Security benefit payments are excluded as income. As Senator Edward Kennedy (D–MA) stated in support of his amendment providing for this exclusion that was ultimately included in the 2005 Amendments:

> The bottom line is that bankruptcy shouldn't be made more difficult for those who are depending on Social Security for their livelihood. Social Security was developed to ensure that seniors can live their golden years in dignity. If we allow Social Security income to be considered while determining whether someone is eligible for bankruptcy, a portion of those benefits could be used in a manner inconsistent with Congress' intent.[14]

There are, however, various other federal retirement benefit programs—such as programs for veterans—that take the place of Social Security, at least for the period during which the worker held the type of employment covered under such program. Much like Social Security, these other federal benefit programs almost always prevent assignment or seizure of these benefits by creditors.[15] Nevertheless, the Bankruptcy Code's means test treats such payments as income.

H.R. 2938, the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act," would bring certain veterans' disability benefits paid by the U.S. Department of Veterans Affairs and the U.S. Department of Defense into parity with the treatment of Social Security payments under the Bankruptcy Code's means test. According to the NCBJ, such treatment "will remedy an imbalance in the Bankruptcy Code that disproportionately steers veterans receiving such benefits into Chapter 13 cases because they often fail the Chapter 7 means test."[16]

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing was used to consider H.R. 2938: "Oversight of Bankruptcy Law and Legislative Proposals," which was held on June 25, 2019 by the Committee's Subcommittee on Antitrust, Commercial, and Administrative Law.[17] The hearing considered various legislative measures. Of pertinence to H.R. 2938, the following witnesses testified: Hollister K. Petraeus, former Assist-

[12] 11 U.S.C. § 707(b)(2)(A) (2019).
[13] 11 U.S.C. § 101(10A) (2019).
[14] 145 Cong. Rec. 29,929 (1999).
[15] See ABI Consumer Report at 134–35.
[16] Letter from John E. Waites, President, Nat'l Conf. of Bankr. Judges, to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, & Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (May 31, 2019).
[17] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019).

ant Director, Consumer Financial Protection Bureau's Office of Servicemember Affairs; Edward C. Boltz, on behalf of the NACBA; and Robert J. Keach, on behalf of the ABI.[18]

Committee Consideration

On July 11, 2019, the Committee met in open session and ordered the bill, H.R. 2938, favorably reported without amendment by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no rollcall votes occurred during the Committee's consideration of H.R. 2938.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 2938 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2938 would extend the temporary authorization exempting certain qualifying reserve component members of the Armed Services and National Guard members from the Bankruptcy Code's means test for four years.

[18] *See generally id.*

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2938 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Honoring American Veterans in Extreme Need Act of 2019" or the "HAVEN Act".

Sec. 2. Definition of Current Monthly Income. Bankruptcy Code section 101 defines various terms. Section 2 would amend Bankruptcy Code section 101(10A), which defines "current monthly income" for purposes of the Code's means test, to exclude compensation paid by the U.S. Department of Veterans Affairs and the U.S. Department of Defense to an individual in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 11, UNITED STATES CODE

* * * * * * *

CHAPTER 1—GENERAL PROVISIONS

* * * * * * *

§ 101. Definitions

In this title the following definitions shall apply:

(1) The term "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized.

(2) The term "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an

entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

(7) The term "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case.

(7A) The term "commercial fishing operation" means—

(A) the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or

(B) for purposes of section 109 and chapter 12, aquaculture activities consisting of raising for market any species or product described in subparagraph (A).

(7B) The term "commercial fishing vessel" means a vessel used by a family fisherman to carry out a commercial fishing operation.

(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose.

(9) The term "corporation"—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

[(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.]

(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

(ii) excludes—

(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

(11) The term "custodian" means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section

101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

(13A) The term "debtor's principal residence"—

(A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.

(14) The term "disinterested person" means a person that—

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

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(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 for any other reason.

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee.

(16) The term "equity security" means—

(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph.

(17) The term "equity security holder" means holder of an equity security of the debtor.

(18) The term "family farmer" means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $3,237,000 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $3,237,000 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

(19) The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.

(19A) The term "family fisherman" means—

(A) an individual or individual and spouse engaged in a commercial fishing operation—

(i) whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and

(ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) a corporation or partnership—

(i) in which more than 50 percent of the outstanding stock or equity is held by—

(I) 1 family that conducts the commercial fishing operation; or

(II) 1 family and the relatives of the members of such family, and such family or such relatives conduct the commercial fishing operation; and

(ii)(I) more than 80 percent of the value of its assets consists of assets related to the commercial fishing operation;

(II) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for 1 dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such corporation or such partnership; and

(III) if such corporation issues stock, such stock is not publicly traded.

(19B) The term "family fisherman with regular annual income" means a family fisherman whose annual income is sufficiently stable and regular to enable such family fisherman to make payments under a plan under chapter 12 of this title.

(20) The term "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

(21) The term "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

(21A) The term "farmout agreement" means a written agreement in which—

(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property.

(21B) The term "Federal depository institutions regulatory agency" means—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation.

(22) The term "financial institution" means—

(A) a Federal reserve bank, or an entity 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 (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(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 (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, 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) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

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

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

(25) The term "forward contract" means—

(A) a contract (other than a commodity contract, as defined in section 761) 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 or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in this section) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination 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 subparagraph (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 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) 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.

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(27A) The term "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.

(27B) The term "incidental property" means, with respect to a debtor's principal residence—

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

(29) The term "indenture trustee" means trustee under an indenture.

(30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker.

(31) The term "insider" includes—

(A) if the debtor is an individual—

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

(32) The term "insolvent" means—

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due.

(33) The term "institution-affiliated party"—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act.

(34) The term "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union Act.

(35) The term "insured depository institution"—

(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and

(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection).

(35A) The term "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law.

(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

(38) The term "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments.

(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.

(39) The term "mask work" has the meaning given it in section 901(a)(2) of title 17.

(39A) The term "median family income" means for any year—

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

(40A) The term "patient" means any individual who obtains or receives services from a health care business.

(40B) The term "patient records" means any record relating to a patient, including a written document or a record recorded in a magnetic, optical, or other form of electronic medium.

(41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

(A) acquires an asset from a person—

(i) as a result of the operation of a loan guarantee agreement; or

(ii) as receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of—

(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.

(41A) The term "personally identifiable information" means—

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes—

(i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;

(ii) the geographical address of a physical place of residence of such individual;

(iii) an electronic address (including an e-mail address) of such individual;

(iv) a telephone number dedicated to contacting such individual at such physical place of residence;

(v) a social security account number issued to such individual; or

(vi) the account number of a credit card issued to such individual; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)—

(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or

(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

(42) The term "petition" means petition filed under section 301, 302, 303 and 1504 of this title, as the case may be, commencing a case under this title.

(42A) The term "production payment" means a term overriding royalty satisfiable in cash or in kind—

(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs.

(43) The term "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee.

(44) The term "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.

(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

(46) The term "repo participant" means an entity that, at any time before 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 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, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such 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 registra-

tion 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.

(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 and Exchange Commission under section 6 of the Securities Exchange Act of 1934.

(49) The term "security"—

(A) includes—

(i) note;

(ii) stock;

(iii) treasury stock;

(iv) bond;

(v) debenture;

(vi) collateral trust certificate;

(vii) pre-organization certificate or subscription;

(viii) transferable share;

(ix) voting-trust certificate;

(x) certificate of deposit;

(xi) certificate of deposit for security;

(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under section 3(b) of such Act from the requirement to file such a statement;

(xiii) interest of a limited partner in a limited partnership;

(xiv) other claim or interest commonly known as "security"; and

(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include—

(i) currency, check, draft, bill of exchange, or bank letter of credit;

(ii) leverage transaction, as defined in section 761 of this title;

(iii) commodity futures contract or forward contract;

(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;

(v) option to purchase or sell a commodity;

(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities

Act of 1933 from the requirement to file such a statement; or

(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered.

(50) The term "security agreement" means agreement that creates or provides for a security interest.

(51) The term "security interest" means lien created by an agreement.

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

(51B) The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

(51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

(51D) The term "small business debtor"—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

(52) The term "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.

(53) The term "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

(53A) The term "stockbroker" means person—
(A) with respect to which there is a customer, as defined in section 741 of this title; and
(B) that is engaged in the business of effecting transactions in securities—
(i) for the account of others; or
(ii) with members of the general public, from or for such person's own account.
(53B) The term "swap agreement"—
(A) means—
(i) any agreement, including the terms and conditions incorporated by reference 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, and basis swap;
(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity 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;
(VIII) a weather swap, option, future, or forward agreement;
(IX) an emissions swap, option, future, or forward agreement; or
(X) an inflation swap, option, future, or forward agreement;
(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 or other derivatives markets (including terms and conditions incorporated by reference therein); and
(II) is a forward, swap, future, option, or spot transaction 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 an agreement or transaction referred to in this subparagraph;

(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 Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.

(53C) The term "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.

(56A) The term "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized.

(53D) The term "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

(54) The term "transfer" means—

(A) the creation of a lien;

(B) the retention of title as a security interest;
(C) the foreclosure of a debtor's equity of redemption; or
(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—
(i) property; or
(ii) an interest in property.

(54A) The term "uninsured State member bank" means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation.

(55) The term "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.

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P.L. 116-54 (Eurolled Bill H.R. 3311)

Small Business Debtor Reorganization Act of 2019

House Committee Report 116-171

H. R. 3311

One Hundred Sixteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and nineteen

An Act

To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Reorganization Act of 2019".

SEC. 2. REORGANIZATION OF SMALL BUSINESS DEBTORS.

(a) IN GENERAL.—Chapter 11 of title 11, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION

"§ 1181. Inapplicability of other sections

"(a) IN GENERAL.—Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter.

"(b) COURT AUTHORITY.—Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter.

"(c) SPECIAL RULE FOR DISCHARGE.—If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.

"§ 1182. Definitions

"In this subchapter:

"(1) DEBTOR.—The term 'debtor' means a small business debtor.

"(2) DEBTOR IN POSSESSION.—The term 'debtor in possession' means the debtor, unless removed as debtor in possession under section 1185(a) of this title.

"§ 1183. Trustee

"(a) IN GENERAL.—If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person

to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.

"(b) DUTIES.—The trustee shall—

"(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

"(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

"(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—

"(A) the value of property subject to a lien;

"(B) confirmation of a plan filed under this subchapter;

"(C) modification of the plan after confirmation; or

"(D) the sale of property of the estate;

"(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

"(5) if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;

"(6) if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and

"(7) facilitate the development of a consensual plan of reorganization.

"(c) TERMINATION OF TRUSTEE SERVICE.—

"(1) IN GENERAL.—If the plan of the debtor is confirmed under section 1191(a) of this title, the service of the trustee in the case shall terminate when the plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) of this section and section 1185(a) of this title.

"(2) SERVICE OF NOTICE OF SUBSTANTIAL CONSUMMATION.—Not later than 14 days after the plan of the debtor is substantially consummated, the debtor shall file with the court and serve on the trustee, the United States trustee, and all parties in interest notice of such substantial consummation.

"§ 1184. Rights and powers of a debtor in possession

"Subject to such limitations or conditions as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor.

"§ 1185. Removal of debtor in possession

"(a) IN GENERAL.—On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.

"(b) REINSTATEMENT.—On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

"§ 1186. Property of the estate

"(a) INCLUSIONS.—If a plan is confirmed under section 1191(b) of this title, property of the estate includes, in addition to the property specified in section 541 of this title—

"(1) all property of the kind specified in that section that the debtor acquires after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first; and

"(2) earnings from services performed by the debtor after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first.

"(b) DEBTOR REMAINING IN POSSESSION.—Except as provided in section 1185 of this title, a plan confirmed under this subchapter, or an order confirming a plan under this subchapter, the debtor shall remain in possession of all property of the estate.

"§ 1187. Duties and reporting requirements of debtors

"(a) FILING REQUIREMENTS.—Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

"(b) OTHER APPLICABLE PROVISIONS.—A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

"(c) SEPARATE DISCLOSURE STATEMENT EXEMPTION.—If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

"§ 1188. Status conference

"(a) IN GENERAL.—Except as provided in subsection (b), not later than 60 days after the entry of the order for relief under this chapter, the court shall hold a status conference to further the expeditious and economical resolution of a case under this subchapter.

"(b) EXCEPTION.—The court may extend the period of time for holding a status conference under subsection (a) if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

"(c) REPORT.—Not later than 14 days before the date of the status conference under subsection (a), the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.

"§ 1189. Filing of the plan

"(a) WHO MAY FILE A PLAN.—Only the debtor may file a plan under this subchapter.

"(b) DEADLINE.—The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension

is attributable to circumstances for which the debtor should not justly be held accountable.

"§ 1190. Contents of plan

"A plan filed under this subchapter—

"(1) shall include—

"(A) a brief history of the business operations of the debtor;

"(B) a liquidation analysis; and

"(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

"(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

"(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was—

"(A) not used primarily to acquire the real property; and

"(B) used primarily in connection with the small business of the debtor.

"§ 1191. Confirmation of plan

"(a) TERMS.—The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.

"(b) EXCEPTION.—Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

"(c) RULE OF CONSTRUCTION.—For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:

"(1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.

"(2) As of the effective date of the plan—

"(A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or

"(B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

"(3)(A)(i) The debtor will be able to make all payments under the plan; or

"(ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

"(B) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

"(d) DISPOSABLE INCOME.—For purposes of this section, the term 'disposable income' means the income that is received by the debtor and that is not reasonably necessary to be expended—

"(1) for—

"(A) the maintenance or support of the debtor or a dependent of the debtor; or

"(B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or

"(2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

"(e) SPECIAL RULE.—Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

"§ 1192. Discharge

"If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

"(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

"(2) of the kind specified in section 523(a) of this title.

"§ 1193. Modification of plan

"(a) MODIFICATION BEFORE CONFIRMATION.—The debtor may modify a plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. After the modification is filed with the court, the plan as modified becomes the plan.

"(b) MODIFICATION AFTER CONFIRMATION.—If a plan has been confirmed under section 1191(a) of this title, the debtor may modify the plan at any time after confirmation of the plan and before substantial consummation of the plan, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. The plan, as modified under this subsection, becomes the plan only if circumstances warrant the modification and the court, after notice and a hearing, confirms the plan as modified under section 1191(a) of this title.

"(c) CERTAIN OTHER MODIFICATIONS.—If a plan has been confirmed under section 1191(b) of this title, the debtor may modify the plan at any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1191(b) of this title. The plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan, as modified, under section 1191(b) of this title.

"(d) HOLDERS OF A CLAIM OR INTEREST.—If a plan has been confirmed under section 1191(a) of this title, any holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless, within the time fixed by the court, such holder changes the previous acceptance or rejection of the holder.

"§ 1194. Payments

"(a) RETENTION AND DISTRIBUTION BY TRUSTEE.—Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting—

"(1) any unpaid claim allowed under section 503(b) of this title;

"(2) any payment made for the purpose of providing adequate protection of an interest in property due to the holder of a secured claim; and

"(3) any fee owing to the trustee.

"(b) OTHER PLANS.—If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

"(c) PAYMENTS PRIOR TO CONFIRMATION.—Prior to confirmation of a plan, the court, after notice and a hearing, may authorize the trustee to make payments to the holder of a secured claim for the purpose of providing adequate protection of an interest in property.

"§ 1195. Transactions with professionals

"Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than $10,000 that arose prior to commencement of the case.".

(b) CLERICAL AMENDMENT.—The table of subchapters at the beginning of chapter 11 of title 11, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION

"1181. Inapplicability of other sections.
"1182. Definitions.
"1183. Trustee.
"1184. Rights and powers of a debtor in possession.
"1185. Removal of debtor in possession.
"1186. Property of the estate.
"1187. Duties and reporting requirements of debtors.
"1188. Status conference.
"1189. Filing of the plan.
"1190. Contents of plan.
"1191. Confirmation of plan.

SEC. 3. PREFERENCES; VENUE OF CERTAIN PROCEEDINGS.

(a) PREFERENCES.—Section 547(b) of title 11, United States Code, is amended by inserting ", based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)," after "may".

(b) VENUE OF CERTAIN PROCEEDINGS.—Section 1409(b) of title 28, United States Code, is amended by striking "$10,000" and inserting "$25,000".

SEC. 4. CONFORMING AMENDMENTS.

(a) TITLE 11.—Title 11, United States Code, is amended—

(1) in section 101—

(A) in paragraph (51C), by inserting "and has not elected that subchapter V of chapter 11 of this title shall apply" after "is a small business debtor"; and

(B) in paragraph (51D)—

(i) in subparagraph (A)—

(I) by striking "or operating real property or activities incidental thereto" and inserting "single asset real estate"; and

(II) by striking "for a case in which" and all that follows and inserting "not less than 50 percent of which arose from the commercial or business activities of the debtor; and"; and

(ii) in subparagraph (B)—

(I) by striking the period at the end and inserting a semicolon;

(II) by striking "does not include any member" and inserting the following: "does not include—
"(i) any member"; and

(III) by adding at the end the following:
"(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or
"(iii) any corporation that—
"(I) is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); and
"(II) is an affiliate of a debtor.";

(2) in section 103—

(A) by redesignating subsections (i) through (k) as subsections (j) through (l), respectively; and

(B) by inserting after subsection (h) the following:
"(i) Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of chapter 11 shall apply.";

(3) in section 322(a), by inserting "1183," after "1163,";

(4) in section 326—

(A) in subsection (a), by inserting ", other than a case under subchapter V of chapter 11" after "7 or 11"; and

(B) in subsection (b), by inserting "subchapter V of chapter 11 or" after "In a case under";

(5) in section 347—

(A) in subsection (a)—

(i) by inserting "1194," after "726,"; and

(ii) by inserting "subchapter V of chapter 11," after "chapter 7,"; and

(B) in subsection (b), by inserting "1194," after "1173,";

(6) in section 363(c)(1), by inserting "1183, 1184," after "1108,";

(7) in section 364(a), by inserting "1183, 1184," after "1108,";

(8) in section 523(a), in the matter preceding paragraph (1), by inserting "1192" after "1141,";

(9) in section 524—

(A) in subsection (a)—

(i) in paragraph (1), by inserting "1192," after "1141,"; and

(ii) in paragraph (3), by inserting "1192," after "523,";

(B) in subsection (c)(1), by inserting "1192," after "1141,"; and

(C) in subsection (d), by inserting "1192," after "1141,";

(10) in section 557(d)(3), by inserting "1183," after "1104,";

(11) in section 1102(a), by striking paragraph (3) and inserting the following:

"(3) Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter."; and

(12) in section 1146(a), by inserting "or 1191" after "1129".

(b) TITLE 28.—Title 28 United States Code, is amended—

(1) in section 586—

(A) in subsection (a)(3), by inserting "(including subchapter V of chapter 11)" after "7, 11";

(B) in subsection (b), by inserting "subchapter V of chapter 11 or" after "cases under" the first place it appears;

(C) in subsection (d)(1), by inserting "subchapter V of chapter 11 or" after "cases under" each place that term appears; and

(D) in subsection (e)—

(i) in paragraph (1), by inserting "subchapter V of chapter 11 or" after "cases under";

(ii) in paragraph (2), by inserting "subchapter V of chapter 11 or" after "cases under" each place that term appears; and

(iii) by adding at the end the following:

"(5) In the event that the services of the trustee in a case under subchapter V of chapter 11 of title 11 are terminated by dismissal or conversion of the case, or upon substantial consummation of a plan under section 1183(c)(1) of that title, the court shall award compensation to the trustee consistent with services performed by the trustee and the limits on the compensation of the trustee established pursuant to paragraph (1) of this subsection.";

(2) in section 589b—

(A) in subsection (a)(1), by inserting "subchapter V of chapter 11 and" after "cases under"; and

(B) in subsection (d)—

(i) in the matter preceding paragraph (1), by inserting "subchapter V of chapter 11 and" after "trustees under"; and

(ii) in the undesignated matter following paragraph (8), by inserting "subchapter V of chapter 11 and" after "cases under"; and

(3) in section 1930(a)(6)(A), by inserting ", other than under subchapter V," after "chapter 11 of title 11".

SEC. 5. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

SEC. 6. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

U.S. GOVERNMENT INFORMATION GPO

116TH CONGRESS *1st Session* } HOUSE OF REPRESENTATIVES { REPORT 116–171

SMALL BUSINESS REORGANIZATION ACT OF 2019

JULY 23, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3311]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3311) to amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

Purpose and Summary

H.R. 3311, the "Small Business Reorganization Act of 2019," would streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs. This bipartisan measure was introduced by Representative Ben Cline (R–VA) together with Antitrust, Commercial, and Administrative Law Subcommittee (ACAL Subcommittee) Chairman David N. Cicilline (D–RI), Full Committee Ranking Member Doug Collins (R–GA) and Representative Steve Cohen (D–TN) as original co-

89–006

sponsors. H.R. 3311 is supported by various nonpartisan organizations, including the American Bankruptcy Institute (ABI),[1] the National Bankruptcy Conference (NBC),[2] the American College of Bankruptcy,[3] and the National Conference of Bankruptcy Judges.[4]

Background and Need for the Legislation

BACKGROUND

Small businesses—typically family-owned businesses, startups, and other entrepreneurial ventures—"form the backbone of the American economy."[5] For example, it is estimated that "'companies with 50 to 5,000 employees account for more employment than those with over 5,000.'"[6] By their very nature, however, the longevity of these businesses is limited. According to the Small Business Administration Office of Advocacy, approximately 20 percent of small businesses survive the first year, but by the five-year mark only 50 percent are still in business and by the ten-year mark only one-third survive.[7]

Chapter 11 is a form of bankruptcy relief that is typically used by businesses to reorganize their financial affairs. Under the protection of chapter 11, a debtor is given a "financial breathing spell" from most creditor collection efforts. This protection allows the chapter 11 debtor to continue its business operations while formulating a plan of reorganization to repay its creditors. In general, the chapter 11 process requires the debtor to propose a plan of reorganization pursuant to which the debtor commits to repay its creditors. It is similar to a contract that creditors can enforce in the bankruptcy court should the debtor fail to adhere to the plan's requirements. The plan is voted upon by the debtor's creditors and the bankruptcy court must make certain findings (e.g., the plan was proposed in good faith and it complies with specified payment priorities). If the court is satisfied, then the plan is confirmed and the debtor is no longer in chapter 11.[8]

If a chapter 11 case is unsuccessful, the case is usually converted to one under chapter 7, which is a form of bankruptcy relief that provides for the orderly liquidation of the debtor's assets for distribution to its creditors.[9] Alternatively, the case may be dismissed, whichever is in the best interests of creditors and the bankruptcy estate.[10]

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[1] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (prepared statement of Robert J. Keach, Am. Bankr. Inst.).

[2] *Id.* (prepared statement of Thomas Small, Nat'l Bankr. Conf.).

[3] Letter from Marc A. Levinson, Chair, Am. Coll. of Bankr., and Mark D. Bloom, Pres., Am. Coll. of Bankr., to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, and Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (June 14, 2019).

[4] Letter from John E. Waites, President, Nat'l Conf. of Bankr. Judges, to Rep. Jerrold Nadler (D–NY), Chair, H. Comm. on the Judiciary, and Rep. Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (June 21, 2019).

[5] Am. Bankr. Inst., Final Report and Recommendations of the Commission to Study the Reform of Chapter 11, at 276 (2014) (quoting Deloitte Development LLC, Mid-Market Perspectives: America's Economic Engine—Competing in Uncertain Times 4 (2011)).

[6] *Id.*

[7] Chad Itar, *What Percentage of Small Businesses Fail—And How Can You Avoid Being One of Them*, Forbes: Community Voice (Oct. 25, 2018), https://www.forbes.com/sites/forbesfinancecouncil/2018/10/25/what-percentage-of-small-businesses-fail-and-how-can-you-avoid-being-one-of-them/#76f7489c43b5.

[8] 11 U.S.C. § 1129 (2019).

[9] 11 U.S.C. § 1112(b) (2019).

[10] *Id.*

Not surprisingly, while most chapter 11 business cases are filed by small business debtors, they are often "the least likely to reorganize successfully."[11] While the Bankruptcy Code envisions that creditors will play a major role in monitoring these cases, this often does not occur, chiefly because creditors in these smaller cases do not have claims large enough to warrant the time and money to participate actively in these cases.

In response to this concern, Congress passed legislation in 2005 requiring heightened scrutiny of such cases and streamlining the reorganization process.[12] The legislation sought to address "the special problems presented by small business cases by instituting a variety of time frames and enforcement mechanisms designed to weed out small business debtors who are not likely to reorganize. It also requires these cases to be more actively monitored by United States trustees[13] and the bankruptcy courts."[14] Specifically, with respect to small business cases, the United States trustee is required to:

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall—

(i) begin to investigate the debtor's viability;

(ii) inquire about the debtor's business plan;

(iii) explain the debtor's obligations to file monthly operating reports and other required reports;

(iv) attempt to develop an agreed scheduling order; and

(v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state of the debtor's books and records, and verify that the debtor has filed its tax returns; and

(C) review and monitor diligently the debtor's activities, to determine as promptly as possible whether the debtor will be unable to confirm a plan[.][15]

The United States Trustee Program is also charged with appointing individuals from the private sector to serve as trustees in all consumer chapter 7 and chapter 13 bankruptcy cases as well as in family farmer chapter 12 cases.[16] In addition, the Program may designate an individual to serve as trustee in a chapter 11 case for cause, including "fraud, dishonesty, incompetence, or gross mismanagement," among other grounds.[17]

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[11] H.R. Rep. No. 109–31, at 3 (2005); *see, e.g.*, Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 Com. L.J. 297, 325 (1992) (finding that only 6.5% of debtors confirmed and completed a reorganization plan, seemingly making saving a business under Chapter 11 very unlikely).

[12] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, 59 (2005).

[13] The United States Trustee Program is a component of the U.S. Justice Department charged with maintaining the integrity of the bankruptcy system and, in pertinent part, supervising the administration of chapter 11 cases. 28 U.S.C. § 586(a)(3) (2019).

[14] H.R. Rep. No. 109–31, at 19 (2005).

[15] 28 U.S.C. § 586(a)(7) (2019). In addition, the United States trustee is obligated to promptly seek dismissal or conversion of a chapter 11 case if material grounds for such relief exist. 28 U.S.C. § 586(a)(8) (2019).

[16] 28 U.S.C. § 586(a)(1)–(b) (2019).

[17] 11 U.S.C. § 1104(a) (2019); 28 U.S.C. § 586(a)(2) (2019).

NEED FOR THE LEGISLATION

Notwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing. Based upon their respective reviews of this issue, the NBC and the ABI developed recommendations to improve the reorganization process for small business chapter 11 debtors. H.R. 3311 is largely derived from these recommendations. As the bill's sponsor, Representative Ben Cline (R–VA), explained at the hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law on June 25, 2019 at which H.R. 3311 was considered, the legislation allows these debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business" which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."[18]

The principal features of H.R. 3311 consist of the following: (1) requiring the appointment of an individual to serve as the trustee in a chapter 11 case filed by a small business debtor, who would perform many of the same duties required of a chapter 12 trustee; (2) requiring such private trustee to monitor the debtor's progress toward confirmation of a reorganization plan; and (3) authorizing the court to confirm a plan over the objection of the debtor's creditors, providing such plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

The bill also includes two provisions, not limited to small business chapter 11 cases, pertaining to preferential transfers. In sum, it specifies an additional criterion that a trustee must consider before commencing an action to recover a preferential transfer (i.e., a transfer of property by the debtor made before the filing of the bankruptcy case preferential to a creditor and to the detriment of similarly situated creditors). The first provision would require the trustee to determine whether to exercise such authority based on reasonable due diligence in the circumstances of the case and take into account a party's known or reasonably knowable affirmative defenses. The second provision concerns the venue where such preferential transfer actions may be commenced. Current law requires this type of action to be commenced in the district where the defendant resides if the amount sought to be recovered by the action is less than $13,650.[19] H.R. 3311 would increase this monetary limit to $25,000.

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing was used to consider H.R. 3311: "Oversight of Bankruptcy Law and Legislative Proposals," which was held on June 25, 2019.[20] The hearing considered various legislative measures. Of pertinence to H.R. 3311, the following witnesses testified: Representative Ben Cline (R–VA), the bill's sponsor; Robert J. Keach, on behalf of the American Bankruptcy Institute; and former

[18] *Unofficial Tr. of Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 27 (2019) (on file with H. Comm. on the Judiciary staff).

[19] 28 U.S.C. § 1409(b) (2019).

[20] *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019).