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CHAPTER 2. THE ADMINISTRATION OF BANKRUPTCY CASES

Introduction

The second major change proposed by the bill is the creation of a Government officer to supervise the conduct of bankruptcy cases, and to serve as trustee in bankruptcy cases when private trustees are unwilling to serve. Many of the functions assigned to the new official, called the United States trustee, are currently performed by bankruptcy judges. Under the proposed system, the bankruptcy judges will be handling only judicial matters in bankruptcy cases. The proposed United States trustees will be the repository of many of the administrative functions now performed by bankruptcy judges, and will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.

I. The Current Administrative System and Its Problems

Bankruptcy judges administer the present bankruptcy system, and are responsible for the administration of individual bankruptcy cases. Their administrative, supervisory, and clerical functions in these matters are in addition to their judicial duties in bankruptcy cases.[1] The situation is in marked contrast to most litigation, in which the parties themselves manage the progress of the case. The judge does not become involved in the case, and if a party fails to take action, the judge does not intercede on his behalf. Instead, the party is foreclosed.

The practice in bankruptcy is different for several reasons. First, there is a public interest in the proper administration of bankruptcy cases. Bankruptcy is an area where there exists a significant potential for fraud, for self-dealing, and for diversion of funds.[2] In contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors.[3] In general civil litigation, a default by one party is relatively insignificant, and though judges do attempt to protect parties' rights, they need not be active participants in the case for the protection of the public interest in seeing disputes fairly resolved. In bankruptcy cases, however, active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by an impartial supervisor.

The bankruptcy judges have stepped in to perform the supervisory role because of the dearth of creditor participation. The Bankruptcy

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[1] *See Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess., ser. 27, pt. 1, at 99–101, 121, 259–66 (1975–76) [hereinafter cited as *Hearings*].

[2] *See* COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT, H.R. Doc. No. 93–137, 93d Cong., 1st Sess., pt. I, at 6, 93, 103–17 (1973) [hereinafter cited as COMMISSION REPORT].

[3] *See Hearings*, pt. 3, at 1699–1702, 1723–28 (consumers creditors).

Act was designed in 1898 to give creditors control over the bankrupt's assets, which in equity belong to them. The bankruptcy trustee, whose trust is for the benefit of creditors, was to be elected by creditors.[4] Creditors were permitted to elect a committee to represent them in additional matters, such as the conduct of the case, and supervision of the work of the trustee.[5] However, creditor control of bankruptcy cases has become a myth in all but the largest cases.[6] The only supervision available is by the bankruptcy judges themselves.

The Bankruptcy Act provides for the default of creditor control by vesting the creditors' normal functions in the bankruptcy judge when the creditors do not exercise them. The bankruptcy judge is required to appoint a trustee in liquidation cases when creditors do not elect one.[7] The bankruptcy judge supervises the trustee in the performance of his duties, often suggesting causes of action that the trustee might pursue to recover assets for the estate. The bankruptcy judge reviews nearly all transactions that trustees enter into, and rules, usually ex parte, on their propriety. The bankruptcy judge frequently entertains requests for instructions from trustees for even the most routine matters. In addition to his supervisory role with respect to the trustee, the bankruptcy judge must preside at first meetings of creditors,[8] and must supervise examinations of the debtor, which are little more than depositions taken by the trustee or creditors to obtain information with which to begin an investigation.

It is enough of a reason for change that these functions and duties of the bankruptcy judge constitute no part of his judicial responsibilities, and divert him from the important judicial and legal work that must be done in bankruptcy cases. However, if that were the system's only vice, adjustments less than those proposed in the bill might suffice. Deeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency places him in an untenable position of conflict, and seriously compromises his impartiality as an arbiter of bankruptcy disputes.[9]

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A. THE COMBINATION OF ADMINISTRATIVE AND JUDICIAL ROLES

The bankruptcy judge is often called upon to resolve disputes between the estate and adverse third parties. The estate is represented by the trustee, usually an appointee of the bankruptcy judge, serving in many cases that are before that judge, and continually being reappointed to new cases as they come in. There usually develops a close working relationship between the judge and "his" trustee, due to the necessity for frequent ex parte contacts between the judge and the trustee in the administration of the case. It is not uncommon to see a trustee enter a courtroom, for a hearing on a matter, from the judge's chambers, followed closely by the judge himself. As often as not, the trustee was working with the judge on a different matter than the

[4] Bankruptcy Act sec. 44a, 11 U.S.C. 72(a) (1970).
[5] Bankruptcy Act § 44b, 11 U.S.C. 72(b) (1970).
[6] COMMISSION REPORT, pt. I, at 103–17.
[7] Bankruptcy Act § 44a, 11 U.S.C. 72(a) (1970).
[8] Bankruptcy Act §§ 38(2), 55b, 11 U.S.C. 66(2), 91(b) (1970); Rules of Bankruptcy Procedure 204(a)(2).
[9] *Hearings*, pt. 1, at 501–03; COMMISSION REPORT, pt. I, at 93–94.

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one up for hearing. Nevertheless, the combined force of all of these factors seriously compromises the appearance of the bankruptcy judge as an impartial arbiter. They have worked to generate deep suspicion on the part of attorneys who practice in the bankruptcy court as to the fairness of the decisions of the bankruptcy court.[10]

The bankruptcy judge must preside at the first meeting of creditors, at which an examination of the debtor usually takes place.[11] The judge listens to the examination, and rules on the permissibility of any challenged questions posed to the debtor. The scope of the examination is broad. It may cover any of "the acts, conduct, or property of a bankrupt."[12] It is similar to a deposition. Its purpose is to permit the trustee to gather enough information to determine whether there are assets to pursue, transfers that are avoidable, or causes of action on which to bring suit. Much of the testimony elicited would be inadmissible in a trial,[13] but is necessary to assist the trustee in the performance of his duties. The bankruptcy judge, which presiding at the meeting, listens to all of this evidence. If disputes arise later in the course of administration of the case, the bankruptcy judge must rule. If the trustee initiates a cause of action, the bankruptcy judge must hear the trial, without a jury. It is not uncommon for a bankruptcy judge to be unable to recall, when called up to resolve a dispute or find facts after a trial, whether the information on which he is basing a decision was heard at the first meeting of creditors, during the judge's extensive ex parte contacts with the trustee and with counsel during the administration of the case, or during the actual trial on the issue presented for decision.[14] It is a fundamentally unfair system that channels inadmissible evidence to the arbiter that must decide disputed issues.

The judge obtains information and impressions from other sources as well. A bankruptcy judge may be required to grant a debtor in possession in a reorganization case authority to enter into a contract subject to certain terms and conditions. The judge may actually participate, through the debtor in possession, in negotiating the con-

tract. He may work with the debtor in possession and a union to avert a strike that would ruin the business. He may advise the debtor in possession or the trustee in the management of the business, and issue frequent instructions for its conduct. Later in the case, that same judge may be faced with the responsibility for resolving a dispute that arises over the terms of the contract that he participated in negotiating or over the nature of the union's obligation to the debtor. An individual that is in effect a "party" to a contract simply cannot render a fair or impartial decision concerning its interpretation.

In particular cases, a judge may, after reviewing the schedules of assets and liabilities that the debtor has filed, and various other information in the case, suggest to a dilatory trustee that he pursue a cause of action, for example to recover a preference or avoid a lien,

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[10] *Id.*
[11] Bankruptcy Act §§ 38(2), 55b, 11 U.S.C. 66(2), 91(b) (1970).
[12] Bankruptcy Act § 21a, 11 U.S.C. 44(a) (1970); Rules of Bankruptcy Procedure 205(d).
[13] *Hearings*, pt. 1, at 566–67.
[14] *Id.*

or suggest that he initiate a proceeding to recover an asset of the estate held by a third party. If the trustee brings the action in the bankruptcy court, the bankruptcy judge that suggested it will be sitting in judgment on the validity of the trustee's claim. Such a position is untenable for any adjudicator in our judicial system.

These factors add an additional dimension to the position of the bankruptcy judge. As the administrator of bankruptcy cases, and the individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as "my case." [15] The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court, and has caused at least one occasional bankruptcy practitioner to suggest that "the bankruptcy court is the only court I appear in in which the judge is an interested party."

These problems are particularly acute in business rehabilitation cases. In chapter X corporate reorganization cases, the judge must appoint the trustee,[16] and then work with the trustee in the conduct of the business. The appearance of unfairness generated when the judge's appointee appears before the judge for a hearing is magnified because the judge must work so closely with the trustee in the management of the business undergoing reorganization. Though there is no trustee in a chapter XI or chapter XII arrangement case, the judge works closely with the debtor in possession in the management of the business. It is in these cases in which the judge's personal responsibility for the success or failure of a case is intense, with the consequent appearance of bias in the judge's consideration of disputes that arise in the case.

None of these problems are the creation of the bankruptcy judges themselves. As a whole, they are fair-minded individuals who do the best they can to avoid the conflicts and institutional bias that exists in the bankruptcy system. Nevertheless, the structure of the system, written into the present Bankruptcy Act as law, necessitates the awkward position in which the bankruptcy judges find themselves, and

brings disrepute on the whole system. The law must be changed to afford bankruptcy litigants the fair and impartial justice to which all other litigants in the federal courts are entitled.

B. CREDITOR CONTROL

Other problems, unrelated to the conflicting roles of the bankruptcy judges, exist in the current administrative structure of the Bankruptcy Act. They may be grouped under the general heading of creditor control. When the Bankruptcy Act was adopted 80 years ago, the underlying premise was that the money of the estate was essentially a trust for the benefit of the bankrupt's creditors. Consequently, the creditors themselves should be entitled to supervise the collection and liquidation of the estate. They would do so through their elected representative, the trustee in bankruptcy. They would supervise the work of the trustee through an elected creditors' com-

[17] *Hearings*, pt. 1, at 593.
[18] Bankruptcy Act § 156, 11 U.S.C. 556 (1970); Rules of Bankruptcy Procedure 10-202(a).

mittee, who would serve without compensation, simply to protect their own interests and the interests of those they represented.[17]

The present Bankruptcy Act thus relies exclusively on a system of private trustees,[18] supervised by the bankruptcy judges. The Act contemplates election of a trustee in each case by the general unsecured creditors. If, however, creditors do not elect a trustee, the judge may appoint a trustee to serve in the case.

The notion of creditor control, while still theoretically sound, has failed in practical terms. Creditor control in bankruptcy cases is a myth.[19] Creditors take little interest in pursuing a bankrupt debtor. They are unwilling to throw good money after bad. As a result, creditor participation in bankruptcy cases is very low. More often than not, the bankruptcy trustee is appointed by the judge, which generates some of the institutional bias problems noted above. Such a practice, while damaging to the system's appearance of integrity, is innocuous from the standpoint of creditor control. It does no harm to the debtor or to creditors.

However, if there are assets available in a case, the vacuum created by the lack of creditor interest in the case is not in fact filled by the bankruptcy judge, and the result is not innocuous. In practice, creditor control has become attorney control, and the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors.[20] The practices that have grown out of this shift of control often work to the detriment of both debtors and creditors. They benefit only those administering bankruptcy cases.

The means by which those operating the system turn it to their own advantage are served. Frequently, an attorney that has represented a creditor in past cases will notify him of the bankruptcy of one of the creditor's current debtors. The attorney then obtains a proxy from the creditor to vote the creditor's interest in the case. An attorney may obtain numerous proxies in a particular case in this manner. When the trustee is to be elected, the attorney votes all of his proxies for a colleague. The colleague thus elected then hires the attorney to serve as counsel to the trustee in the case, assuring a fee for his services. The

fee for counsel is usually substantially higher than the fee for the trustee, because it is not limited to a specified percentage under the Bankruptcy Act. In a subsequent case, the colleague and the attorney will switch places.[21]

In those districts where such practices do not prevail, bankruptcy judges appoint the trustees. Some judges view the trustee's job as a patronage position for the bankruptcy judge to dispense; the judge may even let it be known that elections are not viewed with favor. In those districts, and in some others, trustees are routinely appointed in all cases in which there is no election. In others, judges do not appoint trustees in what appear to them after examination of the schedules to be no asset cases. The practice varies widely.

The Bankruptcy Act also provides for the appointment of a receiver pending the election or appointment of a trustee. In some districts

[21] *Cf. Hearings*, pt. 1, at 537.
[22] *See* Bankruptcy Act § 44a, 11 U.S.C. 72(a) (1970).
[23] COMMISSION REPORT, pt. I, at 103–117.
[24] *See id.*
[25] *Hearings*, pt. 2, at 1252–53.

the receiver's position is also viewed as a patronage job and receivers are appointed by the judge as a matter of course. Then, if a trustee is not elected, the receiver is appointed trustee in the case.

Creditor control problems arise in business arrangement cases as well, though in a different form. In chapter XI cases, there is no trustee. However, there is an official committee of unsecured creditors that negotiates with the debtor in possession in the formulation of a plan.[22] The committee also supervises, to a limited degree, the conduct of the case by the debtor in possession.[23] The committee is elected by the unsecured creditors, just as the trustee is elected in a liquidation case.[24] The members of the committee are not compensated. However, the counsel to the creditors' committee is paid for his services;[25] it is a lucrative position. Thus, creditors' attorneys with proxies participate actively in the election of the members of the committee in order that they may be selected as counsel to the committee. The participation parallels their participation in the election of a trustee in a liquidation case.

C. FEES

The third problem generated by the current administrative system relates to fees. In order to provide an incentive to trustees to collect assets for the estate, trustees are compensated out of money of the estate.

The Bankruptcy Act provides a graduated maximum compensation scale for trustees, starting with a maximum of 10% on the first $500 of assets in the estate, 6% on the next $1,000, and so on.[26] It provides, however, that in any case where the assets of the estate are inadequate to compensate the trustee for his services in the case, the judge may award a fee of up to $150.[27] If the trustee in the case has also served as receiver, present law entitles him to a separate fee in his capacity as a receiver, even if the work he did as receiver was part of his work as trustee.[28]

The practice under these provisions of the Bankruptcy Act has diverged from the original intent of their draftsmen. As so often happens, maximums tend to become minimums. In all but the largest cases,

trustees receive the maximum fee. This is especially true with respect to the $150 discretionary fee. Frequently in consumer cases, that $150 fee amounts to over 90% of the assets of the estate. In those cases, the debtor surrenders assets, but creditors receive virtually nothing. The assets go to pay the trustee's fee, his counsel's fee, and the required contribution to the Referees Salary and Expense Fund. These cases, in which only the administrative expenses are paid and there is no distribution to creditors, are known as nominal asset cases.[29]

Of course, practices vary widely around the country, but as one example, recent statistics show that over 40% of bankruptcy cases in

[29] Bankruptcy Act § 339(1)(c), U.S.C. 739(1)(c) (1970); Rules of Bankruptcy Procedure 11-29(a).
[30] Bankruptcy Act § 339, 11 U.S.C. 739 (1970); Rules of Bankruptcy Procedure 11-29(a).
[31] Bankruptcy Act § 338, 11 U.S.C. 738 (1970); Rules of Bankruptcy Procedure 11-27.
[32] Bankruptcy Act § 339(2), 11 U.S.C. 739(2) (1970); Rules of Bankruptcy Procedure 11-29(c).
[33] Bankruptcy Act § 48c(1), 11 U.S.C. 76(c)(1).
[34] *Id.*
[35] Bankruptcy Act § 48a, 11 U.S.C. 76(a) (1970).
[36] *Hearings*, pt. 2, at 773-88.

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Massachusetts were nominal asset cases.[30] The existence of nominal asset cases, in which the bankruptcy system is operated primarily for the benefit of those operating it, has been one of the most frequently expressed criticisms of the current system.

The existence of the $150 discretionary fee and of nominal asset cases is based on an averaging rationale. In every case, the trustee receives $10 for his services from the $50 statutory filing fee for the case. It is clear that $10 is inadequate to compensate a trustee for the paper shuffling that must be done in even the simplest no-asset case. Trustees are willing to take no-asset cases with only a $10 fee, however, because through tacit agreements with the bankruptcy judges that appoint them, they know that they will receive the $150 fee in any case where there are adequate assets to pay it, even though the reasonable value of the trustee's services in such a case may be far less than $150. Thus, in the long run, the trustees average out their fees, with the creditors in nominal asset cases subsidizing trustees for all cases.

The $150 discretionary fee is detrimental to the interests of creditors, whom the trustee ostensibly represents, because it allows the trustee to take nearly all of the assets of the estate without any distribution to creditors. The fee raises a conflict of interest for the trustee as well. Under the percentage fee schedule, a trustee must recover approximately $2400 in assets before the maximum percentage fee amounts to $150.[31] Such a recovery is very unlikely in the average consumer bankruptcy case. Thus, the trustee has no incentive to search for assets worth more and $150 or $200, which is just enough to pay for his fee. If he spends more time on the case and discovers assets worth $1500 or $2000, he still will not receive a fee of more than $150.[32] The result is that the percentage fee system, designed originally to induce trustees to find assets, has been defeated in the smaller cases by the discretionary fee of $150.

Where the courts permit it, it is usually an easy matter for a trustee to find assets worth $150 to $250. The trustee can demand the keys to the debtor's car, no matter how little it is worth, and then sell the car back to the debtor for $150. Repurchase of the car is cheaper for the debtor than having to replace it.[33] The trustee may also simply collect

an income tax refund that the debtor has coming, if the case is filed in the early part of the year; [34] or the trustee can collect a security deposit that a debtor has for his apartment. There have also been cases where the trustee has taken the debtor's pets and sold them back to the debtor. All of these practices detract from the debtor's fresh start, and do nothing to help creditors.[35] They also strongly resemble many of the sharp practices of the consumer finance industry, and are wholly out of place when done under the auspices of bankruptcy court.

These practices do not occur uniformly throughout the country. The bankruptcy judges in some districts regulate trustees more than in others. In New Hampshire and Vermont, the bankruptcy judges do not appoint trustees in what appear to be no-asset or nominal

[34] *Hearings*, pt. 2, at 1146.
[35] *Hearings*, pt. 2, at 786; Bankruptcy Act § 48c(1), 11 U.S.C. 76(c)(1) (1970).
[36] *Hearings*, pt. 2, at 786–87.
[37] *Id.* at 781–82.
[38] *Id.* at 782–84.
[39] *Id.* at 787–88.

asset cases.[36] They simply order any assets in the case abandoned to the debtor. In Los Angeles, the judges do not permit the trustee to collect an income tax refund if it is less than $250. In Orange County, California, the judges do not award the trustee a fee in excess of what is actually distributed to creditors. However, these districts are the exceptions, not the rule.

The general practices grow from the relationship between the trustees and the bankruptcy judges. The Bankruptcy Act permits election of trustees by creditors. Creditors seldom take an interest in consumer cases, however, and thus the bankruptcy judges appoint their friends as trustees in the vast majority of cases. Thus, litigants and observers frequently object to the apparent, and in many cases real, cronyism between bankruptcy judges and their trustees. The "bankruptcy ring" is reflected not only in the appearance of unfairness in bankruptcy judges ruling in litigation between their appointees and third parties, but also in the awarding of compensation by the appointing authority. The judges protect their appointees, mostly through use of the $150 discretionary fee, to the detriment of both the debtor's fresh start and the creditors' recovery.

D. THE BANKRUPTCY RING

Finally, there is a fourth class of problems, generated by the interplay between the first three classes. There is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bars. They are in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor in possession. Usually, a trustee is appointed by the bankruptcy judge, and is appointed in numerous cases before the same judge. Debtors' attorneys make frequent appearances in the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among nonbankruptcy practitioners that there is a "bankruptcy ring" that has an inside track on all bankruptcy matters, including the judges' favoritism. As Harold Marsh, Chairman of the Bankruptcy Commission, stated in hearings before the Subcommittee on Civil and Constitutional Rights.[37]

As a result of the nature of the system itself, there exists a relationship between the Bankruptcy Judges, the trustees and the counsel for the trustees which many people, including many involved in the system, consider unhealthy from the point of view of proper judicial and governmental administration. The judges by and large appoint the trustees and thereby in effect select the counsel. They do not generally appoint persons who are total strangers to them, and it would be entirely unrealistic to expect that they would or should. These same trustees and lawyers then deal on a day-to-day basis with the judge regarding the routine conduct of the proceeding, and finally these same trustees and lawyers appear before the judge as litigants and counsel when a controversy arises.

[36] *Id.* at 785–86.
[37] *Id.*, pt. 1, at 538.

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As a result of the conditions discussed above, and I am sure for other reasons, there grew up over the years an isolation of the bankruptcy bench and bar from the mainstream of American jurisprudence and from the judiciary and the legal fraternity generally. Persons practicing in the bankruptcy field tended to confine their activities exclusively to that area, and the Bankruptcy Court, of course, did so from necessity. Therefore, a relatively small group of lawyers controlled the bankruptcy field. Those not within this group tended to regard them with suspicion and distrust. I believe that in the last ten years there may be some evidence that this "separate but unequal" status of the bankruptcy lawyers is being eliminated to some extent; but when the bar associations discuss one of their favorite new subjects, that of "specialization," the first thing that everyone agrees upon is that bankruptcy can be labeled a "specialty", although thereafter consensus immediately disappears. There is no real reason for this other than a historical one.

E. HISTORICAL PROBLEMS

The problems caused by the combination of administrative and judicial responsibility for the case, the lack of true creditor control, and the cronyism of the "bankruptcy ring" are not new. They have plagued the bankruptcy system for many years. The Bankruptcy Commission documented them in detail in its study, and noted their persistence in the bankruptcy system for over forty years.[38]

1. The Recommendations of the Donovan Report.

Prior studies of the bankruptcy system have recommended something akin to the Commission's recommendation of an agency to handle bankruptcy administration. The first major study of the system in the United States was the investigation headed by William J. Donovan for the United States District Court for the Southern District of New York. The Association of the Bar of the City of New York, the New York County Lawyers Association, and the Bronx County Bar Association

petitioned the United States District Court for the Southern District of New York on March 21, 1929, requesting an investigation of the administration of the bankruptcy law in the Southern District.[2] This resulted from a report and presentment of the grand jury of the district, February 27, 1929, and from disclosures in other proceedings indicating that the administration of the bankruptcy law was characterized by serious abuses and malpractices on the part of attorneys, receivers, trustees, appraisers, custodians, auctioneers, and other persons and associations. On March 6, 1929, Judge Thomas D. Thacher had directed an investigation before him and invited the three associations to participate as friends of the court. The formal petition was filed thereafter.

[2] Counsel to the Petitioners in the Matters of Inquiry into the Administration of Bankrupt Estates, 71st Cong., 3d Sess., *Administration of Bankruptcy Estates* ix-x, 36-37 (Comm. Print for House Comm. on the Judiciary 1931).

[3] COMMISSION REPORT, pt. I, at 103-06.

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William J. Donovan was selected as counsel for the petitioning associations. Private and public hearings were conducted before Judge Thacher from June 27, 1929, through September 13, 1929. Over 1,000 court files of cases and some 4,000 witnesses were examined.

The investigators concluded that the bulk of the bankruptcy practice in New York City was concentrated in the hands of approximately 21 law firms. This was possible due to a lack of creditor participation and the ability to control appointments by filing an involuntary petition. Counsel for the petitioning creditors would suggest that the court appoint a certain person as receiver, and the receiver would then select counsel for the petitioning creditors as his attorney; thereafter the process would continue when the receiver was elected or appointed trustee and counsel for the petitioning creditors was chosen as his attorney. Voluntary proceedings were controlled through the device of filing petitions for the appointment of receivers.

These abuses led to others and to conflicts; outright theft occurred. Twelve attorneys were indicted; one absconded and then committed suicide; two pleaded guilty and received jail sentences. The Report found that the condition in New York City was not an isolated condition; based on studies in six different cities it was concluded that ". . . fundamental defects in administration are not restricted to New York, but exist generally throughout the country." [3]

It was concluded that the conditions were caused by two main features of the Act which were not adapted to present business conditions: (1) slow-moving procedural machinery laid down by the Act; (2) the theory underlying the administrative structure of the Act, that of creditor control, had broken down for many reasons, some of which were that: (a) administration could not wait until creditors could be called together to elect a representative; (b) the elections were manipulated by irresponsible outsiders for their own

ends; (c) courts had to take on administrative duties for which they were not competent; (d) attorneys were to play a minor role, but due to the legalistic development rather than business development of the system, attorneys had dominated, due to "formalities of procedure laid down by the courts in their efforts to prevent abuses and partly to the low compensation of receivers and trustees,"; (e) in small and no-asset cases, which constituted the great bulk of bankruptcies, creditors were not interested in policing the Act, so that criminal and discharge provisions had become largely ineffective; and (f) creditors had not supervised and directed administration and this had been shifted to the courts, which were not adequate to handle the problem.[4] As the Report explained:

[3] *Id.* at 3–4.
[4] *Id.* at 4–5.

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> We are faced with this situation. Bankruptcy is administered by over 140 district judges, over 530 referees in bankruptcy, and an army of shifting and changing individuals consisting of some 50,000 trustees a year, together with a multitude of receivers, appraisers, attorneys, accountants, watchmen, and others. These groups exist supposedly to aid the creditors, of whom there are at least several millions a year. They fail in that purpose because responsibility is divided. The judges have neither the time, the facilities, nor the training to exercise the administrative duties which have been thrust upon them. They must rely greatly upon the referees whom they appoint. The referees in turn look to the receivers and trustees, whose actions they can watch only to a limited extent. The receivers think they owe nothing to the creditors since their appointments come from the judges or referees. The trustees in most cases feel no obligation to the creditors because the election machinery is generally controlled by others. Receivers and trustees, besides being inexperienced and engaged in other occupations, are underpaid and rely upon their attorneys to do the work. The great creditor body which under the act was supposed to control, delegates its duties to unknown collection agents and attorneys, who have solicited claims and proxies in order to obtain control for their own ends of this vast unregulated machinery.
>
> Creditors are not wholly to blame for this situation. Circumstances differ from those existing when the act was passed in 1898. With the rapid growth of the machinery of credit, creditors in bankruptcy cases are located in various parts of the country. They can not directly participate in administration. They either take no part at all or forward their claims for filing to the first collection agent or attorney who solicits them. They have learned by bitter experience that bankruptcy too often means a total loss of their claims. As appears from Table

V (A) nearly two-thirds of all bankruptcy cases in the country are cases in which no assets are recovered for creditors. The average return to creditors on their claims has amounted in the last four years throughout the country, as a whole, to a little more than 8 percent. (Table I.) In these circumstances creditors as business men prefer to write off their claims rather than spend valuable time in an apparently fruitless endeavor to salvage something from the wreck.[5]

In commenting on general supervision and direction of bankruptcy administration, the Donovan Report pointed out that there was no agency to study the major problems of administration and no uniformity of practice. It was concluded that "[T]hese and many similar matters in our judgment re-

[5] *Id.* at 5.

quire study and the compilation of data on a national scale, which can be accomplished only by a Federal executive agency." [6]

The act undoubtedly contemplated that creditor control of administration would be so effective as to render centralized administrative machinery unnecessary. All that the act provides is that the Attorney General shall annually transmit bankruptcy statistics to Congress and that the United States Supreme Court shall have power to make orders for carrying the act into effect. The facts developed show that this is not enough.

(1) With the breakdown of the theory of creditor control and the great increase in the administrative functions and responsibilities of the courts, rules have been adopted in each of the 84 judicial districts regulating procedure: these rules all differ from each other and the actual practice is even more divergent. The United States Supreme Court, which, during the past 30 years, has adopted 46 general orders regarding bankruptcy administration, has no facilities for inquiring into the details of administration in the various districts. The Attorney General, who simply receives statistical information of a limited nature from the clerks of the various courts and transmits it to Congress, has no supervisory or executive function. The utter lack of anything approaching uniformity of practice can not therefore be remedied.

(2) The major problems of administration can not be studied because there is no agency to study them and no information available.[7]

The Report recommended the creation of a federal bankruptcy commissioner to license and supervise trustees in the principal localities; investigate complaints against unlicensed trustees and abuses in administration; make administrative rules and supervise and coordinate the system throughout the country; compile statistics and other data and make studies and reports, particularly in reference to the enforcement of criminal and discarge provisions and the jurisdiction and method of compensation of referees; establish bureaus in the

principal localities for the examination of the transactions of bankrupts in nominal-asset and no-asset cases. It was suggested by some that the foregoing would result in a separation of judicial and administrative functions and that the latter would be centralized in the commissioner. However, the Report concluded that official administration was not an acceptable approach.

II. The Proposed Administrative System

In order to solve the problems and to make the bankruptcy system operate more efficiently and fairly, the bill proposes a new system for

[6] *Id.* at 23.
[7] *Id* at 22-23.

the administration of bankruptcy cases. The bill continues to rely primarily on private trustees, as under current law, but adds a role for a Government official to supervise bankruptcy administration, and to fill the vacuum of lack of creditor participation, where necessary to assure fair and efficient administration.

A. UNITED STATES TRUSTEES

The bill creates a system of United States trustees.[39] The structure of the system is modeled on the United States attorney system. The districts they serve will be the same as those of the United States attorney, that is, the Federal judicial districts.[40] Like the United States attorneys, they will have assistants [41] and clerical employees.[42] However, United States trustees will be appointed by the Attorney General for a term of seven years, and will be subject to removal for cause by the Attorney General.[43] The difference in appointment and removal procedure is designed to make the office of the United States trustee more of a professional and less of a political position.

The pay of the United States trustees will be lower than that of the United States attorneys. The Attorney General is authorized to fix their salaries at rates not to exceed the lowest rate of basic pay for level GS-16, which is approximately $39,600.[44]

The salaries of United States attorneys and assistant United States attorneys are fixed by the Attorney General.[45] The maximum level is GS-18 ($47,500) with four exceptions. The four exceptions are for the Southern District of New York, the Northern District of Illinois (Chicago), the Central District of California (Los Angeles and Orange County), and the District of Columbia. The maximum rate in those four districts is set at the Executive Schedule Level 4 ($50,000). These exceptions do not apply for United States trustees. For those districts with the GS-18 maximum, only 2 United States attorneys receive the full $47,500. In 28 districts, United States attorneys receive $39,600. In the remaining 62 districts, the United States attorneys receive salaries between $39,600 and $47,500, based on the size of the district. Assistant United States attorneys receive a salary fixed by the Attorney General, not to exceed the GS-18 level. The range of salaries for the 1600 assistant United States attorneys is from $14,000 to $47,500. Less than 10 receive $47,500. These figures are also based on the pay raise granted in February, 1977.

By way of comparison, the Director of Administrative Office of the United States Courts fixes the salaries of clerks of district courts.[46] The salaries are pegged to the salaries of the district judges as follows:

Clerks in large districts—75% of the salary of a district judge ($40,875).

Clerks in medium districts—70% of the salary of a district judge ($38,150).

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[42] H.R. 8200 § 224 (proposed 28 U.S.C. 581–89).
[43] H.R. 8200 § 224 (proposed 28 U.S.C. 581(a)).
[44] *Id.* (proposed 28 U.S.C. 582).
[45] *Id.* (proposed 28 U.S.C. 589).
[46] *Id.* (proposed 28 U.S.C. 581).
[47] *Id.* (proposed 28 U.S.C. 587).
[48] 28 U.S.C. 548 (1970).
[49] 28 U.S.C. 604(a)(5) (1970).

Clerks in small districts—60% of the salary of a district judge ($32,700).

These figures are effective with the pay raise granted to the district judges in February, 1977. The category into which a particular district falls is determined under a formula based on the number of district judges in the district, and the case load of the district.

There will be one United States trustee for each of the judicial districts, though the Attorney General is permitted to appoint the same individual to serve as United States trustee for more than one district where the need warrants.[47] Such an appointment might be appropriate in adjacent districts where the work of the office of a United States trustee is light, and combination of two offices under one individual would be administratively sound. The concept of the United States trustee system is to provide decentralized, semiautonomous officials to administer the bankruptcy laws. Much of the testimony during the Subcommittee's hearings in opposition to the Administrator proposed by the Bankruptcy Commission focused on the notion of a centralized, Washington-based bureaucracy that would be insensitive and unresponsive to local needs. The United States trustee system was designed to make the administration of the bankruptcy laws responsive to local needs, as is now done by localized and locally appointed bankruptcy judges.

The United States trustees will be locally based and generally autonomous, but will be loosely supervised and assisted by the Department of Justice.[48] The bill provides for an Assistant Attorney General, nominated by the President, and confirmed by the Senate, to assist the Attorney General in matters related to United States trustees.[49] It is expected that the Assistant Attorney General will have only a small staff, and will offer general administrative assistance and support services in individual cases to the United States trustees in each judicial district, where the bulk of the work will be done.[50] Every effort has been made, because of the differences in bankruptcy administration in various parts of the country, to decentralize the United States trustee system, and not to have a Washington-based hierarchy.

The United States trustee is not intended to replace private trustees in bankruptcy cases, but rather to perform the supervisory and appointing functions now handled by the bankruptcy judges, and to monitor trustee performance in more detail than is now practicable.

The United States trustees will relieve the bankruptcy judges of their current administrative and supervisory role, and will become the principal administrative officers of the bankruptcy system. Bankruptcy judges, relieved of administrative responsibilities, will take a more passive role, consistent with their judicial responsibilities, which will serve to eliminate the institutional bias that exists in the bankruptcy system today.

The primary function of United States trustees will be to establish, maintain, and supervise panels of private trustees to serve in liquidation cases under chapter 7 of the bankruptcy code, and to serve as, or appoint standing trustees to serve as, trustees in individual repay-

[47] H.R. 8200 § 224 (proposed 28 U.S.C. 581).
[48] *Id.* (proposed 28 U.S.C. 586(c)).
[49] H.R. 8200 § 218.
[50] H.R. 8200 § 224 (proposed 28 U.S.C. 586(c)).

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ment plan cases under chapter 13 of the code.[51] The Attorney General will prescribe the qualifications for panel membership, which will be uniform throughout the country.[52] The Attorney General will also prescribe qualifications for standing trustees for chapter 13 cases.[53] However, the actual creation of the panels, the examination of candidates for membership on the panels, and the selection of standing chapter 13 trustees will be done locally by United States trustees. United States trustees will also monitor the performance of panel members and standing chapter 13 trustees in order to determine whether they should be continued in or removed from panel membership or office.

B. TRUSTEES IN LIQUIDATION CASES

When a liquidation case is commenced under chapter 7, the United States trustee will immediately designate a member of the panel to serve as interim trustee in the case.[54] Between the time the case is filed and the first meeting of creditors, the interim trustee will begin preliminary investigations, and begin to determine whether there are assets in the estate with which to pay creditors. The interim trustee will have all the powers of a trustee in a case under chapter 7.[55] He is appointed immediately, rather than after the first meeting of creditors, as under current law, in order to expedite matters in connection with the case. His function is similar to that of a receiver under current law, but his powers and duties are broader.

If none of the members of the panel is willing to serve in a particular case, the United States trustee will serve as interim trustee.[56] This will most often happen when the schedules of assets and liabilities disclose that there are unlikely to be any assets in the estate, and when the only duty of the trustee will be to perform a cursory examination of the papers and handle whatever routine clerical matters are necessary to close the estate.

At the first meeting of creditors, creditors will continue to have the right to elect a trustee of their own choice to serve in the case, subject to certain limitations not imposed under current law.[57] The bill permits creditor election of a trustee only in cases in which at least creditors holding 20 percent in amount of certain scheduled unsecured claims request election of a trustee.[58] The minimum percentage request requirement is designed to insure that a trustee is elected only

in cases in which there is true creditor interest, and to discourage election of a trustee by attorneys for creditors, as is so often the practice under current law. If a significant percentage of creditors does not wish to elect a trustee, it is unfair to impose the will of a few creditors' attorneys on the rest of the creditor body.

It will be more difficult under this procedure for a trustee to be elected unless there is actual creditor interest in the case. In any case where there are significant assets, there is often creditor interest. The

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[55] *Id.* (proposed 28 U.S.C. 586(a), (b)).
[56] *Id.* (proposed 28 U.S.C. 586(d)).
[57] *Id.*
[58] H.R. 8200 § 101 (proposed 11 U.S.C. 701).
[59] *Id.*
[60] *Id.*
[61] *Id.* (proposed 11 U.S.C. 702).
[62] *Id.*

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problems under current law occur most often in cases where the return to creditors from the estate promises to be small. Thus, they are uninterested, and attorneys can move in to control the case. By adopting the 20 percent requirement, the bill discourages attorney control, but retains the idea of true creditor control, because the theory of creditor control remains valid.

If creditors do request election of a trustee, they are not required to select candidates from members of the panel of private trustees, but may elect any individual that is eligible to serve in the case. Eligibility consists of only two requirements:[59] that the individual be competent to serve as trustee, and that he maintain an office in the district in which the case is pending or in an adjacent district. If the trustee elected is a corporation, the requirements are similar.

If creditor interest in the case is sufficient to permit election of a trustee, then the strict supervision aspects of panel membership are unnecessary, because creditor control will be adequate to supervise the performance of the trustee. Further, a requisite majority of creditors should not be constrained in choosing their own representative. Of course, creditors are not precluded from electing a member of the panel.

If creditors request an election and then elect a trustee, the appointed interim trustee is ousted, and the elected trustee takes over the administration of the case.[60] If creditors do not elect a trustee, then the interim trustee, whether a panel member or the United States trustee, becomes the trustee and serves in that capacity in the case.[61]

If a panel member serves in the case, the United States trustee will be available to give advice in the administration of the case and to supervise the private trustee's performance. Instead of bankruptcy judges reviewing schedules and suggesting causes of action to private trustees, the United States trustee will perform that function. If a private trustee frequently misses assets and needs to be assisted by the United States trustee too often, it is likely he would be removed from the panel for incompetency. Fee applications of private trustees will be filed with both the court and the United States trustee.[62] The court will rule on fees, but the United States trustee will have an opportunity to object to any excessive fee application. A private trustee will also file his final account with the United States trustee as well as with the court.[63]

The bill changes the fee structure for trustees from current law. In recognition of inflation since 1952, the last time the fee schedule for trustees was amended, the bill doubles the bases on which the percentage fee schedule is calculated (the consumer price index has more than doubled since 1952). It also increases the percentage payable on the first amount from 10% to 15%.[64] Thus, a trustee may receive up to 15% on the first $1,000; up to 6% on the next $2,000, and so on. However, the discretionary $150 fee is eliminated. Its use today bears no relationship to the services performed in the cases in which it is

[64] H.R. 8200 § 101 (proposed 11 U.S.C. 321).
[65] *Id.* (proposed 11 U.S.C. 701(c)).
[66] *Id.* (proposed 11 U.S.C. 702(d)).
[67] *Id.* (proposed 11 U.S.C. 330(a), 503(a)).
[68] *Id.* (proposed 11 U.S.C. 704(8)).
[69] *Id.* (proposed 11 U.S.C. 326).

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awarded. Instead, its use represents the averaging theory of fees, which is unjustified in a bankruptcy system that is supposed to operate for the benefit of creditors on a case-by-case basis. The bill also deletes the current statutory $10 trustee's fee from the filing fee, and prohibits dual fees to an individual that serves both as interim trustee (receiver) and trustee.[65]

C. ADMINISTRATION OF REORGANIZATION CASES

Under the proposed reorganization chapter, chapter 11, the appointments process for both trustees and creditors' committees are changed. The bill does not require a trustee in every reorganization case, but permits the debtor to remain in possession in some cases.[66] The court will determine, on request of any party in interest, including the United States trustee, whether a trustee should be appointed in the case to assume the possession and management of the debtor's property and the operation of the debtor's business. If the court determines that a trustee should be appointed, it will order the United States trustee to select the individual to serve as trustee. The United States trustee is required to consult with parties in interest before he selects a trustee. His selection is subject to court approval, in order to insure against bad appointments. However, the scope of the court's review of the United States trustee's discretion will be limited. The United States trustee is permitted to select a person that is not a member of the panel of private trustees, which exists only to regulate liquidation trustees.[67]

The selection of creditors' committees will also differ in reorganization cases. First, the bill permits more than one committee in reorganization cases.[68] The supervisory functions of the committees will be diminished, due to the existence of the United States trustee. They will primarily be negotiating bodies for the classes of creditors that they represent. As such, it is important that they be representative of their respective classes, and not chosen by attorneys for creditors that seek the position of counsel to the committee. The bill provides that the court appoint the creditors' committees in reorganization cases. The court is directed to appoint a representative committee, and to give due consideration to the holders of the largest claims of the represented class, or to the members of a functioning creditors com-

mittee formed in connection with negotiations conducted before the case was filed.[69] Court appointment under a statutory requirement that committees be representative is more likely to assist in successful reorganizations than proxy election, by attorneys, of a committee that may not truly represent the interests of its constituents.

In order to discourage the practices surrounding election of creditors' committees today and to avoid a serious potential for conflict of interest, the bill requires that the counsel to the creditors' committee cease any representation of creditors in their individual capacities in

[69] *Id.*
[70] H.R. 8200 § 101 (proposed 11 U.S.C. 1104).
[71] *Id.* In addition, if the trustee selected is a corporation, it need not have an office in the judicial district in which the case is pending. H.R. 8200 § 101 (proposed 11 U.S.C. 321(2)).
[72] *Id.* (proposed 11 U.S.C. 1102(a)).
[73] *Id.*

connection with the case.[70] Under present practice, the attorney with the most proxies can usually have himself retained as counsel for a creditors' committee. The practice presents an enormous potential for conflict of interest. If the creditors on a committee split in a vote, the attorney for a particular creditor on the committee may be required to represent both the committee's position and his creditor-client's position, which may be directly contrary to the committee's position. Under this bill, where more diverse interests may be represented on committees than under current law, the conflict is more likely to arise. Thus, the bill requires that an attorney for a creditors' committee cease representation of creditors in connection with the case. It does not require the attorney to cease representation of the creditors in matters unrelated to the case. It merely sets out a mandatory anti-conflict of interest rule for each case.

D. ADMINISTRATION OF INDIVIDUAL REPAYMENT PLAN CASES

The problems that have arisen in liquidation and business rehabilitation cases under the current law have not arisen in chapter XIII wage earner plan cases. There, the system of private trustees has worked relatively well.[71] In those districts in which there are standing chapter XIII trustees, they are closely supervised by the bankruptcy judge. Serious disputes do not frequently arise in chapter XIII cases, and thus the institutional bias problems that exist under the other chapters are not so severe in chapter XIII. Not all districts have standing chapter XIII trustees, however, because the caseload is very light in some parts of the country. In those districts, the lack of close supervision over the conduct of chapter XIII cases and the lack of experience of the occasional chapter XIII trustee could be improved by transfer of the functions to a more regular practitioner.

Thus, for the new chapter 13 individual repayment plan cases, the bill proposes only slight alteration of the present system. Consistent with the general separation of administrative and judicial functions in bankruptcy cases, the prime administrative responsibility for the conduct of chapter 13 cases is removed from the bankruptcy court and placed in the United States trustee.

In those districts in which the caseload warrants, the United States trustee is authorized, subject to the approval of the Attorney General,

to appoint one or more individuals to serve as standing chapter 13 trustee for the chapter 13 cases in the district, or to designate one or more assistant United States trustees to perform the duties of the United States trustee in chapter 13 cases.[72] If circumstances within the district warrant, more than one private standing trustee, assistant United States trustee, or a combination of both, may be appointed or designated. For example, the caseload in the district may be too heavy for one trustee to handle, or the geography of the district may preclude one person from doing an effective job.

The Attorney General will prescribe, by rule, qualifications for appointment as a private standing chapter 13 trustee. The qualifica-

[72] *Id.* (proposed 11 U.S.C. 1103(b)).
[73] *See Hearings*, pt. 3, at 1398–1409.
[74] H.R. 8200 § 224 (proposed 28 U.S.C. 586(b)).

tions will be uniform nationwide, as they are for membership on the panels of private trustees in liquidation cases.[73] The current standing chapter XIII trustee system has functioned well without any requirement that trustees be attorneys. The bill carries over that practice, and prohibits the Attorney General from requiring that private standing chapter 13 trustees be attorneys in order to qualify.[74] Within each district in which a standing trustee is to be appointed, the United States trustee will apply the qualifications, and will select the person to serve. The United States trustee for the district will also supervise the performance of private standing trustees and is empowered to remove a trustee from office for cause.

The Attorney General, in consultation with each United States trustee that has appointed a standing chapter 13 trustee, will fix the maximum compensation of the trustee and the fees to be charged in chapter 13 cases.[75] The Attorney General may fix the maximum compensation at any level up to the level of the maximum salary of a United States trustee, which is $39,600. The private standing trustee will receive his income from fees that he collects in chapter 13 cases in which he serves. The percentage fee that he will be permitted to charge will also be fixed by the Attorney General, based on the standing trustee's projected office expenses and the maximum salary fixed by the Attorney General. The percentage fee may not exceed ten percent of the amount paid under plans in cases for which the trustee serves.[76]

The bill also provides for the return of certain excess amounts paid to the private standing chapter 13 trustee to the Treasury.[77] The standing trustee will be required to pay in to the Treasury any amount by which the salary the standing trustee receives exceeds five percent of the amount paid under plans in cases in which he serves. In addition, if the amount collected by the private standing chapter 13 trustee in the cases in which he serves exceeds the sum of his actual salary (as adjusted by the five percent rule) plus his necessary office expenses, then the excess is paid by the standing trustee to the Treasury. These situations would most likely occur in districts in which the standing trustee served in more cases with greater payments to creditors than anticipated at the beginning of the year when the budget was prepared and the fee fixed.

The functions and duties of the standing chapter 13 trustee will be similar to those he performs under current chapter XIII, including the duty to provide non-legal advice to debtors in the execution of their repayment plans. In cases in which a standing trustee does not serve, the United States trustee will perform this advisory duty.[78]

Finally, creditors are given the opportunity in chapter 13 cases to elect a trustee.[79] This is a departure from current law that is justified by the different kind of debtors that will be permitted to use chapter 13. The eligibility requirements for the chapter are expanded to cover small businesses that are sole proprietorships.[80] The election of a

[78] *Id.* (proposed 28 U.S.C. 586(d)).
[79] *Id.*
[80] *Id.* (proposed 28 U.S.C. 586(e)).
[81] *Id.*
[82] *Id.*
[83] H.R. 8200 § 101 (proposed 11 U.S.C. 1302).
[84] *Id.*
[85] *Id.* (proposed U.S.C. 109(e)).

trustee is subject to the same 20 percent request requirement that applies in liquidations cases.

This system will allow the retention of the private standing chapter XIII trustees that have performed as well under current law. The Attorney General will be able to utilize the private sector to provide personalized efficient service and to keep subordinate employees of the standing trustee off the public payroll. The fee system is designed to encourage the standing trustees to keep costs low at the risk of reduced compensation. Finally, any excess collected will be paid into the Treasury to offset the cost of the U.S. Trustee system.

E. ALTERNATE ADMINISTRATIVE SYSTEMS

During the court of deliberations on the revision of the bankruptcy system, proposals were made that would transfer the administrative functions of bankruptcy judges to the clerks of court. These proposals were considered and rejected. A major facet of administration of bankruptcy cases is the appointment and supervision of trustees. Supervision involves seeing that the trustee and his attorney diligently pursue the collection of assets. It is unlikely that clerks of court are qualified to advise trustees concerning legal issues involved in fraud, preference, and other actions against third parties. More important, however, is the fact that under the proposed jurisdiction of the bankruptcy courts, suits involving controversies arising out of bankruptcy cases will be filed in the bankruptcy court. Designating the clerk as the supervisor of trustees will place him on a treadmill of conflict, because he will be directing trustees to file suit against third parties in his own court. It was these kinds of considerations that led to the recommendation for the creation of the United States trustee system disassociated from the court. The United States trustee system will remove from the bankruptcy court any taint of involvement in the litigation instituted by trustees in the bankruptcy court.

III. The Effects of the Proposed System

These changes in the present bankruptcy administrative system will accomplish the separation of judicial and administrative func-

tions currently performed by the bankruptcy judges. The judges will become passive arbiters of disputes that arise in bankruptcy cases. The United States trustees will assume the bankruptcy judges' current supervisory roles over the conduct of bankruptcy cases and over individuals serving in the bankruptcy system. More responsibility for the administration of cases will be shifted to the trustees that serve in cases, whether they are private members of the panel or the United States trustee. Another change proposed by the bill facilitates the shift of responsibility, and the placement of the bankruptcy judge in the dispute-deciding role.

The trustee in each case will be responsible for the administration of the case. The bill gives him adequate powers to accomplish what must be done, and relieves him of the necessity for applying to the court and receiving court approval for every action he proposes to take. The bill introduces the concept that the trustees may take any

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action necessary to the administration of the case if he first notifies those parties in interest to whom notice would be appropriate under the particular circumstances (in some instances, only notice to the United States trustee will suffice; in others, emergencies, for example, after-the-fact notice may suffice), and provide an opportunity for a party in interest to object.

If an objection to the proposed action is not made, then the trustee may proceed with the same authority as if he had obtained a court order authorizing the action. If an objection is made, the court will hear the dispute generated by the trustee's proposed action and the objection to it, and make the appropriate orders, either authorizing or prohibiting the trustee's proposed action. The United States trustee will exercise his supervisory role in part by consulting with trustees in advance of proposed action, and by raising an objection to the proposed action with the court when the action would be improper.

This concept, embodied in the phrase "after notice and a hearing",[81] will free the judge from ruling on the many undisputed administrative decisions that must be made in a case, and will involve the judge only when there is an actual dispute to be resolved. It should eliminate the need for continual requests for instructions by the trustee, and should significantly reduce, if not eliminate, the amount of ex parte contacts currently required between the bankruptcy judge and the trustee. In sum, the bankruptcy judge will be separated from the administration of the case, and his duties will be solely judicial.

The administrative system proposed in the bill also solves the other problems plaguing the current bankruptcy system. The imposition of the 20 percent request requirement for the election of a trustee in a liquidation case will significantly reduce use of the bankruptcy system for the benefit of those operating it, by eliminating the elections of trustees that occur today without any significant creditor interest.

For those cases in which creditors do not elect a trustee, the creation of the United States trustees to establish panels of private trustees, subject to qualifications prescribed by the Attorney General, will regularize the appointments process. It will insure a minimum standard of competence for those serving as trustees in bankruptcy liquidation cases. It will eliminate the cronyism that exists in many parts of the country in the appointment of trustees by bankruptcy judges, and the uncomfortably close relationship that exists between the judges and

"their"trustees. Finally, it will eliminate the appearance of partiality on the part of the bankruptcy judge that exists today whenever the trustee comes before his appointing judge for a hearing or a ruling. These last two factors will go far toward reducing the appearance of the bankruptcy system as run by a "bankruptcy ring".

The change in the fee structure for liquidation cases will discourage individuals from administering a liquidation case solely for the purpose of obtaining a fee as trustee. Trustees will be required to recover assets for the benefit of creditors before they may be paid. They will no longer have the incentive to deprive the debtor of small assets solely to pay their own fee, but instead will be required to search for significant assets from which creditors may recover a portion of their

[48] *Id.* (proposed 11 U.S.C. 102(1)).

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debts. The elimination of the $150 discretionary fee also restores the incentive to private trustees to search out all assets, and not to cease when just enough are found to pay the trustee's fee. This, too, will cause the system to operate more for the benefit of creditors rather than for the benefit of the administrators.

In those cases in which there are inadequate assets to pay a private trustee to serve, the panel members will be able to decline to serve. The authority given by the bill to the United States trustee to serve in those cases will permit an expeditious closing of no-asset bankruptcy cases, while making available the machinery of the bankruptcy laws to protect creditors, by having an individual available to pursue assets that might otherwise go undetected.

IV. Placement of the Office of United States Trustee

The nature of the duties of the United States trustees makes them the administrative officers of the bankruptcy system. They will not concern themselves with the processing of disputes in bankruptcy cases through the courts, and will not become involved in the administration of the courts. Those functions will continue to reside in the Administrative Office of the United States Courts. The United States trustees will, however, be responsible for the day-to-day operations of the bankruptcy system. They will supervise trustees, assist them in the performance of their duties, oversee their actions, and see to it that the bankruptcy laws are properly executed. They will concern themselves with the administrative aspects of bankruptcy cases, and not with the judicial aspects. They will serve as enforcers of the bankruptcy laws by bringing proceedings in the bankruptcy courts in particular cases in which a particular action taken or proposed to be taken deviates from the standards established by the proposed bankruptcy code. In this sense, they operate much as the Securities and Exchange Commission operates under current chapter X of the Bankruptcy Act, protecting the public interest and ensuring that bankruptcy cases are conducted according to the law.

United States trustees will also carry out the bankruptcy laws in their duties relative to panels of private trustees. They will be the officers responsible for putting into effect the system of panels, and for carrying out the rules and regulations prescribed by the Attorney Gen-

eral governing qualification for panel membership. They will be responsible for determining the needs of the chapter 13 system, and whether a particular judicial district is best served by a private standing trustee or by an assistant United States trustee. They will enforce the qualifications prescribed by the Attorney General for service as a chapter 13 trustee, and will supervise the performance of chapter 13 trustees. They will consult with the Attorney General to fix the fees that a private standing chapter 13 trustee may charge, and the salary that the private trustee may receive.

The United States trustee will also serve as trustee in some no-asset liquidation cases, and in chapter 13 cases in certain districts in which a private standing chapter 13 trustee is not appointed. His duties in connection with these cases will be limited in scope, but again will be generally administrative in nature. He will be responsible for the con-

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duct of the liquidation cases, to the extent that anything more than paper processing occurs in them, and will act as the disbursing agent and debtor's adviser in chapter 13 cases. He will not be policing the official participants in the bankruptcy system as he will when private trustees are serving, but nevertheless he will be administering the cases in which he serves as trustee.

The United States trustee will conduct investigations in appropriate circumstances to ensure that participants in bankruptcy cases are not avoiding the requirements of the bankruptcy code.[82] In liquidation cases in which he serves as trustee, he will investigate the affairs of the debtor to determine whether assets or causes of action exist that he should pursue.[83] In cases in which a private trustee serves, the United States trustee is permitted to examine the debtor at the first meeting of creditors,[84] and is permitted to conduct his own investigation into the existence of facts that should spur the private trustee to action. Such periodic examinations will be necessary for the United States trustee to exercise effective supervision and make an effective evaluation of the performance of the private trustees on the panel. The United States trustee is also given a function currently performed by United States attorneys—that of investigating allegations of facts that would lead to a denial of the discharge of the debtor.[85] In this way, too, the United States trustee will be policing the bankruptcy system and its participants.

The sum of all of these duties suggests strongly that the United States trustees will be the executives of the bankruptcy network. Their functions are unrelated to and divorced from the bankruptcy courts. The United States trustees will not be serving the bankruptcy courts as assistants or as arms of the court. The functions described above are not a part of the courts' duties in bankruptcy cases under the proposed law. The courts' duties relate solely to resolving disputes that arise in bankruptcy cases. Instead, the United States trustees' responsibilities will be to operate the bankruptcy system and to executive the bankruptcy laws. As such, the United States trustee is created in the Executive Department, as an Executive Branch officer, and is not placed in the Judicial Branch.

The position of the United States trustees vis-a-vis the bankruptcy courts may be compared with the comparable position of a prosecutor. The prosecutor appears in every criminal case before a particular court.

Nevertheless, the prosecutor is not an assistant to the court, but has an independent executive duty to pursue. Likewise, the United States trustee will be responsible for certain administrative, or executive duties, and will not be serving as an arm of the court or as a service agency for the courts. That he will frequently appear in the same bankruptcy court does not detract from his independent obligation to execute and enforce the bankruptcy laws.

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[84] *See, e.g.*, H.R. 8200 § 101 (proposed 11 U.S.C. 727(c)).
[85] *Id.* (proposed 11 U.S.C. 704).
[86] *Id.* (proposed 11 U.S.C. 342).
[87] *Compare* H.R. 8200 § 101 (proposed 11 U.S.C. 727(c)) *with* Bankruptcy Act § 14d, 11 U.S.C. 32(d) (1970). It is not clear that United States attorneys have the time or interest necessary to pursue these matters. Transfer of the function to the United States trustees will make the enforcement of the discharge provision more effective, because the United States trustees will be exclusively concerned with bankruptcy matters and not distracted by other duties.

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The decision to place the United States trustee system in the Department of Justice was reached as a result of thorough deliberations. Other alternatives were examined. The Committee considered two different suggestions for placing United States trustees in the Judicial Branch. One would have placed the appointment and supervision of United States trustees under the Administrative Office of the United States Courts. The other would have placed appointment and supervision for each United States trustee under the bankruptcy court for the district in which the United States trustee serves. Proponents of both proposals argued that bankruptcy is inherently a judicial activity, that the United States trustees were performing primarily judicial functions, and that the United States trustees were assistants to the bankruptcy courts in bankruptcy cases. In sum, placement in the Executive Branch violated the doctrine of separation of powers. Moreover, placement in the Executive Branch, specifically, in the Department of Justice, created a potential conflict of interest in those bankruptcy cases in which the Government was a creditor. The Committee adopted neither suggestion. The nature of the work of the United States trustees makes their placement in the Executive Branch more appropriate. The nature of bankruptcy does not require or favor their placement in the Judicial Branch. Moreover, serious administrative problems arise under either of the proposed alternatives.

Chief Justice Earl Warren suggested in an address to the National Conference of Referees in Bankruptcy in 1962 that nothing in the Constitution required that bankruptcy be administered in the courts, and that Congress might repeal the Bankruptcy Act and transfer the handling of bankruptcy cases to the Executive Branch at any time.[86] Though many judicial disputes do arise in bankruptcy cases, and legal rights must be determined, much of bankruptcy consists of routine administration of cases, processing of information, and liquidation and distribution of assets without any dispute.[87] The judicial nature of bankruptcy derives from disputes that arise and that must be settled.[88] In current practice, however, disputes seldom arise in the vast majority of bankruptcy cases. The development of a consumer credit economy and the consequent rise in the number of consumer bankruptcies has decreased the number of actual litigable disputes per bankruptcy case from the time when bankruptcy cases were primarily business cases with distributable assets.[89] To the extent that disputes do not arise in particular bankruptcy cases, there is no need

to invoke the judicial machinery established by the bill, nor is there any need to consider bankruptcy an inherently judicial process.

The Brookings Institute, in its study of the bankruptcy system, and the Commission on the Bankruptcy Laws both proposed that the bulk of the work in bankruptcy cases be handled by Executive Branch administrative agencies.[90] They provided for court involvement only on appeal from an agency determination. Though this bill does not go

[90] *Address Delivered by the Honorable Earl Warren, Chief Justice of the United States*, 37 REF. J. 3 (1963).
[91] *See generally* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971).
[92] COMMISSION REPORT, pt. I, at 85–86.
[93] *Id.*; *Hearings*, pt. 1, at 537.
[94] D. STANLEY & M. GIRTH, *supra* note 82, at 196–218; COMMISSION REPORT, pt. I, at 103–156.

so far in placing bankruptcy cases in the Executive Branch, those studies are indicative of the possibility of placement of bankruptcy in the Executive Branch.

Appointment and supervision by the Administrative Office of the United States Courts would create for that office functions not previously assumed by it in any analogous context. Currently, the Administrative Office acts as an administrative service organization for the court system.[95] It does not become involved in the administration of individual cases or in the supervision of court officials in their decision-making in individual cases. Its administrative functions relate only to the court system as a whole. It provides equipment, furniture, courtroom facilities, and stationery and other supplies to the courts. It maintains statistics on court operation, and monitors the efficiency with which cases are processed through the court system. It develops case management techniques that assist courts in the processing of cases. The Administrative Office also operates the Judicial Survivors' Annuity Fund. None of these duties relate to the decisions made in individual cases that come before the courts.

The Administrative Office does not take part in appointment of any court personnel that become involved in decision-making in individual cases. Magistrates, bankruptcy judges, special masters, court clerks, and other personnel are all appointed by the courts that they serve.[96] The Administrative Office has limited salary fixing responsibility for certain lower level judicial personnel, such as clerks and deputy clerks of court, secretaries, librarians, messengers, and bailiffs.[97] It does not, however, take any part in the supervision of any of these employees, which is left entirely to the appointing courts.

Granting the Administrative Office appointment or supervisory power with respect to the United States trustees would be a significant departure from the traditional role of Judicial Branch agencies. The Administrative Office has been an invisible hand to litigants in the Federal courts. Appointment or supervision of United States trustees by the Administrative Office would radically alter that posture and make it an active participant in bankruptcy litigation. It is a wholly inappropriate role for a body that is responsible ultimately only to the Chief Justice and the Judicial Conference.[98] Moreover, it would place the responsibility for execution of the bankruptcy laws in the wrong Branch of the Government.

Finally, there is some constitutional doubt whether the Administrative Office could, consistent with the Appointments Clause of the Constitution,[95] appoint United States trustees, who are inferior officers of the United States.[96]

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[95] *See* 28 U.S.C. 604 (1970).
[96] 28 U.S.C. 631, 671, 711-873 (1970); FED. R. CIV. P. 53; sec. 34a, 11 U.S.C. 62a (1970).
[97] 28 U.S.C. 604(a)(5) (1970).
[98] *See* 28 U.S.C. 601, 604(a) (1970).
[99] U.S. CONST. art., II, §2.
[100] *See* Buckley v. Valeo, 424 U.S. 1 [96 S.Ct. 612, 46 L.Ed.2d 659.] (1974) (Federal Election Commissioners "at the very least" are inferior Officers of the United States, relying on the fact that they are authorized to bring civil suits to enforce the elections laws, that they are appointed for a statutory term, and are not subject to the control or direction of any other executive, judicial, or legislative authority); Myers v. United States, 272 U.S. 52 [47 S.Ct. 21, 71 L.Ed. 160.] (1962) (Postmaster first class is an inferior officer of the United States); Matter of Hennen, 38 U.S. (13 Pet.) 230 [10 L.Ed. 138.] (1839) (Clerk of a District Court is an inferior officer of the United States).

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Appointment and supervision by the individual bankruptcy courts that the United States trustees serve would generate other problems. The primary purpose behind the creation of the office of United States trustee is to remove the bankruptcy courts from the administration of bankruptcy cases. If the United States trustee were created as an assistant to the bankruptcy judge, then the current system would be resurrected and the reforms proposed by the bill would be eviscerated.

A relationship between the bankruptcy court and the United States trustee based on the appointment and supervision of the latter by the former is indistinguishable from the current system, under which the district courts, vested with jurisdiction over bankruptcy cases, appoint referees as administrative officers to handle the administration of bankruptcy cases. Originally, the referees were created to handle administrative functions in bankruptcy cases. The transfer to them of judicial functions occurred over the years.[97] The same would be likely to happen if the United States trustee served under the bankruptcy court.

The creation of new bankruptcy courts and of United States trustees is designed to remove the improper appearance created when the appointing judge (the district judge, under current law) reviews the orders of his appointee (the referee), and to eliminate the present awkward relationship between bankruptcy judges and private trustees, whom they appoint, which has generated great disrespect for the bankruptcy system. Appointment and supervision of United States trustees by the proposed bankruptcy judges would combine both of those problems, which this legislation is attempting to solve, under the same officials. The problems would be magnified rather than diminished.

Though appointment by the bankruptcy courts would not result in constitutional questions under the Appointments Clause, supervision of United States trustees by the courts would generate other constitutional doubts. The bankruptcy courts, under the proposal to have them appoint and supervise United States trustees, would also fix their salaries, supervise their activities, consult with them in determining whether to have private standing trustees appointed for chapter 13 cases, and would fix the salaries of those private standing chapter 13 trustees. The Supreme Court, as early as 1792, enunciated the principle that constitutional courts may not be invested with administrative functions.[98] They may only decide cases or controversies. While

bankruptcy courts today fix fees for trustees in individual cases, those determinations are made within the context of a case or controversy—the liquidation and distribution of a bankrupt estate. The controversy that exists in each such case is the tension between the trustee's request for a fee and the creditors' claim to the assets of the estate. Under the proposed system, the court would be fixing salaries, payable from the United States Treasury, for inferior officers of the United States, a power that no court has exercised before, and would supervise the performance of their duties in general, which is wholly unrelated to any particular case or controversy. Thus, the true separation of powers argument leads to the conclusion that the United States trustee,

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[97] *Hearings*, pt. 1, at 537–38.
[98] United States v. Ferreira, 54 U.S. (13 How.) 40 [14 L.Ed. 42.] (1852); Hayburn's Case, 2 U.S. (2 Dall.) 409 [22 L.Ed. 738.] (1792).

vested under the bill with the powers and duties necessary for the successful operation of the proposed bankruptcy system, should be placed in the Branch of the Government that executes the laws, and should be subject to the supervision of the Executive Branch as well.

Returning to the analogy with prosecutors, it cannot seriously be contended that a system under which prosecutors are placed under the supervision of the courts before whom they appear would give defendants an opportunity for a fair trial. Similarly, placement of the United States trustees under the supervision of the courts in which they must litigate will create an unwarranted and indefensible bias in favor of United States trustees and against adverse parties. The bias is not likely to differ when the United States trustee is serving as trustee in a particular case or is objecting to the proposed action of a private trustee.

In those cases in which the United States trustee serves as trustee, appointment of the United States trustee as a salaried official by the bankruptcy court can be compared with referees under current law serving as trustees in bankruptcy cases. Given their posture in the Judicial Branch, appointed and supervised by the reviewing court,[99] bankruptcy litigants would justifiably object to such an arrangement. The proposal considered and defeated overwhelmingly by the Committee is not different. It would create a severe conflict of interest and an institutional bias worse than that which exists under the current administrative system. The problem would grow, as over the years, more and more judicial functions are transferred from the bankruptcy judges to the United States trustees. The likelihood of transfer of functions is not imagined. It is real. The accretion in power of the referees and magistrates in past years highlights the forces that are at work in the judicial system.

The proponents of the judicial United States trustee system have argued that placement in the Executive Branch will create a conflict in interest in those cases in which the United States is a creditor. There are two answers to that proposition. First, any conflict is theoretical, not real. The conflict will only arise in those cases in which the United States trustee is serving as trustee, and thus represents an interest potentially adverse to the interest of the United States as a creditor.

However, the United States trustee will be serving only in cases in which there are no assets available for distribution. It is in those cases that there is seldom if ever any litigation over creditors' claims, because the determination of creditors' claims that will not be paid in any event is pointless.

Second, other administrative structures give rise to similar or worse theoretical conflicts of interest that have been prevented through careful separation of the potentially conflicting agencies. For example, the conflict potential between a county prosecutor and the public defender for the same county, both under the supervision of the executive department of the county, prevents a severe danger of unfairness. However, cognizant of the problems that might arise, officials have been able, by rule or regulation, to separate control of the agencies in the conduct of individual cases. Similarly, the Department of

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* Bankruptcy Act § 34a 11 U.S.C. 62(a) (1970).

Justice will be able to prescribe a means by which United States trustees are not supervised in particular cases by the officer responsible for collecting claims of the United States.

In conclusion, placement of the appointment and supervisory powers over the United States trustees will lead to a fairer, more equitable and more effective system. It solves the problems plaguing the current bankruptcy system without substituting equally damaging problems. It provides the opportunity for national coordination of the activities of the United States trustees. Placement of the United States trustees themselves in the Executive Branch is more consistent with their functions, powers, and duties. It is the soundest approach to the management of the bankruptcy system, because it renders the separation of administrative and judicial functions complete, and places the administrative duties in bankruptcy in the Branch of Government most capable of executing the laws.

LEGISLATIVE HISTORY
P.L. 95-598

STATEMENTS BY LEGISLATIVE LEADERS

STATEMENT BY THE HON. DON EDWARDS, CHAIRMAN OF THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY, UPON INTRODUCING THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 8200.

September 28, 1978, 124 Congressional Record H 11089

Mr. Speaker, the amendment that I am offering today is the culmination of over 8 years' work by a congressional commission, two congressional committees, and numerous outside groups. The amendment accomplishes the substantial reform of the bankruptcy laws for the first time in 40 years. It is a major effort, one that everyone involved can be proud of.

This bill passed the House last February 1, and passed the Senate with an amendment on September 7, just 3 weeks ago. In those 3 weeks, my distinguished colleague from Virginia, CALDWELL BUTLER, and I have worked closely with the Senate managers of the bill, and we have reached an agreement on the resolution of the differences between the two bills. The agreement was reached after a public meeting this week, in which the final major issues were resolved. This amendment that I am offering is the substance of that agreement.

The amendment retains many of the important reforms included in the original House bill, yet adopts many of the fine and constructive changes made by the Senate. In summary, the amendment retains a strong independent bankruptcy court to handle the large number of bankruptcies filed every year. The amendment does not contain the article III court proposal in the original House bill, but the court that is established is one that everyone can live with very happily. It provides for Presidential appointment and 14-year terms for the new judges, beginning in 1984.

The U.S. trustee system contained in the House bill but not in the Senate amendment was scaled down to a pilot program that will expire in 1984. During that time, we will have time to see how it operates, before creating a nationwide program. In the nonpilot areas of the country, the administrative system for bankruptcies contained in the Senate bill was adopted.

Section 1331 of the House bill and Senate amendment is deleted in the House amendment.

As previously noted, provisions in the House bill pertaining to the U. S. Trustee have been moved to chapter 15 with the section numbers in chapter 15 keyed to corresponding sections in chapters 1, 3, 5, 7, 11, and 13 of title 11.

Title II of the House amendment establishes a new bankruptcy court, a pilot program of U. S. trustees, and contains other amendments to title 28 of the United States Code concerning bankruptcy administration. The provisions of title II of the House amendment are much less complicated than those in title I and therefore a less extensive description is necessary.

Section 201 of the House amendment creates in each judicial district a bankruptcy court that is an adjunct to the circuit court of appeals for the district. The amendment does not specify the number of judges to sit on the bankruptcy court, but instead the determination is to be made by Congress after a study during a 5-year transition period between the present system and a new court. Bankruptcy judges on the new court will be appointed by the President with the advice and consent of the Senate, as are all other Federal judges. Bankruptcy judges will serve for a term of 14 years and receive a salary of $50,000 per year. Removal of a bankruptcy judge during a term may be done only for incompetency, misconduct, neglect of duty, or physical or mental disability.

In order to remove a bankruptcy judge a majority of all the judges of the circuit council of the circuit in which the bankruptcy judge serves must concur. The bankruptcy judge must be given a specification of the charges supporting removal and afforded an opportunity to be heard with respect to the charges. The director of the administrative office of the U. S. courts is authorized to transmit any information in his knowledge supporting removal of a bankruptcy judge to the chief judge of the circuit in which the bank-

ruptcy judge serves. Bankruptcy judges are entitled to substantially increased retirement benefits. Under section 212 of the House amendment at age 65 after 14 years of service at 80 percent of salary for which they contribute 5 percent of their salary per year.

An appeal from a decision of a bankruptcy court will be taken to the district court of the district within which the bankruptcy court is located, unless the circuit council of the circuit in which the bankruptcy court is located orders appeals to be taken to a panel of bankruptcy judges comprised of three bankruptcy judges, or both parties by agreement agree to proceed directly to the circuit court of appeals of the circuit in which the bankruptcy court is located. The subject of appeals is dealt with in sections 201, 236, 237, 238, 240, and 241 of title II of the House amendment which in turn create provisions in sections 163, 1293, 1294, 1334, 1408, and 1482 of title 28 implementing the previously described system of appeals.

Section 224 of title II of the House amendment creates chapter 39 of title 28 relating to a pilot program for U. S. trustees in the Department of Justice. The House amendment establishes a 5-year trial pilot program of U. S. trustees to be supervised by an assistant attorney general in the Department of Justice. Ten pilot programs are established in various geographical areas of the country covering 14 judicial districts. During the 5-year transition period the administrative office of U. S. courts will compare bankruptcy case administration under the U. S. trustee system with administration by the court and the administrative office. At the end of the 5-year transition period Congress will decide whether to fully implement the system of U. S. trustees or to terminate the pilot program.

Under present law bankruptcy judges are required to both resolve disputes and supervise the administration of bankruptcy cases. The main purpose of the U. S. trustee is to remove administrative duties from the bankruptcy judge leaving the bankruptcy judge free to resolve disputes untainted by knowledge of matters unnecessary to a judicial determination. The U. S. trustee is responsible for supervising panels of private trustees in the district or districts covered by the pilot program. The U. S. trustee, rather than the court, in a pilot district will appoint trustees, supervise administration of bankruptcy cases, and exercise any other function prescribed by the Attorney General, such as presiding at first meetings of creditors, related to bankruptcy administration. In addition, in no-asset cases where private trustees may be unwilling to serve or in chapter 13 cases under title 11 where no standing trustee may be willing to serve the U. S. trustee is required to serve as a trustee or standing trustee in the case.

Section 224 of title II creates nine sections in chapter 39 of title 28 providing the details of the U. S. trustee system. During the pilot period the Attorney General must appoint a U. S. trustee for each of the 10-pilot programs covering 14 judicial districts. The U. S. trustee is appointed for a term of 7 years, though if the pilot is terminated after 5 years, his appointment would also terminate. The U. S. trustee is subject to removal for cause by the Attorney General. The maximum annual compensation for a U. S. trustee may not exceed the lowest annual rate of basic pay in GS-16 which is currently $39,500. The U. S. trustee system is patterned after the U. S. attorney system regarding civil service benefits.

Section 233 of title II of the House amendment creates a new chapter 50 of title 28 relating to administrative personnel of the bank-

BANKRUPTCY REFORM ACT OF 1978
P.L. 95-598

STATEMENT BY THE HON. DENNIS DeCONCINI, CHAIRMAN OF THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE SENATE COMMITTEE ON THE JUDIARY, UPON INTRODUCING THE SENATE AMENDMENT TO THE HOUSE AMENDMENT TO H.R. 8200.

October 6, 1978, 124 Congressional Record S 17406

trative office of the U. S. courts is authorized to transmit any information in his knowledge supporting removal of a bankruptcy judge to the chief judge of the circuit in which the bankruptcy judge serves. Bankruptcy judges are entitled to substantially increased retirement benefits. Under section 212 of the House amendment at age 65 after 14 years of service at 80 percent of salary for which they contribute 5 percent of their salary per year.

An appeal from a decision of a bankruptcy court will be taken to the district court of the district within which the bankruptcy court is located, unless the circuit council of the circuit in which the bankruptcy court is located orders appeals to be taken to a panel of bankruptcy judges comprised of three bankruptcy judges, or both parties by agreement agree to proceed directly to the circuit court of appeals of the circuit in which the bankruptcy court is located. The subject of appeals is dealt with in sections 201, 236, 237, 238, 240, and 241 of title II of the House amendment which in turn create provisions in sections 163, 1293, 1294, 1334, 1408, and 1482 of title 28 implementing the previously described system of appeals.

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$39,500. The U. S. trustee system is patterned after the U. S. attorney system regarding civil service benefits.

Section 233 of title II of the House amendment creates a new chapter 50 of title 28 relating to administrative personnel of the bankruptcy courts. Section 771(a) provides for a clerk of the Bankruptcy Court to be appointed based on need. The need for separate Clerks of the Bankruptcy Courts clearly exists at the present time in all judicial districts. Further, Congress has recently addressed the issue and voted unanimously in both bodies of the Congress that separate Clerks of the Bankruptcy Court offices should exist for each Bankruptcy Court. It is further the intent of Congress that this should continue. Where the bankruptcy court is a single bankruptcy judge serving in more than one judicial district, only one Clerk of the Bankruptcy Court may be appointed for all Districts served by that Bankruptcy Judge. In addition the bankruptcy judges may appoint necessary other employees, including law clerks and secretaries, subject to any limitation on the aggregate salaries of the employees imposed by law. Provision is made in the House amendment for bankruptcy court proceedings to be recorded by court reporters or electronic sound recording means or by an employee of the bankruptcy court. Electronic sound recorders means should be the rule. It produces an adequate record and is substantially more economical than a court report or court employee. If the parties agree to bear the cost of a court reporter, it should be permitted. The bill assures similar treatment by the administrative office of the U. S. courts concerning administrative personnel in bankruptcy courts and personnel serving in the U. S. district courts. The Administrative Office should make a study during the transition period regarding the feasibility of the consolidation of the clerk's offices of the Bankruptcy and District Courts. With the addition of the Bankruptcy Judges to the Judicial Conference the Judicial Conference should be better able to evaluate the recommendations contained in such study.

Section 241 of title II establishes a new chapter 90 of title 28 entitled Court of Appeals in bankruptcy courts. This chapter specifies the jurisdiction and venue in bankruptcy cases and specifies various powers of the bankruptcy courts. The chapter grants the courts of appeals original and exclusive jurisdiction of all cases under title 11. That jurisdiction in turn is completely delegated to the bankruptcy court with the sole exception of punishing for contempts by imprisonment and enjoining other courts. The bankruptcy court is thus given pervasive jurisdiction over all proceedings arising in or relating to bankruptcy cases. In addition, the bankruptcy court is given exclusive jurisdiction of the property of the estate in a case under title 11. This represents a major improvement over present law where the distinction between summary and plenary jurisdiction often results in wasteful litigation. Venue provisions pertaining to the new bankruptcy court have been described adequately in the House report accompanying H.R. 8200. It is intended that 28 United States Code 1473 provide alternate venues under subsections (a) and (c) in situations where both paragraphs would apply. Section 250 of title II of the House amendment makes clear that a bankruptcy court may issue a writ of habeas corpus and section 1651 of title 28 applies by its terms to enable a bankruptcy court to issue all other writs; 28 United States Code 1481 rounds out the power of a bankruptcy court by making clear that the court has all the powers of a court of equity, law, or admiralty.

RECONSTRUCTED LEGISLATIVE HISTORY TO THE
BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984
Pub.L. 98-353
Title III, Amendments to Title 11 of the United States Code.

Subtitle A - Consumer Credit Amendments

Sec. 301 amending 11 U.S.C. § 109.

DERIVATION.

> (f) Section 109 is amended by adding at the end thereof the following new subsection:
> "(f) The court shall not permit any person to file for relief under this title who, within the previous six months, (1) has sought relief under this title in a proceeding which was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or (2) has voluntarily dismissed a proceeding filed under this title following the filing of a request for relief from the automatic stay provided by section 362.".

S.445, 98th Cong., 1st Sess. § 315(f) (1983).

> Subsection (f). Adds a new paragraph to section 109. The purpose of the new paragraph is to provide the courts with greater authority to control abusive multiple filing. The section as amended will prohibit any party from filing a petition who, within the previous six months, has had a previous petition dismissed for failure to abide by orders of the court or upon voluntary motion for dismissal.

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

S.333, 98th Cong., 1st Sess. § 2 (1983), contains the amendment verbatim.

"Sec. 2 prevents repeated Chapter 7 or Chapter 13 filings by debtors solely for the purpose of maintaining the automatic stay in effect.

This tightens up a loophole in current law that in some instances has prevented creditors from having the automatic stay lifted in appropriate circumstances.".

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

Sec. 302 amending 11 U.S.C. § 342.

COMMENT.

There is no direct authority for this amendment, however, it probably derives from the debtor counselling provisions of S.445 which were not specifically enacted.

Sec. 303 amending 11 U.S.C. § 349(a).

DERIVATION.

> (b) Section 349 of title 11 is amended by amending subsection (a) to read as follows:
> "(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does it prejudice the debtor in any respect with regard to the filing of a subsequent petition under this title.".

S.445, 98th Cong., 1st Sess. § 203(b) (1983).

COMMENT.

The Senate Report to S.445 did not comment on this change.

Sec. 304 amending 11 U.S.C. § 362(h).

COMMENT.

No prior legislative authority.

Sec. 305(1) amending 11 U.S.C. § 521.

COMMENT.

Conforming amendment.

Sec. 305(2) amending 11 U.S.C. § 521.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 207(3) (1983):

> (3) inserting after paragraph (1) the following new paragraphs:
>
> . . .
>
> "(2) file, at any time prior to the first meeting of creditors, a statement of the debtor's current income and an estimate of the debtor's current expenditures for the support of himself and his dependents.".

COMMENT.

See discussion below of BAFJA, Sec. 305(3).

Sec. 305(3) amending 11 U.S.C. § 521.

DERIVATION.

> (3) inserting after paragraph (I) the following new paragraphs:
>
> ...
>
> "(4) if the debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate, the debtor shall file and serve, within thirty days after filing of a petition under chapter 7 of this title but no later than five days before the first meeting of creditors, upon each creditor holding such security and the trustee, a statement expressing the debtor's intention with respect to retention or surrender of the collateral and, if applicable, specifying that the collateral is claimed as exempt, that the debtor intends to redeem the collateral, or that the debtor intends to reaffirm debts secured by the collateral;".
>
> (4) inserting "(a)" before "The debtor"; and
>
> (5) adding at the end thereof the following new subsection:
>
> "(b) At or before the conclusion of the meeting of creditors provided for by section 341 of this title, or upon such other date as the court in a specific case and in the exercise of its equitable powers may fix, the debtor shall perform his intention with regard to secured creditors, as specified by paragraph [(4)] of

subsection (a), by surrendering such property to the creditor or the trustee; redeeming such property by paying the redemption price, or confirming his intention to pay such price pursuant to section 722(b); or by reaffirming the debt. If the debtor has not fully performed his obligations under paragraph [(4)] of subsection (a) and this subsection at or before the meeting of creditors, the stay imposed by section 362(a) of this title shall terminate with respect to the enforcement of liens against such property, unless the court orders otherwise.".

S.445, 98th Cong., 1st Sess. § 207(3) (1983).

Hearings before the Subcommittee on Courts revealed that one of the most severe problems created by the Code lies in the inadequate mechanisms for enforcement of rights of creditors which are not disputed. That is, the Code imposes such high "transaction costs" on the enforcement of certain rights, that the rights themselves become of little value. This is most clearly the case in connection with the rights of creditors who have a security interest or lien upon the debtor's property which is enforceable in bankruptcy. In most cases, these rights are themselves not disputed or questioned.

When the debtor files a bankruptcy petition, property which is collateral to a secured debt is frequently - in fact usually - retained by the debtor. The debtor generally has several options with respect to such property: He may claim the property as wholly or partially exempt, may seek to redeem the property, or may seek to retain the property by reaffirming all or part of the underlying debt. Or, the debtor may decide to surrender the property to the secured creditor. The trustee also has a potential interest in such property, although this interest is largely theoretical. In the typical case, the property will be worth less than the amount of the debt, and the trustee will disclaim any interest in the property.

Under normal principles of commercial law, if a consumer does not pay a secured debt, the creditor can take either judicial or nonjudicial steps to recover the collateral.

Unfortunately, when the debtor files a bankruptcy petition, the Code provides no orderly, expedited mechanism for enforcing the undisputed interest of the secured creditor. The debtor himself is not required to return the property or exercise one of the other options by a designated time. Theoretically, the secured creditor could request this relief at the meeting of creditors, but attendance at the meeting should not be necessary to get the debtor to elect one of his options.

Alternatively, the matter might be resolved by contacting the trustee, and some have argued that the trustee has a duty to pick up and deliver secured property. Testimony has indicated that in practice, nothing of the sort is taking place. The trustee often is unfamiliar with secured claims, and usually intends to abandon the property since its value is less than the creditor's lien; therefore, trustees are reluctant to expend estate assets to benefit secured claimants. Often, since there are minimal amounts available to pay priority claims, trustees would not be fully compensated for such efforts on behalf of secured creditors.

The secured claimant is barred from the kind of direct action permitted under normal principles of commercial law, as both before and after the meeting of creditors, the automatic stay bars direct communication with the debtor. This is a particularly acute problem if the debtor is not represented by counsel, in which case, there is no one to speak with at all, or if the debtor is represented by counsel who cannot be reached or who is not familiar with the particulars of the case involving the secured claimant. Prior to discharge, the automatic stay clearly prohibits any attempt to seize the property unless the creditor takes affirmative action in the court, which usually requires the filing of an adversary proceeding.

Evidence demonstrates that under the present Code provisions, there is a hiatus of from several weeks to many months during which the debtor has possession of the property, uses the property, and is not required to make any effort to resolve the interest of the secured creditor. During that time, the property will depreciate in value due to normal use, and may be lost or

> destroyed. Ultimately, if the interest is not resolved, the secured creditor must incur the considerable expense of bringing a separate proceeding to obtain relief from the stay so that the lien can be enforced. Creditors have stated that the costs of such a proceeding rarely are less than $350, and may be considerably more if several court appearances are required. Moreover, the debtor continues to retain and use the property for the time it takes to conclude the proceeding. This is a clear instance where the Code has imposed excessive costs on secured creditors who seek to enforce their undisputed rights to secure property. These costs are not imposed so that the debtor can exercise rights of his own; rather, there simply are no procedures for resolving such rights at an early stage of the proceedings at the least possible cost. The effect of the present scheme is to diminish substantially the rights of secured creditors, and, in many instances, entirely deprive them of their security.
>
> This Committee recognizes that secured creditors have a substantial, and perhaps even paramount, interest in collateral property. Accordingly, the debtor should, in the committee's view, be required to notify the secured creditor of his intentions with respect to the property within a reasonable period of time after the filing of the petition, and then, to perform his stated intention by the time of the meeting of creditors. In situations where there is a dispute over the respective rights of debtor and secured creditor, or in the rare case where the trustee will assert an interest of the estate in such property, the court can order the status quo to be maintained until any disputed matters are resolved.

S. Rep. No. 65, 98th Cong., 1st Sess. 6 (1983).

COMMENT.

The amendment proposed by S.445 and that enacted in BAFJA are very similar with two exceptions: (1) the times for filing and and performing the statement of intention; and (2) the consequences to the debtor for failing to perform the stated intention. With regard to the latter, S.445 proposed that the automatic stay be terminated while Sec. 311(a) of BAFJA provides that the trustee shall ensure that the debtor performs the stated intention. Therefore, under BAFJA, the most severe consequences to a recalcitrant debtor would be a denial of discharge.

Sec. 306(a) amending 11 U.S.C. § 522(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 208(a)(1) (1983) is substantively the same provision as enacted by BAFJA.

> Sec. 208: In response to problems encountered with the federal exemptions as enacted in the 1978 Reform Act, the section amends section 522 of the code to require individuals filing in joint or consolidated cases to elect either the federal or state exemptions together... .

S. Rep. No. 65, 98th Cong., 1st Sess. 58 (1983).

> First, witnesses criticized the ability of joint petitioners to make separate elections regarding exemptions under the federal law or under the state law. In many cases this provision allows married couples to take unfair advantage of the most liberal provisions in both state and federal law: for example, one individual can take advantage of a liberal state homestead exemption designed to serve an entire family, while that person's spouse can take advantage of the liberal federal exemption regarding household goods.

Id. at 8.

Sec. 306(b) amending 11 U.S.C. § 522(d)(3).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 208(3) (1983), contains the amendment verbatim.

> Second, the provisions regarding household goods were particularly criticized by creditors. Section 522(d) of the Code allows a debtor to exempt any interest in any particular item of household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family or household use of the debtor or his dependents, so long as the value of any specific item exempted does not exceed $200 ($400 in the case of a joint petition). No limit exists as to the total value of goods that may be exempted pursuant to the provision, thus

> allowing debtors to "stack" exemptions to maximize the total value of the exemption.

S. Rep. No. 65, 98th Cong., 1st Sess. 8 (1983).

"[T]he section amends section 522 of the code ... and places an aggregate limit on the value of the exemption with regard to household goods and personal effects of $4,000.".

Id. at 58.

Sec. 306(c) amending 11 U.S.C. § 522(d)(5).

DERIVATION.

> (4) Subsection 522(d)(5) of title 11, United States Code, is amended to read as follows:
> "(5) The debtor's aggregate interest, not to exceed in value $400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, not to exceed $2,000, in any property.".

S.445, 98th Cong., 1st Sess. § 208(4) (1983).

> Third, the hearings brought out problems with regard to the so-called wild card exemption. Section 522(d)(1) of the Code provides that a debtor may exempt an interest, not to exceed $7,500 in value, in real property ($15,000 in a joint petition). Section 522(d)(5) provides an additional exemption of $400 plus any unused portion of the real property exemption. If the debtor does not own real property, he may use this wild card to exempt up to an additional $7,000 to $15,000 in any type of property owned. This wild card, which applies in addition to the eleven specific exemptions articulated in the Code, confers an unjustifiable, unnecessary "windfall exemption" upon the debtor in bankruptcy.

S. Rep. No. 65, 98th Cong., 1st Sess. 8 (1983).

"The section [208] also prohibits the debtor from utilizing more than $2,000 of the unused dollar value of the homestead exemption to exempt additional property not explicitly provided for by the section.".

Id. at 58.

COMMENT.

BAFJA placed a $3,750 ceiling on the use of unused exemptions.

Sec. 306(d) amending 11 U.S.C. § 522(m).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 208(2) (1983), contains the amendment verbatim.

COMMENT.

See discussion of Sec. 306(a) herein.

Sec. 307(a) amending 11 U.S.C. § 523(a)(2).

DERIVATION.

> (b) Section 523 of title 11, United States Code, shall be further amended by striking out subsection (d) and inserting in lieu thereof the following:
>
> "(d) For purposes of subsection (a)(2) of this section, any debt which was incurred on or within forty days before the date of the filing of a petition under this title is presumed to be nondischargeable under such subsection; however, such presumption shall not apply to the extent such debts were incurred for expenses which were reasonably necessary for the support of the debtor or the debtor's dependents, and shall be rebuttable by the debtor.".

S.445, 98th Cong., 1st Sess. § 209(b) (1983).

> Sec. 209(a): Section 523 is amended and expanded to address a type of unconscionable or fraudulent debtor conduct not heretofore considered by the code - that of loading up. In many instances, a debtor will go on a credit

buying spree in contemplation of bankruptcy. The new subsection (d) creates a rebuttable presumption that any debt incurred by the debtor within 40 days before the filing of the petition has been incurred under the circumstances that would make the debt nondischargeable. Only that portion of a debt which was incurred within the 40-day time period is subject to this presumption. The burden is upon the debtor to demonstrate that the debt was not incurred in contemplation of discharge in bankruptcy and thus a fraudulent debt. As the language makes clear, debts incurred for expenses reasonably necessary for support of the debtor and the debtors dependents are not covered by the presumption.

S. Rep. No. 65, 98th Cong., 1st Sess. 58 (1983).

Excessive debts incurred within a short period prior to the filing of the petition present a special problem: that of "loading up" in contemplation of bankruptcy. A debtor planning to file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property. In many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent. Not only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation.

During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts. Nevertheless, it is often difficult to prove that such debts are fraudulent.

To correct this problem, the bill reported by the committee creates a rebuttable presumption that any consumer debt incurred within 40 days before the filing of the petition has been incurred under circumstances that would make the debt nondischargeable. This has the effect of shifting the burden to the debtor to demonstrate that the debt was not incurred in contemplation of discharge in bankruptcy. The committee believes that this provision, coupled with the modification of the standard applicable to awards of attorney's fees in proceedings to challenge dischargeability

> under S. 523 - discussed below - will be sufficient to discourage this practice and provide an effective mechanism for remedial action. The committee intends that only that portion of a debt which is incurred within the 40-day time period shall be subject to the presumption; furthermore, debts incurred for purposes of providing support for the debtor and the debtor's dependents are not covered by the presumption.

Id. at 9.

Sec. 307(b) amending 11 U.S.C. § 523(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 209(b) (1983) contains the amendment verbatim.

> Sec. 209(b): This section amends section 523 provisions governing the award of attorney's fees in cases where there is a challenge to the dischargeability of a specific debt.
>
> The amended language provides that the court shall award attorney's fees to a debtor who prevails in a challenge to dischargeability when the court finds that the challenge was not "substantially justified". The test of whether a challenge is substantially justified is essentially one of reasonableness.
>
> To obtain an award of attorneys' fees, a prevailing debtor must request a fee award and allege that the creditor was not substantially justified in challenging the dischargeability of the debt. To avoid a fee award, the creditor must show that its challenge had a reasonable basis both in law and in fact. The requirement that the creditor must show that it was substantially justified to avoid a fee award is necessary because it is far easier for the creditor to demonstrate the reasonableness of its action than it is for the debtor to marshal the facts to prove that the creditor was unreasonable.
>
> Certain types of challenges may indicate that the creditor's action was not substantially justified. The court should look closely at cases, for example, where the creditor challenges the

> dischargeability of a debt which was incurred for expenses which were reasonably necessary for the support of the debtor or the debtor's dependents.
>
> The standard, however, should not be read to raise a presumption that the creditor was not substantially justified, simply because it lost the challenge. Furthermore, the creditor should not be held liable where "special circumstances would make an award unjust." This "safety valve" gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

S. Rep. No. 65, 98th Cong., 1st Sess. 58 (1983).

> The original congressional intent in the drafting of S. 523(d) of the existing Bankruptcy Code was to discourage frivolous objections to discharge of consumer debts, but not discourage well-founded objections by honest creditors. The language of the subsection, however, makes the award of the debtor's costs and attorney's fees virtually mandatory in an unsuccessful challenge of a consumer debt. It has been interpreted as requiring the award of fees and costs even when the creditor acted in good faith. CF., In re Majewski, 7 B.R. 904 (Bd. D. Conn. 1981). The net effect of this provision has been to preclude creditors from objecting to discharge of any consumer debt unless they are certain that the court will sustain the objection.
>
> The Committee, after due consideration, has concluded that amendment of this provision to incorporate the standard for award of attorney's fees contained in the Equal Access to Justice Act strikes the appropriate balance between protecting the debtor from unreasonable challenges to dischargeability of debts and not deterring creditors from making challenges when it is reasonable to do so. This standard provides that the court shall award attorney's fees to a prevailing debtor where the court finds that the creditor was not substantially justified in challenging the dischargeability of the debt, unless special circumstances would make such an award unjust.

Id. at 9.

Sec. 308(a) amending 11 U.S.C. § 524(a)(2).

DERIVATION.

The amendment appears verbatim in S.333, 98th Cong., 1st Sess. § 7(1) (1983).

COMMENT.

See comment to Sec. 308(d) herein.

Sec. 308(b) amending 11 U.S.C. § 524(c).

DERIVATION.

> (b) Section 524(c) of title 11, United States Code, is amended-
>
> (1) in paragraph (1) by inserting "and" at the end thereof, and
>
> (2) by striking out paragraphs (2), (3), and (4), and inserting in lieu thereof the following new paragraph:
>
> "(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after it is filed with the court, whichever occurs later, by giving a written notice of rescission to the creditor. Any reaffirmation agreement so filed with the court shall be reviewed by the court and shall be effective from the date of filing in all cases where the debtor is represented by counsel, or the date on which the court approves such agreement in the case of a debtor appearing pro se; and such agreement shall be binding according to its terms from and after such date unless the court, in the exercise of its equitable powers, and after notice and hearing, orders otherwise within sixty days after the filing of the agreement. Any payments made by the debtor prior to the expiration of sixty days after the date of the filing of the agreement shall be held by the creditor in trust for the benefit of the debtor in the event of any subsequent rescission or disallowance of the agreement effected in accordance with this section, except where the debtor has had possession and use of the collateral during the pendency of the agreement.

"(B) Subparagraph (A) of this paragraph shall not apply to a case concerning an individual, to the extent that such debt is a consumer debt secured by real property.".

S.445, 98th Cong., 1st Sess. § 210(b) (1983).

(b) The amendment to section 524(c) substantially revises the reaffirmation procedures of the 1978 act. Whereas the 1978 act required, as to reaffirmations of consumer debts, prior court approval for the agreement to be effective, the new section provides for immediate effectiveness of the agreement upon its filing with the court, subject to the court's review of the agreement pursuant to the exercise of its equitable jurisdiction. The requirement of court approval will continue to be applicable to debtors filing pro se. The purposes of the new section are (1) to lower the cost to the parties of the reaffirmation transaction; (2) to minimize the potential burden on the bankruptcy court, and (3) to ensure that the court is properly informed of such agreements so that it may exercise equitable powers to protect the debtor from overreaching creditors. While the purpose of the new section is to abolish the cumbersome "Miranda Warning" approach of the 1978 act, it is nevertheless intended the court review will constitute more than a rubber stamp of the agreement. The key consideration should be ensuring that the debtor will not suffer an undue hardship by the execution of any reaffirmation agreements. In short, the debtor's fresh start should not be impaired by any such agreements.

It is anticipated that, in the vast majority of cases, the obligations of the court may be adequately discharged by brief inquiries to counsel and the debtor. Where the debtor and the debtor's counsel are in agreement that the execution of the agreement is beneficial to the debtor, the presumption should be in favor of ratification of the agreement.

The debtor is further protected by an expanded cooling off period, which is extended to 60 days. In cases where the debtor rescinds, or the court annuls, the reaffirmation agreement, such payments as may have been made to the credit [sic] are to be returned to the debtor.

In all, the new section is designed to encourage the prompt execution and implementation of good faith reaffirmation agreements by eliminating the cumbersome and unnecessary prior approval procedures which inhibited debtors and creditors from consummating mutually acceptable debt retirement arrangements.

S. Rep. No. 65, 98th Cong., 1st Sess. 59 (1983).

The Bankruptcy Reform Act of 1978 imposed significant procedural limitations on the debtor's ability to reaffirm debts that would otherwise be discharged in bankruptcy. All creditors - especially credit unions (which are democratically owned and controlled consumer financial organizations) - have experienced an unprecedented decrease in the number of reaffirmations made by borrowers in bankruptcy. As a consequence, increased losses must be borne by the consumers who repay their debts as well as the consumer saver. Industry figures for credit unions alone indicate that reaffirmation rates on both secured and unsecured loans, which ran as high as 70 percent before the new code, have remained around 10 percent since adoption of the 1978 Bankruptcy Reform Act.

Present practice under the Bankruptcy Reform Act

The code now requires the debtor to appear in court at the discharge hearing and have any reaffirmation approved by the bankruptcy judge. The court may approve a reaffirmation only if the agreement is made before the granting of the discharge; if it has not been rescinded within 30 days of becoming enforceable; and if the court has informed the debtor that reaffirmation is not required, and of the legal consequences of reaffirmation. The court must also find that the agreement does not impose undue hardship on the debtor or a dependent of the debtor and that it is in the best interests of the debtor or entered into in good faith in settlement of litigation or to provide for redemption.

In practice, courts have interpreted these requirements in numerous ways. Some courts refuse to approve any reaffirmation agreement, while others provide a limited review of the fairness of the agreement; and a number approve

reaffirmation agreements in mass at the discharge hearing. In almost all cases, the court will not approve a voluntary reaffirmation of an unsecured debt. Therefore, many lenders, but especially credit unions which lend to a large degree on an unsecured basis, have been significantly adversely affected by the provisions of the code dealing with reaffirmation.

Under the 1978 code, the court's intervention and admonition that reaffirmation is not required now comes at the end of the bankruptcy process. This greatly diminishes the impact of the warning and enhances the obligation of the judge to scrutinize each bankruptcy agreement under the rigid reaffirmation requirements of the 1978 Bankruptcy Reform Act. Also, frequently long delay between the filing of the petition and the reaffirmation/discharge hearing increases the likelihood that the creditor will realize a loss not intended by the debtor. This is a particularly troublesome result where a voluntary reaffirmation has been made by the debtor and the bankruptcy court, because of its interpretation of the code, refuses to approve the reaffirmation. Testimony of industry spokesmen indicates that credit union members frequently approach the credit union after filing for bankruptcy and enter into voluntary reaffirmation agreements, only to have the court deny the approval required. Many credit unions, frustrated by these denials, no longer even expend the effort necessary to secure reaffirmations under the present system.

Impact of automatic stay on reaffirmations

The committee believes that the automatic stay provided under section 362 of the Bankruptcy Reform Act of 1978 has drastically reduced, if not eliminated, the abusive practices encountered under the pre-1978 bankruptcy law. Creditors can no longer independently contact debtors to encourage them to reaffirm debts because such contact is prohibited by the code.

The proposals placed before the committee to remedy defects in the reaffirmation process would not alter the prohibitions on contact with the debtor. Therefore, the major protection provided under the code to prevent coercive reaffirmation remains intact. Reaffirmations obtained presently

that are subsequently denied by a bankruptcy court are, in fact, truly voluntary reaffirmations.

Committee bill

The committee proposal envisions a signed agreement or order between the debtor and the creditor that is filed with the bankruptcy court. The agreement must inevitably be voluntary because contact between the debtor and creditor is otherwise prohibited by the automatic stay, and because of the court's obligation to advise the debtor at the first meeting that such agreements are voluntary in nature. The debtor, therefore, has to initiate the contact with the creditor concerning the preexisting debt. In cases where debtor is represented by counsel, the debtor's counsel would clearly provide an additional buffer to ill-advised reaffirmations. In cases where the debtor appears pro se, the bill will still require court approval of such agreements. . . .

. . .

Many debtors feel a special obligation to a certain lender or financial institution, such as a credit union, and desire to repay those debts regardless of their ability to obtain a discharge under the Bankruptcy Code. While the Bankruptcy Reform Act of 1978 has effectively eliminated the abuses encountered in the reaffirmation area under the prior law, it has also eliminated almost all voluntary reaffirmations in many courts.

The Committee proposal would again permit voluntary reaffirmations while preserving the major protection in the 1978 law against abuses by not permitting a creditor to initiate contact with the debtor to obtain a reaffirmation. It is the Committee's view that the enactment of the 1978 Bankruptcy Reform Code was not designed to eliminate or even substantially restrict truly voluntary reaffirmation between a debtor and a particular creditor; and the fact that the Code has had this effect makes the amendment necessary.

Id. at 10-13.

Sec. 308(c) amending 11 U.S.C. § 524(d)(2).

COMMENT.

Conforming amendment.

Sec. 308(d) amending 11 U.S.C. § 524(f).

DERIVATION.

S.333, 98th Cong., 1st Sess. § 7(2) (1983), contains the amendment verbatim.

> Sec. 7 clarifies that under current law a debtor is free to relay [sic] voluntarily any discharged debt, even if reaffirmation of that debt is disallowed by the court. This change meets the concern expressed by some creditors that, because the court must approve all reaffirmations, debtors are prevented from repaying the debts they want to pay.

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

Sec. 309 amending 11 U.S.C. § 525.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 352 (1983) is substantively the same provision as enacted by BAFJA, except S.445 uses the word "person" and BAFJA employs the word "individual".

> Sec. 352: This section amends section 525 of title 11 to extend the protections against discrimination to persons employed in the private sector. Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that that person has been or will be a debtor in bankruptcy, or has suffered insolvency pending a discharge.

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 310 amending 11 U.S.C. § 547(c).

DERIVATION.

> Sec. 9. Section 547(c) of title 11, United States Code, is amended-
>
> (1) in paragraph (5) by striking out "or" at the end thereof,
>
> (2) in paragraph (6) by striking out the period at the end thereof and inserting in lieu thereof ", or", and
>
> (3) by adding at the end thereof the following new paragraph:
>
> "(7) if the aggregate value of all property that constitutes or is affected by such transfer-
>
> "(A) in a case under chapter 7 or 13 of this title is less than $250; and
>
> "(B) in a case under chapter 11 of this title is less than $750.".

S.333, 98th Cong., 1st Sess. § 9 (1983).

> Sec. 9 prevents the trustee from avoiding (i.e., undoing) pre-petition payments made by a debtor to a creditor if the amount is less than $250 is a personal bankruptcy and less than $750 in a business bankruptcy. This change will expedite bankruptcy proceedings. Under current law the trustee may nullify most payments made within 90 days of filing.

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

Sec. 311(a) amending 11 U.S.C. § 704.

COMMENT.

The express language of this amendment is not found in prior legislation. However, see discussion in Sec. 305(3), infra, of the amendment to 11 U.S.C. § 521(2) versus language proposed by S.445. S.445 was very strong - failure to perform statement of intention meant automatic stay was terminated. This mandatory result was eliminated and, instead, section 704 as amended allows the trustee to deal with the debtor's behavior.

Sec. 311(b) amending 11 U.S.C. § 1106(a)(1), § 1304(c), § 15103(f), and § 151301(b)(1).

COMMENT.

These are conforming amendments. Note, there is no section 151301(b)(1). Apparently section 151302 was intended. In addition to the conforming change, the amendment to section 15302(b)(1) also adds section 704(7) to the list of duties of the chapter 13 trustee. Section 704(7) relates to the duty of the trustee to furnish information about the estate to parties in interest.

Sec. 312 amending 11 U.S.C. § 707.

DERIVATION.

> (a) Section 305 of title 11 of the United States Code is amended by adding at the end thereof the following new subsection:
>
> "(d)(1) Subject to the provisions of paragraph (2), the court on its own motion according to procedures established by rule, and not at the request or suggestion of any party in interest, may dismiss a case under chapter 7 of this title filed by an individual debtor if it finds that the granting of relief under such chapter would be a substantial abuse of the provisions of such chapter. In determining the question of substantial abuse, there shall be a presumption in favor of granting the relief requested by the debtor.".

S.445, 98th Cong., 1st Sess. § 203(a) (1983).

> Sec. 202(c) [203(a)]: This section authorizes a court to dismiss a case brought under Chapter 7 if the filing represents a substantial abuse of that Chapter. Under this provision, the court may not dismiss a case in response to a request or suggestion from any party in interest, nor may a party in interest make such a request or suggestion. Instead, the case may be dismissed only where the court, acting independently on its own motion, finds substantial abuse, and in such case, the court must make an express finding of substantial abuse.
>
> This provision represents a balancing of two interests. It preserves the fundamental concept embodied in our bankruptcy laws that debtors who cannot meet debts as they come due should

be able to relinquish non-exempt property in exchange for a fresh start. At the same time, however, it upholds creditors' interests in obtaining repayment where such repayment would not be a burden.

Crushing debt burdens and severe financial problems place enormous strains on borrowers and their families. Family life, personal emotional health, or work productivity often suffers. By enabling individuals who cannot meet their debts to start a new life, unburdened with debts they cannot pay, the bankruptcy laws allow troubled borrowers to become productive members of their communities. Nothing in this bill denies such borrowers with unaffordable debt burdens bankruptcy relief under Chapter 7. However, if a debtor can meet his debts without difficulty as they come due, use of Chapter 7 would represent a substantial abuse.

S. Rep. No. 65, 98th Cong., 1st Sess. 53 (1983).

Sec. 313 amending 11 U.S.C. § 1301(d).

DERIVATION.

Section 1301 of title 11, United States Code, is amended by inserting after subsection (c) the following new subsection:

"(d) A creditor who proposes to act pursuant to subsection (c) shall notify the debtor and codebtor of such intention. The debtor or codebtor shall then have ten days to file and serve a written objection to the taking of the proposed action. If the debtor or codebtor does not file and serve a timely written objection, then the creditor's action taken in accordance with the notice shall not violate this section.".

S.445, 98th Cong., 1st Sess. § 217 (1983).

Sec. 217: Section 1301 of the Code imposes a stay on attempts by a creditor to recover debts of the debtor by proceeding against codebtors during the pendency of. a plan. The amendment allows for automatic termination of the stay in accordance with the provisions of subsection (c) where the codebtor is notified of the creditor's intention to take action with respect to the

collection of the debt from the codebtor, and the codebtor or debtor does not object. At present, the stay may be terminated in such cases, but the Code requires creditors to seek court relief to effect the termination. The new section 1301(d) thus eliminates the needless expense of a court hearing to enforce an undisputed right.

In some situations, it may not be entirely clear whether the conditions for automatic termination of the stay have occurred; therefore, the provision sets up an informal mechanism to permit creditors and debtors to resolve such matters. Thus, a creditor who believes the stay has terminated may notify the debtor and codebtor of a proposed action against the codebtor. If the debtor or codebtor notifies the creditor that he believes the stay is still in effect within 10 days, any further action against the codebtor requires court authorization. If the debtor and codebtor fail to notify the creditor, then the creditor can carry out the proposed action.

S. Rep. No. 65, 98th Cong., 1st Sess. 62 (1983).

Section 1301 stays the creditor's efforts to collect a consumer debt from codebtors, cosigners or guarantors upon the filing of a chapter 13 petition. The creditor is entitled to have the stay lifted to the extent the plan does not propose to pay the debt or to the extent that the codebtor, cosigner or guarantor received consideration for the debt. The lifting of the stay on those grounds, however, is not automatic and requires a request before the court and notice and a hearing.

Creditors maintain that the significant costs and expenses which are involved in this procedure can be eliminated without undue burden for the debtor or codebtor by requiring a 10-day advance notice to the debtor and the codebtor after which time the stay, absent an objection, would be lifted. The committee believes that this constitutes a reasonable proposal which will help minimize unnecessary expenditures of time and financial resources by the courts and creditors alike. If an objection to the proposed action against the codebtor, cosignor or guarantor is lodged by the debtor, or codebtor, notice and

> hearing as provided for in present law will precede any collection action.

Id. at 15.

Sec. 314 amending 11 U.S.C. § 1302(b).

COMMENT.

This amendment conforms section 1302(b) to section 1326, as amended, (see discussion of Sec. 318, BAFJA), and incorporates section 704(3), as amended, as an additional duty of the chapter 13 trustee. (See discussion of Sec. 311(a) and 305(3), BAFJA.)

Sec. 315 amending 11 U.S.C. § 1307(c)(4).

COMMENT.

This amendment adds to section 1307(c) a new ground for converting or dismissing a chapter 13 petition based on the failure of the debtor to commence payments within 30 days as required by section 1326(a). (See Sec. 318(a), BAFJA.)

Sec. 316 amending 11 U.S.C. § 1322(b)(1).

DERIVATION.

> (b) Section 1322(b) of title 11, United States Code, is amended by amending paragraph (1) thereof to read as follows:
> "(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims which are specified in section 523(a) or involve a codebtor differently than other unsecured claims;".

S.445, 98th Cong., 1st Sess. § 219(b) (1983).

> By amendment to section 1322(b)(1), the section permits separate classification of nondischargeable and codebtor obligations so as to facilitate payment of the amount the holders of such claims would have received but for the chapter 13 proceedings. Separate classification of

claims upon which there are codebtors is warranted by the practical reality that the debtor is often compelled by circumstances to pay such claims in full. Frequently, the codebtor is a friend, relative, or employer, and will have posted collateral. If such claims are going to be paid anyway, it is important that they be considered in determining the feasibility of the plan.

S. Rep. No. 65, 98th Cong., 1st Sess. 63 (1983).

A number of cases have considered whether claims involving codebtors may be classified separately from other claims. Thus far, the majority of cases have refused to permit such classification on the ground that codebtor claims are not different than other claims. See, for example, In re Utter, 3 B.R. 369 (Bk. W.D.N.Y. 1980); In re Montano, 4 B.R. 535 (Bk. D.D.C. 1980).

Although there may be no theoretical differences between codebtor claims and others, there are important practical differences. Often, the codebtor will be a relative or friend, and the debtor feels compelled to pay the claim. If the debtor is going to pay the debt anyway, it is important that this fact be considered in determining the feasibility of the plan. Somethines [sic], the codebtor will have posted collateral, and the debtor will feel obligated to make the payment to avoid repossession of the collateral. In other cases, the codebtor cannot make the payment, and the effect of nonpayment will be to trigger a chapter 7 or chapter 13 petition of the codebtor, which may have a ripple effect on other parties as well. For these reasons, separate classification is often practically necessary.

Courts under both the present Act and the former law have emphasized that plans must be realistic. For example, courts have refused to confirm plans which the debtor could not possibly perform; have insisted on realistic estimates of expenditures; and have considered debts which the debtor proposes to pay outside the plan in determining feasibility. See, for example, In re Washington, 6 BCD 1094 (Bk., E.D. Va. 1980). This approach is eminently sensible. No purpose is served by confirming a plan which the

> debtor cannot perform. If, as a practical matter, the debtor is going to pay the codebtor claim, he should be permitted to separately classify it in chapter 13. A result which emphasizes purity in classifying claims does so at the price of a realistic plan. Neither debtors nor creditors benefit from such a rigid approach, and the Committee has determined that statutory authority to separately schedule such debts will contribute to the success of plans contemplating repayment of same. Accordingly, this authority is provided for in the proposed bill by amendment to section 1322(b)(1).

Id. at 17.

Sec. 317 amending 11 U.S.C. § 1325.

DERIVATION.

> Section 1325(a) of title 11, United States Code, is amended-
>
> (a) in paragraph (3) by inserting ", and the plan represents a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents," before the semicolon,
>
> (b) in paragraph (C) of paragraph 5 thereof by striking out "and",
>
> (c) by redesignating paragraph (6) as paragraph (7), and
>
> (d) by inserting after paragraph (5) the following new paragraph:
>
> "(6) the plan extends for a period of five years or the plan provides for payment of a reasonable portion of all allowed unsecured claims; and".

S.445, 98th Cong., 1st Sess. § 220 (1983).

> In theory, chapter 13 is consistent with the basic premise upon which consumer credit is granted: The debtor proposes a plan to pay his debts over a period of time and, almost always, out of future income. Chapter 13 proceedings thus look to future income - the very asset upon which credit is granted in the first place - as a source for repayment of debt. The committee believes that chapter 13 should therefore be

consistent with the income-based approach to consumer credit.

Unfortunately, the promise of chapter 13 has only been partly realized. The present chapter 13 provisions do not articulate any meaningful standards for determining what portion of the debtor's income should be devoted to the plan, and for how long the plan should last. The absence of such meaningful standards has had an important impact on the ability of creditors to obtain meaningful recoveries in chapter 13 cases.

Income devoted to the plan

Chapter 13 does not contain any standard which specifies how much of the debtor's future income should be devoted to the plan. The only provisions which bear on this issue are found in section 1325(a)(4), which requires that creditors receive at least as much in a chapter 13 case as they would receive in a chapter 7 liquidation, and section 1325(a)(3), which requires the plan to be "proposed in good faith."

In both theory and practice, the requirement that creditors in a chapter 13 case receive at least as much as they would receive in a chapter 7 liquidation, is not a meaningful standard. In theory, the liquidation standard necessarily looks to present assets as a source for paying debts. The fact that debts cannot be paid out of assets has no bearing upon the extent to which they can be paid out of future income. In practice, chapter 13 creditors usually would receive little or nothing in a chapter 7 case because the debtor has little or no non-exempt property for distribution. Indeed, some courts have turned this standard against creditors. These courts reason that since creditors would have received nothing in a chapter 7 case, they have little cause to complain if they receive nominal payments under a chapter 13 plan (footnote omitted).

The good faith standard provides little further protection. The standard is unduly vague, and there is no legislative history, or supportive provisions in chapter 13, which would help to give it content. Indeed, it is not even clear whether good faith, as contemplated in the statute requires some objectively determined

portion of the debtor's future income to be devoted to the plan, or whether subjective good faith (a pure heart) is all that is necessary (footnote omitted).

The Code does not provide any target for the portion of debt which should be repaid, nor does the Code even provide that repayment of debt should take precedence over expenses for non-necessary or luxury items (footnote omitted).

Given such vague and uncertain standards, it is not surprising to find widely different approaches among bankruptcy courts. Some courts have set a benchmark test of a 70-percent payment, while others have specifically rejected guidelines (footnote omitted). Some courts reportedly press debtors' attorneys for plans paying 50-100 percent of claims, while others intimate that attorneys for debtors who propose to pay more than 10-25 percent have not provided effective representation to their clients. Some courts seem to consider the debtor's ability to pay as crucial, whereas others have refused to confirm low payment plans even when they represent the debtor's best effort. Throughout the country, courts regularly are confirming plans which provide for payment of 10-25 percent of claims, and occasionally nothing at all.

A chapter 13 proceeding involves substantial benefits to the debtor who is able to retain his property, avoid most nondischargeable debts, and cram down debts of secured creditors. The quid pro quo for such benefits would seem to be a substantial effort by the debtor to pay his debts. Of course, the first criterion in such cases must be the debtor's obligations to support himself and his family. But beyond that, it is necessary to have a definite standard delineating how much of the debtor's future income should be committed to the plan.

Chapter 13 relief is essentially equitable, and contemplates a substantial effort by the debtor to pay his debts. Such an effort, by definition, may require some sacrifices by the debtor, and some alteration in prepetition consumption levels. Thus, the debtor might reasonably be required to devote to the plan that portion of his income which is not necessary for support of the debtor and his family. The courts

> may be expected to determine norms for such support, and Labor Department cost of living figures may provide some help. This approach will also permit plans to be confirmed where the debtor does make a substantial effort to pay his debts even though the payment itself is not substantial.

S. Rep. No. 65, 98th Cong., 1st Sess. 20 (1983).

S.333, 98th Cong., 1st Sess. § 10 (1983), contains the same substantive provision as enacted by BAFJA.

> Section 10, 11 and 12 tighten provisions for Chapter 13 (repayment plan) bankruptcies, making this Chapter more equitable to all parties.
>
> Section 10 amends Chapter 13 to prevent the court from approving a 'mere' repayment plan if the debtor has the ability to pay at least some of his debts.

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

COMMENT.

S.445 proposed that before a plan could be confirmed, it had to utilize all the debtor's disposable income. BAFJA incorporates a similar requirement, but it is only imposed when and if an objection is made to the plan. (Section 1326(b)) In the absence of an objection, the codified guidelines for confirming a plan remain essentially unchanged (Section 1326(a)); however, see the remarks to S.333.

Sec. 318(a) amending 11 U.S.C. § 1326.

DERIVATION.

> Section 1321 of title 11, United States Code, is amended by
> (1) inserting "(a)" before "The debtor", and
> (2) adding at the end thereof the following new subsection:
> "(b) Unless otherwise ordered by the court, the case will be automatically dismissed unless payments under the plan commence within thirty days after the filing of the plan. The payments shall be made to the trustee, and shall be

retained by the trustee until a plan is confirmed or not confirmed. If any plan is confirmed, the trustee shall then distribute the funds in accordance with the plan. If no plan is confirmed, the funds shall be returned to the debtor after deducting the costs of administration.".

S. 445, 98th Cong., 1st Sess. § 218 (1983):

> Under present law, payments under a chapter 13 plan frequently do not begin until the plan is confirmed. This sometimes takes several months or longer. Unfortunately, when the payments do not begin promptly, the debtor becomes accustomed to living on money that will not be available once the plan becomes operational; and it may be very difficult for the debtor to scale down expenditures once the plan begins. Indeed, chapter 13 trustees report that there is much greater incidence of compliance with the plan when payments begin promptly, and prompt commencement is required in some districts by local court rules. Moreover, the period between the filing of a plan and confirmation provides a good test of whether the debtor will be able to carry out the plan, or whether some modification is necessary.
>
> In testimony before the Committee it was pointed out that:
>
> > In a number of districts the debtors are expected to, and do, commence making payments to the trustee immediately upon the filing of the case; and we suggest that adequate authority for such procedure is presently in the statute. However, the language contained in section 1325(b) has led some courts to conclude that the debtor should not make payments immediately upon filing of the case. (Emphasis added.)(Footnote omitted.)
>
> There appears to be broad agreement that payments to the trustee should commence immediately upon filing of the plan.

S. Rep. No. 65, 98th Cong., 1st Sess. 15 (1983).

> Sec. 218: This amendment of section 1321 adds a new subsection (b) requiring the debtor to commence payments under chapter 13 plans upon the filing of the plan.
>
> This change attacks the problem of debtors using depreciable property for many months in chapter 13 cases without paying anything to the lender, and then having the case dismissed or converted to chapter 7. Under the Bankruptcy Code, a considerable amount of time may lapse between the filing of the chapter 13 plan and its confirmation. No provision in the Reform Act is made for the prompt commencement of payments. In order to promote completion of chapter 13 plans as quickly as possible, payments should begin when the debtor has filed the plan that he believes he can complete. If no plan is confirmed, the payments may be returned after deducting the costs of administration.
>
> . . . Under the section as amended, the period between the filing of the plan and confirmation will provide a good test of whether the debtor will be able to carry out the plan. Where commencement of payment is delayed until confirmation of the plan, debtors frequently default, or must bear the time and expense of a separate proceeding to modity [sic] the plan.

Id. at 63.

S.333, 98th Cong., 1st Sess. § 11 (1983), contains the amendment verbatim.

"Section 10, 11 and 12 tighten provisions for Chapter 13 (repayment plan) bankruptcies, making this Chapter more equitable to all parties.".

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

COMMENT.

The automatic dismissal proposed in this section by S.445 should be cross-referenced to Sec. 315, BAFJA which provides that the failure to commence payments is a ground for dismissal or conversion of the case.

Sec. 318(b) amending 11 U.S.C. § 15103(f).

COMMENT.

Conforming amendment.

Sec. 319 amending 11 U.S.C. § 1329(a).

DERIVATION.

> Section 1329 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:
> "(d) On request of the debtor, the trustee, or a creditor holding an allowed unsecured claim and after notice and a hearing, the plan shall be modified under subsection (a) of this section to any extent that any change in the debtor's anticipated disposable income substantially affects whether the plan, before modification, complies with the requirements specified in section 1325(a)(6) and section 1325(b) of this title.".

S.333, 98th Cong., 1st Sess. § 12 (1983):

"Sections 10, 11 and 12 tighten provisions for Chapter 13 (repayment plan) bankruptcies, making the Chapter more equitable to all parties.".

129 Cong. Rec. S799 (daily ed. Feb. 1, 1983).

Sec. 321 amending Bankruptcy Rule 2002(n).

COMMENT.

There is no prior legislative authority for this amendment.

Sec. 322 amending Official Bankruptcy Form No. 1.

COMMENT.

There is no prior legislative authority for this amendment which conforms Form No. 1 to 11 U.S.C. § 342(b), as amended by BAFJA, Sec. 302.

Sec. 323 amending Section 408(c) of the Act of November 6, 1978 (Public Law 95-598, 92 Stat. 2683), as amended.

COMMENT.

This amendment extends the United States Trustee Pilot Program to September 30, 1986.

Sec. 324 amending 11 U.S.C. § 1103(b).

COMMENT.

There is no prior legislative authority for this amendment; however, see discussion of BAFJA, Sec. 500(a) which further amended section 1103(b).

Subtitle B - Amendments Relating to
Grain Storage Facility Bankruptcy

Sec. 350 amending 11 U.S.C. § 507(a).

DERIVATION.

> Section 507(a) of title 11, United States Code, is amended-
>
> (1) by adding after paragraph (4) the following:
>
> "(5) Fifth, allowed unsecured claims of farmers or other persons engaged in farming operations or the catching of fish arising from the sale or conversion of farm produce or fish to or by a debtor engaged in the business of operating a farm produce storage facility or United States fish processing facility where such sale or conversion occurred within one hundred and eighty days before the date of the filing of the petition or before the cessation of the debtor's business, whichever was earlier, but only to the extent of $2,000 for each such individual";
>
> (2) by striking out "(5) Fifth" and inserting in lieu thereof "(6) Sixth"; and
>
> (3) by striking out "(6) Sixth" and inserting in lieu thereof "(7) Seventh".

S.445, 98th Cong., 1st Sess. § 235 (1983).

> Sec. 235: Amends S. 507(a)(5) of Title 11 to substitute new language for the section. The new language creates a priority in the distribution of assets to general, unsecured creditors, in favor of farm producers who suffer loss pursuant to the sale or conversion of farm produce to or by a debtor engaged in the business of operating a farm produce storage facility. Together with the amendments made by s. 5(2) and (3) of the bill, this section restructures the distribution of assets to such creditors so as to allow farm products to participate in priority distribution after those distributions made from trustee and court expenses, wages and pension plans, and before distributions made to individuals on account of the deposit of money in connection with the purchase, lease, or rental of property or the purchase of services not delivered or provided. Thus, the priorities contained in the present section 507(a)(5) and (a)(6) are subordinated to the new priority, and the present section 507(a)(5) and (a)(6) are renumbered as (a)(6) and (a)(7) by sections 5(2) and 5(3) of the reported bill.

S. Rep. No. 65, 98th Cong., 1st Sess. 65 (1983).

Sec. 351 amending 11 U.S.C. § 546.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 236 (1983), contains the amendment in the same substantive form.

> Sec. 236: Amends section 546 of the Code to provide greater reclamation protection for producers who have sold grain to an insolvent elevator but have not received payment. The new subsection "(d)" requires the court to secure the interest of such a producer with a lien where reclamation is denied.

S. Rep. No. 65, 98th Cong., 1st Sess. 65 (1983).

Sec. 352(a) amending 11 U.S.C. § 557.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 237 (1983), contains the amendment in the same substantive form, although S.445 suggested more amendments than were incorporated in BAFJA. The following index cross-references each subsection of section 557 as enacted by BAFJA to its correlative subsection in S.445:

BAFJA Section 557	S.445 Proposed Section 557
§ 557(a)	§ 557(a)
§ 557(b)(1)	§ 557(b)(1)
§ 557(b)(2)	§ 557(b)(2)
§ 557(b)(3)	§ 557(b)(4)
§ 557(c)	§ 557(c)
§ 557(d)	§ 557(d)
§ 557(e)	§ 557(f)
§ 557(f)	§ 557(g)
§ 557(g)	§ 557(i)(1)
§ 557(h)	§ 557(l)
§ 557(i)	§ 557(h)

The subsections referred to below in the Senate Report to S.445 refer, of course, to the subsections proposed in S.445.

> Sec. 237: Amends Chapter 5 of title 11 to add a new section 557 dealing with expedited determination of interests in, and . . . other disposition of grain assets stored in an insolvent grain storage facility.
>
> Subsection "(b)" defines the terms "grain", "grain storage facility" . . . .
>
> Subsections "(c)" and "(d)" provide authority and direction to the court to establish a timetable for the accomplishment of the various judicial and administrative steps necessary to facilitate the expedited disposition of grain assets stored in an insolvent storage facility.
>
> Subsection "(f)" permits state or federal regulatory agencies having jurisdiction over the operation or liquidation of storage facilities involved in the bankruptcy proceedings to participate in the case. Subsection "(g)" allows expansion of the time limits for disposition of grain assets, with due regard for the interests of the parties affected by any expansion. Subsection "(h)" requires the trustee to liquidate grain assets held which exceed ten thousand

bushels in amount, so as to prevent waste of the assets of the estate and to facilitate distribution. . . . . Subsection "(i)" sets forth the provisions governing appeal of orders determining interests in, or approving distribution of, grain or proceeds of grain. . . . Subsection "(1)" governs assessment of grain or grain proceeds for trustees costs and expenses.

S. Rep. No. 65, 98th Cong., 1st Sess. 65 (1983).

B. GRAIN STORAGE FACILITY AMENDMENTS

This subtitle is designed to respond to the concerns and needs of the farm producing community with respect to farm produce storage facility bankruptcies, as those concerns and needs were expressed during hearings held on April 6th and May 18th, 1981. These hearings were prompted by the circumstances surrounding the bankruptcy of three farm produce storage companies which owned and operated thirteen crop storage facilities in the states of Missouri and Arkansas. Testimony of Mr. Thomas Hopkins, Coordinator of the Grain Regulatory Services Program of the Missouri Department of Agriculture, before the Subcommittee reflected that these elevator companies (commonly owned by three brothers, d/b/a Frisbee Cotton Company, James Gin and Elevator Company and James Agri-Center, Inc., and hereinafter referred to as the James Brothers Elevators), filed voluntary petitions in bankruptcy in the United States Bankruptcy Court for the Eastern District of Arkansas on August 11, 1980. Two of these companies applied for liquidation under Chapter 7 of Title 11; the third (James Agri-Center) filed for reorganization under Chapter 11 of that title.

Mr. Hopkins related that immediately prior to the filings in bankruptcy, the James Brothers had, on August 8, 1980, notified the Missouri Department of Agriculture that all their legal entities were unable to comply with the requirements of the Missouri Grain Warehouse Law and that they wished to voluntarily surrender possession of the five Missouri warehouses to the Department. Employees of the Missouri Department of Agriculture then proceeded to secure and take possession of the five elevators

and control over the grain stored in the five Missouri warehouses was given to the Director of Agriculture. This control was delivered in express recognition of the Director's statutory authority to take possession of crops on hand at an insolvent elevator for the purpose of enforcing the Missouri Grain Warehouse Law. An audit was conducted by the Missouri authorities which showed that, except for approximately 4,000 hundredweight of grain sorghum (milo) having a value of approximately $20,000, there was enough grain on hand at each of these warehouses to meet their obligations under the outstanding receipts held by the farmer-depositors, bankers, and Commodity Credit Corporation. On August 12, 1980, the state of Missouri acted to enforce the Missouri Grain Laws to insure delivery of stored grain to warehouse receipt holders, as rightful owners, by filing separate receiverships in the Circuit Courts of New Madrid County, Dunklin County, Pemiscot County, Ripley County, and Butler County, state of Missouri. By orders dated August 12, 1980, the Director of the Missouri Department of Agriculture was appointed receiver of each of the Debtors' warehouses by those Circuit Courts of Missouri in accordance with the authority set forth in Section 411.519.6 of the Missouri Grain Warehouse Law.

Within a short time of the filings in bankruptcy on August 11, 1981, the Arkansas bankruptcy court appointed an interim trustee for the partnership debtors. The bankruptcy trustee obtained an order dated August 27, 1980, from the bankruptcy court authorizing him to operate the business of the partnership debtors, which included the right on his part to perform grain purchase agreements that the debtors had made with farmers. Upon request, he was also given the right to resell the grain so purchased to other parties pursuant to certain contracts of purchase and sale, which involved large quantities of grain. The trustee's plan, of course, became known to the public, and the farmer-receipt holders became incensed when, although grain would be leaving the warehouses to enable the trustee to perform these purchase and sale contracts, the farmer-depositors were told they could not get possession of the grain they had stored at these elevators, and to which they had retained title. Some of the farmer-sellers were even being required to sell

additional grain to the trustee, who refused to release their stored grain. Because of their inability to take possession of their own property, the farmer-depositors took possession of, and barricaded others from entering, the Ristine, Missouri, grain warehouse administered by the bankruptcy trustee. The bankruptcy trustee responded with a motion to the court for orders finding the farmers in contempt of court, which asserted that these Missouri farmer-depositors were guilty of unlawful possession, criminal trespass, and blockade.

On September 17, 1980, the bankruptcy court granted an order directing the United States Marshal for the Eastern District of Missouri to remove all persons blockading the facilities and directing that the marshals arrest and bring before the bankruptcy court any persons found to be blockading or barricading the James Brothers facilities or interfering with the trustee's "capacity to operate the debtor's business." United States Marshals appeared at the premises in force. In response to demands of the trustee in bankruptcy, the Missouri Receiver involuntarily surrendered possession, and, on September 17, 1980, the Missouri Department of Agriculture's employees turned over the keys to the bankruptcy trustee, his employees and agents. The Missouri Department of Agriculture's employees surrendered to the trustee only because they were threatend [sic] with contempt.

On September 23, 1980, the bankruptcy trustee filed a pleading in the Bankruptcy Court in which the trustee alleged that the grain in the four Missouri warehouses of the partnership Debtors, namely those at Holcomb, Caruthersville, New Madris (Ristine), and Naylor, Missouri, was owned by him as trustee in bankruptcy, subject to the possibility of certain adverse claims. This was the first time that the trustee had made claim to ownership, and naturally, state of Missouri officials became greatly disturbed at the time it was made because the trustee's claim to ownership was, in their view, inconsistent with the provisions of the Missouri Grain Laws (the trustee admittedly did not hold any document of title to the grain). After consideration by the Missouri Attorney General and the Missouri Department of Agriculture of the options available to the state of Missouri to preserve the integrity of its Grain

Laws, the state of Missouri filed enforcement proceedings in the Circuit Court of New Madrid County, Missouri, on October 20, 1980. After an ex parte hearing, that Circuit Court issued a temporary restraining order prohibiting the bankruptcy trustee from exercising any jurisdiction with respect to the grain located in Missouri. Immediately thereafter, the legal representatives of the Missouri Department of Agriculture were advised that contempt proceedings against the Circuit Court would be held in the Bankruptcy Court on October 22, 1980. On October 30, 1980, the state of Missouri filed a Petition for Writ of Prohibition in the District Court in Arkansas and, on December 2, 1980, that Court decided the Bankruptcy Court had jurisdiction with respect to the grain located in Missouri. In its opinion, the District Court stated that it presumed the grain would not be sold until the ownership issues were determined. However, on December 4, 1980, the bankruptcy trustee requested the Bankruptcy Court to sell the grain without determining ownership, and the court so ordered. The December 4, 1980, decision obviously affected all of the holders of documents of title to the Missouri grain. Consequently, the state of Missouri requested a stay pending appeal in order that the jurisdiction and ownership issues could be decided before important property rights of the holders of the documents of title could be prejudiced. On December 22, 1980, the District Court denied the Motion for Stay Pending Appeal; later that day, the state of Missouri filed a Petition for Writ of Prohibition in the Eighth Circuit and obtained a stay of the bankruptcy proceedings. The appeal of these matters was set for hearing before the United States Court of Appeals for the Eighth Circuit in March 1981, and decision was rendered on April 8, 1981, nine months after the filing of the bankruptcy.

That decison [sic] held, in effect, that the bankruptcy court properly exercised preliminary jurisdiction over crop assets in which the debtor held a possessory interest, subject to final determination of ownership interests, as between holders of warehouse receipts (documents of title) and scale tickets (receipts) obtained from the debtor as documentary evidences of ownership of crop assets delivered to the debtor upon contracts of bailment, on the one hand, and the

debtor and the debtor's assignees, on the other. (In Re State of Missouri, et al. v. United States Bankruptcy Court for the Eastern District of Arkansas, Nos. 80-2198 and 80-2179 [8th Circ., 1981].)

Farm producer-depositors became increasingly impatient during the litigation process described above, and on February 16, 1981, one producer forcibly removed approximately 33,000 bushels of soybeans from the Ristine, Missouri elevator under jurisdiction of the Bankruptcy Court, which he owned and had deposited therewith. This was done in violation of orders of the Bankruptcy Court and with the assistance and support of several hundred farmers. The soybeans removed were taken to a nearby elevator and redeposited. As a result of this action, that producer was arraigned on federal charges relating to these acts in early March of 1981. The charges were subsequently dropped by a federal grand jury on March 20, 1981.

According to the testimony of Mr. Hopkins, the resolution of the James Brothers case is further complicated by the claims of entitlement to crop assets made by certain creditors holding secured interests as good faith purchasers for value of bogus warehouse receipts issued by the debtors purporting to assign title to crop assets owned by the debtors which did not in fact exist at the time the assignments were made.

The events in the James Brothers case were symptomatic of similar problems experienced by farm producer groups and state Department of Agriculture officials in farm produce storage facility bankruptcies throughout the United States during the past several years. Testimony before the Subcommittee on the Courts established that the following problems, encountered in the James Brothers cases, have repeatedly hindered the proper distribution of farm produce located in storage facilities that are the subject of proceedings in bankruptcy;

(1) delay in abandonment of crop assets owned by parties who have delivered such assets to the debtor upon a contract of bailment, with delays in excess of two years not uncommon;

(2) conflicts in jurisdiction between the bankruptcy courts and state agencies charged

with the responsibility of supervising the liquidation of insolvent storage facilities;

(3) the requirements of present law which mandate that owners of crop assets held by the debtor solely on the basis of his status as a bailee must share grain assets held by the trustee in bankruptcy on a pro rata basis with any creditor holding a security interest in assets of a similar type which are owned by the debtor, such that the bailors of such storage contract crop assets have the value of their property diminished for the benefit of such creditors when there is a shortage of produce on hand;

(4) the unprotected status, as unsecured creditors in bankruptcy, of farmers who have sold crops to a farm produce storage facility but have not received payment for that crop;

(5) the reluctance of some courts to accept warehouse receipts and scale tickets, the principle documents used in warehouse business to establish record of ownership of crop assets stored in warehouse facilities on bailment contracts, as evidence of ownership in bankruptcy abandonment proceedings; and

(6) the tendency of certain bankruptcy courts to attach bailed property for the payment of trustees fees and expenses incurred in performing services unrelated to that bailed property.

The Subcommittee on the Courts received testimony from officials of the United State Department of Agriculture, state warehouse regulatory and licensing agencies, farm producer organizations, the National Grain and Feed Association, and representatives of various banking associations which detailed the occurrence of these problems in warehouse bankruptcies in twenty-two states of the midwest and southeastern areas of the United States during the past two years.

In response to this testimony, the provisions of subtitle "B" of the Committee bill would do the following:

(1) The bill would require the bankruptcy courts, upon request in a case involving a grain storage facility, to establish a timetable for the performance of all judicial and administrative functions in connection with the abandonment or other distribution of grain assets from such a facility;

(2) The bill would require the court to distribute grain assets or the proceeds of such assets first to producers who have merely stored their grain in such a facility upon a contract of bailment;

(3) The bill mandates distribution of grain within 120 days of the filing in bankruptcy except in cases involving special circumstances requiring more time;

(4) The bill contains measures requiring the court to allow state or federal agencies charged with the responsibility of liquidating farm produce storage facilities to participate in the distribution process;

(5) The bill contains measures which would strengthen present provisions of the Code allowing a right of reclamation to producers who have sold goods to a debtor in bankruptcy who have not received payment;

(6) The bill contains measures requiring the bankruptcy court to accept valid warehouse receipts and scale tickets as proof of ownership of crop assets possessed by the debtor upon contracts of bailment where they were issued for that purpose;

(7) The bill incorporates measures that would act to prohibit an involuntary bailment of crop assets owned by producers to a farm produce storage facility which is the subject of reorganization proceedings under Chapter 11 of the Bankruptcy Act; and

(8) The bill grants farm producers a priority position in the distribution of assets of the bankrupt to general unsecured creditors when those farm producers have suffered a loss as a result of the sale or conversion of farm produce to or by a debtor operating a storage facility, after trustee and court expenses, wages of employees, and pension plan payments.

The bill contains additional sections designed to inhibit frivolous appeals of abandonment orders, eliminate the possibility of grain assets being assessed for trustee fees and costs unrelated to the costs of preserving or distributing those assets, and certain definitional and technical amendments.

Id. at 22.

Sec. 352(b) amending table of sections for Chapter 5.

Sec. 353 amending 11 U.S.C. § 901(a).

COMMENT.

There is no prior legislative history for this, apparently, technical amendment.

Sec. 354 amending Rule 3001 of the Bankruptcy Rules.

DERIVATION.

S.445 sets out a similar version of the rule in its proposed subsection (e) to section 557:

> (e) Any claimant's production to the court of a valid grain storage facility receipt held by that claimant as evidence of ownership of a quantity of farm produce sold by the trustee shall be sufficient to establish a right to possession in such claimant of a share of the proceeds equal in value to the quantity, quality, and type of farm produce specified in such document. In any case where a claimant has placed the original of such document on deposit with any party as collateral for a loan, without assigning ownership interests in the farm produce over to such party, an affidavit from such party verifying ownership of such receipt by the claimant shall be sufficient to establish a prima facie claim of right to possession of proceeds in such claimant.

S.445, 98th Cong., 1st Sess. § 237(a) (1983).

"Subsection '(e)' establishes the utility of a storage facility receipt as proof of ownership and right to move for abandonment or reclamation of property.".

S. Rep. No. 65, 98th Cong., 1st Sess. 66 (1983).

Subtitle C - Leasehold Management Amendments

Sec. 362(a) amending 11 U.S.C. § 365(a)-(d).

LEGISLATIVE HISTORY.

Subtitle C of title III, with the exception of a few minor changes, is identical to S. 549 which was overwhelming [sic] approved by the committee and which unanimously passed the Senate in 1982 and 1983.

This subtitle contains three major substantive provisions which are intended to remedy serious problems caused shopping centers and their solvent tenants by the administration of the bankruptcy code.

The first problem which this bill would remedy is the long-term vacancy or partial operation of space by a bankrupt tenant. Although in a chapter 7 case the bankruptcy code presently requires that the trustee decide whether to assume or reject an unexpired lease within 60 days after the bankruptcy petition is filed, there is no deadline for this decision in a chapter 11 case. Because of the unprecedented number of bankruptcy cases and the consequent delays in the bankruptcy courts, tenant space has been vacated for extended periods of time before the bankruptcy court forced the trustee to decide whether to assume or reject the lease. During this time, the other tenants of the shopping center are hurt because of the reduced customer traffic in the shopping center. Tenants and landlords in other nonresidential structures have encountered similar problems.

The bill would lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject [sic] nonresidential real property lease within 60 days after the order for relief in a case under any chapter. This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases. One of the minor changes in this subtitle was to limit it to nonresidential real property leases. If the lease is not assumed or rejected within this 60-day period, or any

additional period granted by the court, the lease is deemed rejected and the trustee must immediately surrender the property to the lessor.

A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease. These payments include rent due the landlord and common area charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide current services - the use of its property, utilities, security, and other services - without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor.

The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease. For cause, the court can extend the time for performance of obligations due during the first 60 days after the order for relief, but not beyond the end of such 60-day period. At the end of this period, the amounts due during the first 60 days would be required to be paid, and thereafter, all obligations must be performed on time. This permissible 60-day grace period is intended to give the trustee time to determine what lease obligations the debtor has and to locate the cash to make the required payments in exceptionally large or complicated cases. The bill does not require the performance of obligations specified in section 365(b)(2), which relate to solvency and financial condition. The performance by the trustee of the debtor's obligations has no effect on the performance of the trustee's obligations under subsections (b) or (f) of section 365. The acceptance by the lessor of any payments made by the trustee as required by this subsection does not constitute a waiver or relinquishment of the lessor's rights under such lease or under the bankruptcy code.

> A third problem occurs when shopping center leases are assumed or assigned and then used in ways which violate the use clause of the lease and disrupt the tenant mix, the [sic] bankruptcy code currently provides that when a shopping center lease is assumed or assigned, assurances must be given that the lease provisions will not be substantially breached and that the tenant mix will not be substantially disrupted. Unfortunately, courts have misapplied these provisions in ways which have deprived shopping centers and their tenants of the protections which Congress intended to provide them.
>
> This bill would delete the word "substantially" from these provisions, thus requiring that any clause in the lease be adhered to. It is especially important that any use clause in the lease be strictly adhered to and that the tenant mix not be disrupted. The bankruptcy courts will still retain the flexibility to determine whether or not a proposed new use for the premises falls within any use clause of the lease and whether or not the new use would disrupt the tenant mix. This amendment requires strict compliance with the provisions of use clauses in shopping center leases and prohibits any changes in the use of the tenant's space not permitted by the use clause. This amendment is intended to stop courts from creating new leases by changing essential lease terms to facilitate assignments. It is intended to stop the practice of some courts to determine whether there has been a disruption by reference to the amount of space to be assigned as a percentage of the total area in the shopping center. This amendment is not intended to enforce requirements to operate under a specified trade name.

130 Cong. Rec. S8894, 8895 (daily ed. June 29, 1984) (statement of Sen. Hatch).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 252(a) (1983), contains the amendment in similar substantive form. The following index cross-references

each subsection of section 365 as enacted by BAFJA to its correlative subsection in S.445:

BAFJA Section 365	S.445 Proposed Section 365
§ 365(a)	§ 365(a)
§ 365(b)(1)(A-C)	§ 365(b)(1)(A-C)
§ 365(b)(2)(A-C)	§ 365(b)(2)(A-C)
§ 365(b)(3)(A-D)	§ 365(b)(3)(A-D)
§ 365(b)(4)	§ 365(b)(4)
§ 365(c)(1-3)	§ 365(c)(1-3)
§ 365(d)(1)	§ 365(d)(1)
§ 365(d)(2)	§ 365(d)(2)
§ 365(d)(3)	§ 365(a)
§ 365(d)(4)	§ 365(d)(3)

The subsections referred to below in the Senate Report to S.445 refer, of course, to the subsections proposed in S.445.

> 1. Section 365(a) is amended by adding the language:
>
> The trustee shall timely perform all the obligations of the tenant arising from and after the date of the order for relief, under an unexpired non-residential lease (including payment of the rent and other charges specified in such lease) until such nonresidential lease is assumed or rejected, not withstanding the provisions of Section 503 of this title. For cause shown, the court may extend the time for performance of any obligation of rent or other charges due upon an unexpired lease pursuant to the provisions of Section 108(b) of this title. Acceptance of such performance shall not constitute a waiver or relinquishment of the lessor's rights under the lease or under this title.
>
> The purpose of this amendment is to make clear that the trustee is responsible for paying post-petition rent and other charges and performing other obligations of a non-residential lease on a timely basis until the lease is assumed or rejected.
>
> However, where a trustee, unfamiliar with the business of the debtor, is appointed to administer the estate, and where there is reason to question the requirement to pay rent or other charges or to perform other obligations of the estate under the lease, the trustee may petition the court, and, if cause can be shown, the court may extend the time for performance of such

post-petition obligations to a date no later than 60 days after the order for relief to cure defaults and perform other similar acts.

A distinction between residential and non-residential leases is made here and in the amendment to sections 365(c), (c)(3), (d)(1), (d)(2), (d)(3), and to section 541(b).

The application of these provisions is limited to non-residential leases in order to avoid depriving residential tenants of whatever consumer protections they may have under applicable non-bankruptcy law.

This amendment also makes clear that the lessor's acceptance of such performance by the trustee does not constitute a waiver of relinquishment of the lessor's rights under the lease or under the Bankruptcy Code.

2. Section 365(b)(3) has been amended to provide that adequate assurance of future performance of a shopping center lease applies not only where there has been a default, but whenever an unexpired lease is assigned. This change is necessary because, due to a technical omission in the Bankruptcy Code, the protections for shopping centers and their solvent tenants which are provided in Section 365(b)(3) could be construed as not applying in a situation where the debtor has not defaulted on his lease and seeks to assign the lease in violation of the use clause or other provisions of the lease.

3. Section 365(b)(3)(A) is amended to require an adequate assurance that any assignee of the lease will have an operating and financial performance, including guarantors, similar to that of the original tenant when the lease was executed.

This provision is intended to prevent a shopping center lease from being assigned to another business in poor financial condition. Such a business might itself soon fail, resulting in a repetition of the problems caused by the bankruptcy of the assignor.

This provision gives the lessor and the other tenants the benefit of the original bargain with the debtor. Indicia of operating and financial

performance include advertising effort, marketing style, profitability, debt rating, and ability to meet debt obligations.

4. Section 365(b)(3)(C) is amended to make clear that the assumption or assignment of a shopping center lease is subject to all the provisions of that lease, as well as to any other lease, financing agreement, or master agreement relating to the shopping center. Debtors have argued incorrected [sic] that this provision only requires adequate assurances that the provisions of such "other" leases and agreements would not be breached, but that it would not require such assurances regarding the provisions of the lease being assigned.

5. Sections 365(b)(3)(C) and (D) are amended to delete the word "substantially" from provisions requiring that an assignment of a shopping center lease will not breach the assigned lease or other leases or agreements and will not disrupt the tenant mix.

In practice, the presence of the qualifier "substantially" has enabled trustees to ignore the use clause of leases. This violates the assigned lease and other agreements and, thereby, disrupts the tenant mix to the detriment of the other tenants of the shopping center. In 1978, Congress recognized the importance of compliance with the use clauses, and this amendment is necessary to effect Congress' intent.

6. Section 365(c)(3) has been added to provide that the trustee may not assume or assign an unexpired non-residential lease if "such non-residential lease has been terminated under state law prior to the order for relief."

The purpose of this amendment is to provide that an unexpired non-residential lease may not be assumed by a trustee, if such lease has been terminated by a state court judgment or otherwise under state law prior to the order for relief.

7. Section 365(d) has been amended to provide that in a case under any chapter of the Bankruptcy Code, an unexpired non-residential lease of the debtor is deemed rejected if the trustee does not assume or reject such lease

> within 60 days, or within such additional time as the court, for cause, orders.
>
> In addition, this amendment provides that if a nonresidential lease where the debtor is the lessee is deemed rejected, "the court shall order the premises to be vacated immediately."

S. Rep. No. 65, 98th Cong., 1st Sess. 66 (1983).

Sec. 362(b) amending 11 U.S.C. § 365(l)-(m).

LEGISLATIVE HISTORY.

> The bill provides that lessors are permitted to require an assignee to provide a deposit or other security for the performance of the debtor's obligations substantially the same as the landlord would have required upon leasing the space to a similar tenant. This permits the landlord to get his usual, reasonable security deposit from an assignee tenant.

130 Cong. Rec. S8895 (daily ed. June 29, 1984) (statement of Sen. Hatch).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 252(b) (1983), contains the amendment in similar substantive form, with respect to the addition of new subparagraph (1); S.445 makes no reference to the addition of subparagraph (m) as incorporated in BAFJA. Subparagraph (m) appears to be a technical amendment.

> 8. Section 365(l) is added, providing that if an unexpired lease is assigned, the lessor may require from the new tenant a security deposit for the performance of the obligations of the lease which is substantially the same as that required by the landlord upon the initial leasing and a similar tenant.
>
> This amendment is intended to give the landlord the benefit of his original agreement with the debtor, and provide protection to the shopping center and its other tenants equivalent to that of the original bargain.

S. Rep. No. 65, 98th Cong., 1st Sess. 68 (1983).

Sec. 363(a) amending 11 U.S.C. § 541(b).

LEGISLATIVE HISTORY.

> Other provisions of the bill would make minor and clarifying changes in the law. The bill provides that the trustee may not assume or reject a lease of nonresidential real property that has been terminated under applicable nonbankruptcy law prior to the order for relief. A lease that has terminated under applicable nonbankruptcy law is a lease that is unenforceable and no longer subject to reinstatement under the terms of the lease or applicable law.
>
> The bill provides that nonresidential real property subject to a lease that has terminated by the expiration of its stated term is not property of the estate and that a proceeding or action by the landlord to regain possession of the property is not stayed. A lease that has terminated at the expiration of the stated term of such lease is a lease under which the lessee no longer has any renewal or extension rights.

130 Cong. Rec. S8895 (daily ed. June 29, 1984) (statement of Sen. Hatch).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 253 (1983), contains the amendment in similar substantive form.

> Sec. 253: This section amends Section 541 of Title 11, United States Code, to make clear that the debtor's interest in property subject to a non-residential lease which has expired by virtue of its own terms is not property of the estate and that a proceeding to obtain possession of such property is not automatically stayed by Section 362 of the Code.
>
> This amendment is intended to permit landlords to proceed promptly in state court to reclaim possession of non-residential leased premises where such lease has expired by its own terms, i.e., because a specified termination date of the lease has been reached. This change is intended to facilitate the ability of the landlord to

re-lease non-residential space to another tenant as soon as possible.

S. Rep. No. 65, 98th Cong., 1st Sess. 68 (1983).

Sec. 363(b) amending 11 U.S.C. § 362(b).

LEGISLATIVE HISTORY.

See the statement of Sen. Hatch set out in the Legislative History of Sec. 363(a), BAFJA.

Subtitle D - Amendments to Title 11, Section 523 Relating to the Discharge of Debts Incurred by Persons Driving While Intoxicated

Sec. 371 amending 11 U.S.C. § 523(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 261 (1983), contains the amendment verbatim.

> Sec. 261: Amends section 523(a) of title 11 to prohibit the discharge of debts incurred as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States within which such motor vehicle was operated and liability so incurred.

S. Rep. No. 65, 98th Cong., 1st Sess. 69 (1983).

> Subtitle "D" of the Committee bill is a modified version of S.2159 (97th Congress), a bill introduced by Senator Danforth which would render debts incurred as a result of an act of drunk driving non-dischargeable in bankruptcy.
>
> Under present law, a debt that is the result of a tortious act - such as a judgment against a debtor as the result of an automobile accident - is non-dischargeable only if the debt is the result of a "willful and malicious injury" to the property or person of another.

> In most states, an injury resulting from an act of drunk driving will support a finding only of negligence on the part of the driver. Thus, more often than not, the debt is discharged - unless the bankruptcy court finds that the act of drunk driving was a willful and malicious act by the nature of the circumstances surrounding it.
>
> The bill will help deter drunk driving, and protect victims of the drunk driver, by making such debts non-dischargeable in bankruptcy. Where a debt was incurred by the debtor as a result of an act of drunk driving, that debt will not be dischargeable regardless of any court finding that willful, wanton, or reckless behavior was or was not involved.

Id. at 43.

Subtitle E - Referees Salary and Expense Fund

Sec. 381. Title

Sec. 382 amending Section 403(e) of the Act of November 6, 1978 (92 Stat. 2683; Public Law 95-598).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 272 (1983), contains the amendment verbatim.

> Sec. 272: This section amends section 403(e) of Public Law 95-598 so as to place a $200,000 cap on payments to the referee's salary and expense fund in cases under section 40c(2)(a) of the Bankruptcy Act pending after September 30, 1979. It also places a $100,000 cap on payments to the fund in cases under section 40c(2)(b) of the Act wherein the final determination as to the amount of the payment was not made until after September 30, 1979.

S. Rep. No. 65, 98th Cong., 1st Sess. 69 (1983).

Subtitle F - Amendments Regarding Repurchase Agreements

BACKGROUND.

F. REPURCHASE AGREEMENTS AMENDMENTS

(1) INTRODUCTION

Use of repurchase agreements (sometimes referred to herein as "repos") (footnote omitted) has grown rapidly in recent years. Repos are now considered to be a principal means of financing the market for United States Government securities and money market instruments. Recently, however, a serious question has arisen whether the securities and commodities amendments to the Bankruptcy Code (the "Code"), enacted last year as Public Law 97-222, adequately cover the repo market. As a first step, the proposed amendments to the Code would address this question:

(a) by providing new definitions of "repo participant" and "repurchase agreement" in section 101, and

(b) by creating a new section at the end of Chapter 5 and making conforming amendments to sections 362(b), 546, 548(d)(2) and 553(b)(1) of the Code to ensure there is no question that repo participants are afforded the same treatment with respect to the stay and avoidance provisions of the Code in connection with repurchase agreements, as newly defined, which Public Law 97-222 explicitly provided stockbrokers, securities clearing agencies, commodity brokers and forward contract merchants in connection with securities contracts, commodity contracts and forward contracts.

These amendments would take an important first step in resolving the recent uncertainty about whether the provisions of Public Law 97-222 adequately cover the repo market. This uncertainty largely stems from litigation in the Lombard-Wall case, as described below, and has introduced considerable confusion in the use of repo transactions in financial markets. The current Congressional review of other major

problem areas in the Code presents an immediate opportunity to eliminate this confusion.

These amendments are offered as an emergency measure to deal with the effect of the present uncertainty on the repo market only in respect of U.S. Government and agency obligations, certificates of deposit, and eligible bankers' acceptances.

(2) DESCRIPTION OF THE REPO MARKET

As indicated above, repo transactions provide one of the major mechanisms for limited-term investment involving all U.S. Government and agency securities, mortgage-related instruments, commodities and all money market instruments (e.g., certificates of deposit, bankers' acceptances and commercial paper).

The volume of repo transactions is very large. The 36 members of the Association of Primary Dealers in U.S. Government Securities (the "Primary Dealers") alone engage in repo transactions amounting to about $25 billion to $30 billion each day. It is difficult to determine the total size of the repo market, but one can safely estimate that the aggregate daily amount of repo transactions amounts to several hundred billion dollars. This should come as little surprise, since the financial assets that are the subject of repos include a substantial part of the approximately trillion dollar U.S. public debt.

The repo market serves a crucial function for both parties to the repo transaction. The country's major institutional and fiduciary investors make heavy use of repos. For these investors, including such entities as state and local governments, public and private pension funds, money market and other mutual funds, banks, thrift institutions, and large corporations, repos have become a vital tool of cash management.

The repo is particularly well-suited to the needs of these investors. Receipts of taxes and the proceeds of bond issues in the case of state and local governments, cash flows from corporate operations, and liquidity needs of thrift institutions and money market funds often fail to

coincide with the planned expenditures of such funds, thereby creating the need for such entities to invest idle funds for short periods in as risk-free a manner as possible.

Repos generate income for the supplier of funds while at the same time providing flexibility, since they can be arranged for periods which match the supplier's cash flow needs, including periods as short as one day. Few, if any, other investment vehicles have this feature. Government securities or other financial assets can be bought and held for short periods other than in repo transactions, but the transaction costs can be relatively high. Moreoever, [sic] the possibility of capital loss due to market rate volatility or the risk of reinvestment at a lower rate of return significantly reduces the attractiveness of investment alternatives.

For the Primary Dealers in the government-related securities market, the repo market has become the principal means of financing their positions. Repos provide dealers with the financing that is essential for them to buy newly-issued government securities. Repos also enable other dealers to obtain these newly-issued securities from the Primary Dealers. If repo financing becomes unavailable or more costly due to adverse interpretations of the code, the distribution system for newly-issued government securities and the federal government's ability to raise funds in a cost-effective manner will be adversely affected. This would in turn increase the cost of government borrowing and the level of interest rates generally.

Wide public and private sector participation is important to the reliable functioning of the repo markets and permits the U.S. Treasury and other federal agencies to finance the country's public debt at rates of interest lower than otherwise would be possible. Moreover, it provides additional incentive for foreign central banks and other foreign holders of U.S. dollar reserves to participate in financing the nation's public debt.

Just as important, the repo market plays an important role in the conduct of monetary policy. The Federal Open Market Committee, through the

Trading Desk at the Federal Reserve Bank of New York (the "New York Fed"), makes extensive use of repos in regulating the supply of funds in the execution of monetary policy. Repos have become a highly flexible and effective short-term tool for the Federal Reserve System. The effectiveness of the repo market as a tool of monetary policy depends in turn upon broad-based public participation.

As indicated above, the efficient functioning of the repo market also facilitates substantial involvement by foreign central banks, monetary authorities, and international institutions in financing the U.S. public debt. The New York Fed maintains accounts for approximately 140 foreign central banks, monetary authorities, and international institutions. With such large international holdings of the dollar, it has become important to the orderly financing of the public debt that these institutions purchase U.S. Government securities. In 1979, for example, the dollar volume of investment activity for these foreign accounts alone at the New York Fed exceeded $1.4 trillion, most of which involved U.S. Government securities. A substantial amount of this activity was a [sic] repos.

Finally, the existence of an efficient repo market in U.S. Government securities enhances the attractiveness of the U.S. dollar as an international reserve currency. The dollar is the principal reserve currency in the world.

(3) REPO MARKET IN JEOPARDY

The effective functioning of the repo market can only be assured if repo investors will be protected against open-ended market loss arising from the insolvency of a dealer or other counterparty in the repo market. The repo market is as complex as it is crucial. It is built upon transactions that are highly interrelated. A collapse of one institution involved in repo transactions could start a chain reaction, putting at risk hundreds of billions of dollars and threatening the solvency of many additional institutions.

Since the repo market is important to the health of the country's financial system, it is desirable that the Code be interpreted and

implemented in a manner which protects that market without creating an unfair result for debtors. Similar concerns led to Public Law 97-222. Despite Public Law 97-222, investors in the repo market have in the last several months found themselves faced with considerable uncertainty about the treatment of repos in bankruptcy proceedings. The provisions of Public Law 97-222 are not believed adequately [sic] to protect liquidations of repos in the event of the insolvency of a dealer or other participant in the repo market, even though the principal objective of Public Law 97-222 was to prevent the insolvency of one commodities or securities firm from spreading to other firms and possibly threatening the stability of the affected market. H.R. Rep. No. 97-420, 97th Cong., 2nd Sess. 1 (1983).

The uncertainty was highlighted by the filing in the Bankruptcy Court in the Southern District of New York of a Chapter 11 bankruptcy petition by Lombard-Wall Inc. in August 1982. (footnote omitted) A bench decision in the Lombard-Wall case held that the holder of securities subject to a repurchase agreement was subject to the automatic stay of the Code, and that this holder was precluded from closing out its position with the debtor without approval of the Court. Lombard-Wall Incorporated v. Columbus Bank & Trust Co. et al. (In re Lombard-Wall Incorporated), No. 82 B 11556, Bankr. Ct., S.D.N.Y., bench decision, September 16, 1982. This holding made clear the risks to the market created by the Code's stay and avoidance provisions and demonstrated that Public Law 97-222 is not sufficient in scope to protect the market from major dislocations caused by bankruptcy of market participants.

The Lombard-Wall proceedings and their extensive press coverage have had an adverse impact on the financial markets and undermined the primary purposes of Public Law 97-222 because the repo market is subject to the same ripple effect as other securities markets. (footnote omitted)

Uncertainty as to the scope of coverage of Public Law 97-222 with respect to the repo market has already caused special problems for certain

categories of investors. The U.S. Department of Housing and Urban Development has recently decided not to permit further investment in repos by Public Housing Authorities, Indian Housing Authorities and FHA-Approved Mortgagees for Multifamily Projects. Standard and Poor's has suspended rating of "structured municipal issues" (which permit investment of municipal bond or note proceeds in repurchase agreements) with government securities dealers not rated by Standard and Poor's because of the questions raised by the Lombard-Wall bankruptcy about the ability of a bond or note trustee to liquidate, in a timely manner, securities held under a repurchase agreement where the seller-repurchaser files for protection under the Code.

Open-ended mutual funds, particularly the money market funds, use repos on a short term basis to assist in managing their portfolios, to provide flexibility and to provide higher return with relative safety. As of October 31, 1982, money market funds held repo agreements totalling approximately $19.4 billion.

The recent focus on safety and liquidity of repos in the event of a bankruptcy filing by a participant to a repo has raised concerns about their use by the mutual fund industry in light of the regulatory standards under the Investment Company Act of 1940. On November 4, 1982, the Securities and Exchange Commission's Division of Investment Management, in a memorandum to Chairman Shad, indicated that it would revise a previous "no action" position regarding repos and require that investment company boards of directors, to the extent practicable, evaluate the credit-worthiness of the brokers or dealers with which they propose to engage in repo transactions and that it would require that government securities money market funds which advertise that their portfolio securities are government guaranteed to disclose substantial investments in repos.

While these concerns are currently being addressed within the mutual fund industry, the only certain solution at this time appears to be the proposed amendments to the Bankruptcy Code, which assure protection to the repo market participant. If a bankruptcy filing does occur, the proposed legislation would protect the

liquidity of a fund's repo with a debtor, and permit the fund to achieve its bargained-for contract rights.

Safety and the ability to specify term are the key elements of repos which make them attractive to funds. Both elements promote liquidity for funds. Money market funds, by their nature, are required to be highly liquid and are used by millions of investors on a daily basis for investment in and redemption of fund shares. The ability to redeem promptly, at net asset value, is crucial to the operation of these funds and the maintenance of investor confidence. The filing of a case under the Code by a government securities dealer, or other party which holds a repo with a fund, puts these key elements in some doubt. Although there is little likelihood that bankruptcies involving fund repo would occur with any frequency, the mere possibility, under present law, raises significant issues as to the safeguards and circumstances under which funds should utilize repos in their investment portfolios.

The proposed amendments to the Code, described below, will help assure that the objective of Public Law 97-222 to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy (128 CONG. REC. H261 (daily ed. February 9, 1982) (statement of Rep. Edwards)) is carried out by expressly providing the repo market the same protection.

(4) PROPOSED REPO AMENDMENTS

The proposed amendments will take an important first step toward meeting the full objective of Public Law 97-222 by expressly providing that similar protections apply to the crucial portions of the repo market involving U.S. Government and agency obligations, certificates of deposit, and eligible bankers' acceptances. The structure of the proposed amendments is based upon the addition to the Code of new definitions of "repo participant" and "repurchase agreement" and the making of conforming changes in relevent provisions of the Code. The proposed amendments are intended to afford participants in the repo market the same treatment with respect to the stay and avoidance provisions of the Code

> that Public Law 97-222 explicitly provided stockbrokers, securities clearing agencies, commodity brokers and forward contract merchants in connection with securities contracts, commodity contracts and forward contracts.
>
> The amendments would apply only to certain repurchase agreements, namely those involving certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States. These amendments are not intended, however, to affect the status of repos involving securities or involving commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under other provisions of the Code, such as the provisions giving protection to stockbrokers, securities clearing agencies, commodity brokers, and forward contract merchants for liquidation and setoff in respect of securities contracts, commodity contracts or forward contracts. In particular, a repurchase agreement as defined in the amendments, insofar as it applies to a security, would continue to be a securities contract as defined in the Code and thus also would be subject to the Code provisions pertaining to securities contracts. Similarly, insofar as a repurchase agreement as defined by the amendments applies to a commodity, it would continue to be a forward contract for purposes of the Code and would be subject to the Code provisions pertaining to forward contracts.

S. Rep. No. 65, 98th Cong., 1st Sess 44 (1983).

Sec. 391(1) amending 11 U.S.C. § 101.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 281(a) (1983), contains the amendment verbatim.

"Section 281(a): makes conforming redesignations of subsequent definitions.".

S. Rep. No. 65, 98th Cong., 1st Sess. 69 (1983).

Sec. 391(2) amending 11 U.S.C. § 101.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 281(b) (1983), contains the amendment in similar substantive form.

> Section 281(b): provides a new definition for "repo participant" in section 101. " Repo participant" includes any entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has one or more outstanding repurchase agreements with the debtor with an aggregate repurchase price of $1,000,000 or more. The 90 day period is based on the preference period set forth in section 547 of the Code. This definition is intended to include an entity acting for its own account or for the account of one or more other entities (whether as custodian, trustee, fiduciary, agent or in any other capacity).
>
> It is also intended to include an entity, acting for its own account or for one or more other entities, or both for itself and for another or more other entities, that may have entered into one or more repurchase agreements with a single debtor which may each involve a stated repurchase price of less than $1,000,000, but which would have an aggregate stated repurchase price of $1,000,000 or more.
>
> It is not intended by the provisions of this definition to affect the status of agreements involving an aggregate repurchase price of less than $1,000,000 under other provisions of the Code, such as those, for example, protecting securities contracts and forward contracts.
>
> Section [281(b)] provides a new definition for "repurchase agreement" in section 101. "Repurchase agreement" means any agreement which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of

deposit, eligible bankers' acceptances, or securities as described above, at a date certain within one year after such transfers or on demand, against the transfer of funds. This definition also applies to a reverse repurchase agreement. It also covers any related terms in a repurchase agreement (such as market-to-market provisions). For purposes of this definition an "eligible bankers' acceptance" is either (i) an acceptance by any institution of a draft or bill of exchange drawn on itself which, if drawn on a member bank, would be eligible for acceptance under the criteria established in subparagraph (A) of the seventh paragraph of section 13 of the Federal Reserve Act, 12 U.S.C. § 372, or (ii) an acceptance which, on the date the repurchase agreement is entered into, is eligible for purchase under the rules of the Federal Open Market Committee.

While repurchase agreements may be open to various kinds of characterizations and are characterized in market practice under various legal relationships, it is intended by this action that any agreement that meets the terms of the definition of repurchase agreement shall receive the treatment in bankruptcy that is provided for in this subtitle.

The definition does not require (or prevent) the original and reverse transfers to be provided for in separate agreements or confirmations. A repurchase agreement may be either written or oral.

In accordance with market practice, some repurchase agreements permit certain substitutions of the assets subject to the repurchase agreement. Accordingly, under agreements covered by this definition, the transferor may make certain substitutions of assets, but only assets of at least equal market value to those originally transferred and falling within the same one of the three enumerated categories (i.e., certificates of deposit, eligible bankers' acceptances, or U.S. government and Federal agency issued or guaranteed securities). The transferee may return only assets that are the same in all material respects as those last transferred or substituted by the transferor.

Repurchase agreements for only certificates of deposit, eligible bankers' acceptances, and U.S. government and Federal agency issued or guaranteed obligations are afforded the amendment's treatment under the Code. As provided in section 102(5) of title 11, United States Code, the enumeration of the underlying types of property in the alternative is not exclusive; a repurchase agreement can involve the transfer or re-transfer of a combination of the enumerated kinds of property. It is not intended by the enumeration in this definition to affect in any way the status of repurchase agreements for any item, whether or not covered by the definition, under other provisions of the Code, such as those, for example, protecting securities contracts and forward contracts.

In particular, a repurchase agreement as defined in this subtitle, insofar as it applies to a security, would continue to be a securities contract as defined in the Code and thus also would be subject to the Code provisions pertaining to securities contracts. Similarly, insofar as a repurchase agreement as defined in this subtitle applies to a commodity, it would continue to be a forward contract for purposes of the Code and would be subject to the forward contract provisions of the Code.

The reference to "direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States" is based on section 14(b) of the Federal Reserve Act, 12 U.S.C. § 355, and is intended to include all obligations of, or that are fully guaranteed as to principal and interest by, any entity whose obligations are determined by the Board of Governors of the Federal Reserve System to be eligible for purchase by the Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act.

S. Rep. No. 65, 98th Cong., 1st Sess. 69 (1983).

Sec. 392 amending 11 U.S.C. § 362(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 282 (1983), contains the amendment verbatim.

> Section 282(a): makes conforming redesignations of subsequent paragraphs.
>
> Section 282(b): is intended to clarify that, despite the automatic stay of section 362(a), a repo participant may set off a claim for a margin or settlement payment arising out of repurchase agreements against the repo participant's obligations to the debtor in respect of cash, securities or other property that the repo participant is holding, or that is due to the debtor, to margin, guarantee, secure or settle repurchase agreements, notwithstanding the bankruptcy of the party for whose account such cash, securities, or property is held. This provision is essentially parallel to the one in existing Code section 362(b)(6).
>
> This section refers to settlement payments as defined in section 741(8). It is intended for purposes of this section and the other provisions added by this subtitle that any amount paid or payable with respect to any interest, dividend or other distribution in respect of the certificate of deposit, eligible bankers' acceptance, or security that is the subject of the repurchase agreement and any amount paid or payable with respect to any interest, rebate or other fee in respect of the repurchase agreement, regardless of whether the amount is paid or payable on a settlement date or a different date, constitute[s] a settlement payment within the meaning of that term as defined in section 741(8). Such items serve the same function as other, more conventional types of settlement payment and are commonly used in the securities trade. This assures consistency of treatment, since it is understood that similar amounts paid or payable with respect to securities contracts likewise come within the definition of settlement payment as defined in section 741(8) for purposes of the Code provisions relating to securities contracts.

S. Rep. No. 65, 98th Cong., 1st Sess. 71 (1983).

Sec. 393 amending 11 U.S.C. § 546.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 283 (1983), contains the amendment verbatim.

> Section 283: creates a new subsection to section 546 which, together with provisions of section 548, clarifies that a trustee is prohibited from avoiding a transfer that is a margin payment or settlement payment made by or to a repo participant in connection with a repurchase agreement, except where the transfer was made with actual intent to hinder, delay or defraud other creditors and the property transferred was not taken in good faith. This prohibition is parallel to the one in existing Code section 546(d).

S. Rep. No. 65, 98th Cong., 1st Sess. 71 (1983).

Sec. 394 amending 11 U.S.C. § 548(d)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 284 (1983), contains the same substantive amendment.

> Section 284: creates a new subsection to section 548(d)(2) to clarify that all margin or settlement payments made in connection with a repurchase agreement are taken for value to the full extent of such margin payments. This new provision is parallel to the one in existing Code section 548(d)(2)(B).

S. Rep. No. 65, 98th Cong., 1st Sess. 71 (1983).

Sec. 395 amending 11 U.S.C. § 553(b)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 285 (1983), contains the amendment verbatim.

"Section 285: makes a conforming change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 71 (1983).

Sec. 396 amending 11 U.S.C. § 559.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 286 (1983), contains the amendment verbatim.

> Section 286: adds a new section to the end of Chapter 5 of title 11 to clarify that the exercise of a contractual right of a repro [sic] participant to cause the liquidation of a repurchase agreement, because of a condition of the kind specified in section 365(e)(1) of title 11, shall not be stayed, avoided or otherwise limited in any proceeding under title 11 by a court or administrative agency, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) or any statute administered by the Securities and Exchange Commission. This provision would confirm that the liquidation would terminate any right of the debtor's trustee to affirm an executory contract in respect of a repurchase agreement. The prompt liquidation of an insolvent's position is generally desirable to minimize the potentially massive losses and chain reaction of insolvencies that could occur if the market were to move sharply in the wrong direction. This provision is parallel to the one in existing Code section 555.
>
> The amendment also contains an excess proceeds provision applicable in the event that a repo participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to such agreement or agreements to the debtor. In such an event any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid

quotation from such a source) over the sum of the stated repurchase prices and all expenses (including such items as brokerage fees, bank charges or fees for legal services) in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. It is intended that the rights of setoff and other remedies permitted elsewhere in the Bankruptcy Code and under other law are not to be limited by this provision.

The new section includes a definition of the term "contractual right" in respect of repurchase agreements to make explicit that this term includes rights arising under common law, under law merchant or by reason of normal business practice whether or not evidenced in writing, as well as a right set forth in a rule or bylaw, of a national securities exchange, a national securities association, of a securities clearing agency that is applicable to each party to the repurchase agreement. It is understood and intended that such a rule or bylaw would be applicable to each party to the repurchase agreement only if each of them is a member of the exchange, association or agency promulgating the rule or bylaw or has agreed to be bound by such rule or bylaw.

S. Rep. No. 65, 98th Cong., 1st Sess. 71 (1983).

Subtitle G - Amendments to Title 11, Section 365 of the United States Code to Provide Adequate Protection for Timeshare Consumers

BACKGROUND.

G. AMENDMENTS REGARDING TIMESHARE AGREEMENTS

The Bankruptcy Code of 1978 greatly expanded the ability of the Trustee to reject executory contracts. To temper this increased power and to reflect the growing body of bankruptcy common law which provided some protection for consumer creditor interests, specific provisions were included in Section 365 to allow consumers to continue their use and

enjoyment of their leases or land purchased via installment contracts. Thus, while the Trustee could still reject their contracts as executory, the consumers' interests were recognized and protected.

In a similar manner and for similar reasons, these proposed amendments to Section 365 of the Bankruptcy Code of 1978 modify the Trustee's ability to reject contracts of consumer creditors of a bankrupt timeshare developer by seeking to recognize the interests of the growing number of timeshare consumers and the need to provide these consumers with some protection in the event of a timeshare developer bankruptcy. These amendments do two things:

1. Add the definition "timeshare plan" and "timeshare interest" to Section 101 of the Bankruptcy Code; and

2. Modify existing Section 365(h) and (i) to clearly indicate that timeshare interests are to be treated in the same manner as leases and sales of real property.

Courts have refused to extend the existing provisions to timeshare consumers because such consumers are not specifically mentioned in either paragraph and their possessory interests differ from the typical interests of lessees or contract purchasers. Because timeshare interests are difficult to characterize within existing consumer protections to explicitly include them.

This type of legislation is urgently needed. In February of 1982, over 700 timeshare consumers lost whatever interest they had and all moneys paid in Sherwood Hills, a timeshare resort in Utah; and, over 200 timeshare consumers lost all moneys paid to a developer who subsequently declared bankruptcy in the Sombrero Reef Club in Florida. 1/

These consumer creditors do not have adequate protection. They are not businesses

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1/ In re Sombrero Reef Club, Inc. 18 B.R. 612 (Bankr. S.D. Fla. 1982.)

with the ability to spread the burden of bad debt to customers. They are not isolated consumers of a rare enterprise. Current industry estimates place the number of timeshare resorts near 1,000 and the number of timeshare consumers at over 500,000. Because this is a growing industry with the number of consumers at risk increasing at a rapid rate, the need to provide these consumers with protections already provided lessees and purchasers of real property is critical.

Subtitle G of S.445 contains the provisions of S.492, a bill introduced by Senators Hatch and Thurmond in January, 1983. S. 492 is essentially identical to S.3027, which was introduced by Senator Hatch in the 97th Cong. S.492 has also been ordered reported favorably from the Committee on the Judiciary.

In testimony before the Courts Subcommittee on January 24, 1983, Mr. Carl G. Berry, Chairman of the National Timesharing Council of the American Land Development Association stated the problem succinctly. Speaking in reference to Sombrero Reef, Berry stated:

> . . . The Bankruptcy Code held that "right-to-use" timeshare purchase contracts were executory and could be rejected by the debtor-in-possession developer, thereby allowing the sale of the resort property free and clear of the interest of the consumer purchasers.

S. Rep. No. 65, 98th Cong., 1st Sess. 49 (1983).

Sec. 401 amending 11 U.S.C. § 101.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 291 (1983), contains the amendment verbatim.

"Sec. 291: This section defines the terms 'timeshare plan' and 'timeshare interest'.".

S. Rep. No. 65, 98th Cong., 1st Sess. 72 (1983).

Sec. 402 amending 11 U.S.C. § 365(h)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 292 (1983), contains the amendment verbatim.

> Sec. 292: This section amends section 365(h)(1) of title 11 to afford holders of timeshare interests the same protections which are presently extended to lessees of unexpired leases in real property of the debtor under that section of the Code. Also, the language of the section is revised in order to define the parameters of the lessee or timeshare interest holder's authority to treat the lease or timeshare interest as terminated.

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 403 amending 11 U.S.C. § 365(h)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 293 (1983), contains the amendment verbatim.

"Sec. 293: Section 293 amends section 365(h)(2) of title 11 to include holders of timeshare interests in the provisions of that section regarding offsets for damages resulting from nonperformance of the debtor's obligations under the contract.".

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 404 amending 11 U.S.C. § 365(i)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 294 (1983), contains the amendment verbatim.

"Sec. 294: Section 294 amends section 365(i)(1) of title 11 to include timeshare interests in the category of executory contracts covered by the provisions of that section.".

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Subtitle H - Miscellaneous Amendments to Title 11

Sec. 421(a) amending 11 U.S.C. § 101(2)(D).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(a) (1983), contains the amendment verbatim.

"Sec. 311: (a) This section deletes a redundancy. 'Substantially all the property of the debtor' includes all of the property of the debtor and 'all' can be deleted as redundant.".

S. Rep. No. 65, 98th Cong., 1st Sess 73 (1983).

Sec. 421(b) amending 11 U.S.C. § 101(8)(B).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(b) (1983), contains the amendment verbatim.

"Subsection (b). This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 421(c) amending 11 U.S.C. § 101(9)(B).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(c)(1) (1983), contains the amendment verbatim.

> Subsection (c). This amendment cross-references two additional sections to complete the intent that claims fixed after the filing of the petition are to be treated as pre-petition claims, and deletes the reference to present section 502(i), which is in effect repealed by section 30(g) of the bill.

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

COMMENT.

The deleted reference referred to in the Report was not incorporated into BAFJA.

Sec. 421(d) amending 11 U.S.C. § 101(14).

COMMENT.

No prior legislative authority.

Sec. 421(e) amending 11 U.S.C. § 101(24).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(e) (1983), contains the amendment verbatim.

"Subsection (e). This amendment corrects a typographical error in the definition of 'individual with regular income'.".

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 421(f) amending 11 U.S.C. § 101(26)(B)(ii).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(f) (1983) contains the amendment verbatim.

> Subsection (f). This amendment to the definition of "insolvent" with respect to a partnership, clarifies that "separate" as used in the definition refers to the general partners' nonpartnership property, and removes the ambiguity that it might refer to his non-community property in a community property estate.

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 421(g) amending 11 U.S.C. § 101(30).

COMMENT.

No prior legislative authority.

Sec. 421(h) amending 11 U.S.C. § 101(38)(B)(vi).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(g) (1983) contains the amendment verbatim.

"Subsection (g). This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 421(i) amending 11 U.S.C. § 101(44).

COMMENT.

No prior legislative authority.

Sec. 421(j)(1)-(3) amending 11 U.S.C. § 101.

COMMENT.

This is a conforming amendment.

Sec. 421(j)(4)-(7) amending 11 U.S.C. § 101.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 311(i) and (j) (1983) contains the amendment verbatim.

> Subsection (i). This amendment adds a definition of "United States" to section 101. Subsection (j). This section adds definitions to section 101, for the terms "state", "forward contract", "forward contract merchant", and "financial institution". The definition of "forward contract" will eliminate the present uncertainty surrounding the use of that term in the Code.

> The terms "purchase", "sale" and "transfer" are used in the definition in their broadest sense to include, at least, consignments, leases, swaps, hedge transactions, commercial options, deposits, loans, allocated and unallocated transactions, or any combination thereof. The definition of "forward contract merchant" will eliminate the present uncertainty surrounding the use of that term in the Code.

S. Rep. No. 65, 98th Cong., 1st Sess. 73 (1983).

Sec. 422 amending 11 U.S.C. § 102.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 312 (1983), contains the amendment verbatim.

"Sec. 312: This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 423 amending 11 U.S.C. § 103(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 313 (1983), contains the amendment verbatim.

"Sec. 313: This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 424 amending 11 U.S.C. § 108.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 314(a) and (b) (1983), contains the amendment verbatim.

"(a). This amendment corrects a grammatical error. Subsection (b). This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 425 amending 11 U.S.C. § 109. .

DERIVATION.

S.445, 98th Cong., 1st Sess. § 315(a), (d) and (e) (1983), contains the amendment verbatim.

"(a). This amendment makes a stylistic change. . . . Subsection (d). Stylistic change. Subsection (e). Stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 426(a) amending 11 U.S.C. § 303(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 316 (1983), contains the amendment verbatim.

"Sec. 316: This amendment is a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 426(b) amending 11 U.S.C. § 303(b)(1) and (h)(1).

COMMENT.

There is no legislative history for this amendment.

Sec. 427 amending 11 U.S.C. § 303(j)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 317 (1983), contains the amendment verbatim.

"Sec. 317: This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 428 amending 11 U.S.C. § 321(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 318 (1983), contains the amendment verbatim.

"Sec. 318: This amendment makes a stylistic change that clarifies section 321(b).".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 429 amending 11 U.S.C. § 322(b)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 319 (1983), contains the amendment verbatim.

"Sec. 319: This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 430(a) amending 11 U.S.C. § 326(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 320(a) (1983) contains the amendment verbatim.

"(a). Amends section 326(a) to allow greater recovery for trustees in Chapter 7 and 11 cases. Testimony at the April 6, 1981 Senate Judiciary Committee hearings (Courts) revealed that the present fee system has made it very difficult to obtain private trustees in chapter 11 cases.".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 430(b) amending 11 U.S.C. § 326(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 320(b) (1983) contains the amendment verbatim.

"Subsection (b). This amendment makes a stylistic amendment to conform section 326(d) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 74 (1983).

Sec. 430(c) amending 11 U.S.C. § 326(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 320(c) (1983) contains the amendment verbatim.

> Subsection (c). Amendment provides greater flexibility for the trustee in hiring of professional persons to assist with trustee's duties. Where there is an actual conflict of interest, the trustee may not employ a party who represents a creditor in the case. This amendment is consistent with the amendment made to sec. 1103(b) of the Code.

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 431 amending 11 U.S.C. § 328(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 321 (1983), contains the amendment verbatim.

"This amendment corrects a grammatical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 432(a) amending 11 U.S.C. § 329(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 322(a) (1983), contains the amendment verbatim.

"(a) This amendment makes a stylistic amendment to conform section 329(a) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 432(b) amending 11 U.S.C. § 329(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 322(b) (1983), contains the amendment verbatim.

"Subsection (b). This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 433 amending 11 U.S.C. § 330(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 323 (1983), contains the amendment verbatim.

> Sec. 323: This amendment strikes "to any parties in interest and to the United States trustee" in section 330(a) and also makes a stylistic change. All provisions relating to the United States Trustee were intended to be collected together in chapter 15 (listed separately). In that process this reference was overlooked, making the deletion necessary by stylistic change.

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 434(a) amending 11 U.S.C. § 330(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 324(a) (1983), contains the amendment verbatim.

> Sec. 324: (a) This amendment raises the amount from the filing fees in chapter 7 cases to the trustee serving in such cases from $20 to $45. The Administrative Office of the United States Courts is encouraged to develop a system of making the $45 payments that will result in the least expense and administrative work for the government. For example there could be no disadvantage to the government and the taxpayers

> if the $45 were paid from appropriate [sic] funds, provided the full filing fee had been received by clerk of court and deposited in the Treasury.

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 434(b) amending 11 U.S.C. § 330.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 324(b) (1983) contains the amendment verbatim, except the minimum amount to be paid to the trustee is proposed to be $10. BAFJA set a $5 minimum fee.

> Subsection (b). This amendment provides in chapter 13 cases for a specified minimum monthly compensation during the administration of the plan to the trustee serving in such cases. Minimal payment plans under chapter 13 have become a financial burden upon the trustees required to administer them. This amendment will assure that the trustee is paid at least $10 per month for his services if the percentage of the monthly payments to creditors that he would be entitled to receive would be less than $10.

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 435 amending 11 U.S.C. § 342(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 326 (1983), contains the amendment verbatim.

"This amendment creates a new section 342 mandating that adequate notice of any order for relief under the United States Bankruptcy laws be given, including such notice to any holder of a community claim.".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 436 amending 11 U.S.C. § 343.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 327 (1983), contains the amendment verbatim.

"This amendment makes cross-referencing and typographical corrections.".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 437 amending 11 U.S.C. § 345.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 329 (1983), contains the amendment verbatim.

"This amendment makes clear that depositories are authorized to give the security required for deposits of funds from the bankruptcy case as provided under section 345.".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 438 amending 11 U.S.C. § 346(c)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 330(a) (1983), contains the amendment verbatim.

"(a). This amendment corrects a typographical error in section 346(c)(2).".

S. Rep. No. 65, 98th Cong., 1st Sess. 75 (1983).

Sec. 439 amending 11 U.S.C. § 350(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 334 (1983), contains the amendment verbatim.

"Sec. 334: This amendment corrects a typographical error in section 350(b).".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 440 amending 11 U.S.C. § 361(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 335 (1983), contains the amendment verbatim.

> Sec: 335: This section makes an amendment in the first alternative means of providing adequate protection by adding the option of making a one-time cash payment as an alternative to periodic cash payments. It is intended to conform with the drafting style as exemplified in section 102(7), the singular includes the plural.

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 441(a) amending 11 U.S.C. § 362(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(a)(1)-(2) (1983), contains the amendment verbatim.

"(a). Paragraph (1) inserting 'action or' in the phrase 'other proceeding' as among those matters stayed by the automatic stay, makes only a technical change. Paragraph (2) makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 441(b) amending 11 U.S.C. § 362(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(b)(1), (3)-(6) (1983) contain the amendments verbatim. Note, however, that § 336(b)(6) also proposed an additional new paragraph regarding the filing of UCC continuation statements and federal tax liens which was not incorporated into BAFJA.

> Subsection (b). Paragraphs (1) and (2) make technical and stylistic changes. The automatic stay provided by section 362(a) applies to setoffs, enforcement of liens and actions to collect on claims against the debtor. Paragraph (3) makes stylistic changes. Paragraph (4) is intended to clarify that the exception from the automatic stay for injunctive actions by the government is to occur only in instances where there is a serious potential for harm to the public such as the debtor is polluting with toxic waste, and not the ordinary case where the government unit is simply enforcing its regulations by way of injunction. Paragraph (5) is a conforming amendment. Paragraph (6) adds two new paragraphs which add to the exception to the automatic stay for certain transactions involving the filing of a federal tax lien and Uniform Commercial Code continuation statement or of the presentment of a negotiable instrument.

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

COMMENT.

Note: BAFJA did not incorporate the paragraph proposed in paragraph (6) regarding the filing of UCC continuation statements and federal tax liens. Note, also, that BAFJA did not incorporate the stylistic change proposed by paragraph (2).

Sec. 441(c) amending 11 U.S.C. § 362(c)(2)(B).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(c) (1983), contains the amendment verbatim.

"Subsection (c). This amendment conforms section 263(d)(2) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

COMMENT.

The applicable section was referenced incorrectly as "263", rather than "362".

Sec. 441(d) amending 11 U.S.C. § 362(d)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(d)(1) (1983), contains the amendment verbatim.

"Paragraph (1) of this amendment is a cross-reference change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 441(e) amending 11 U.S.C. § 362(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(e) (1983), contains the amendment verbatim.

"Subsection (e). This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 441(f) amending 11 U.S.C. § 362(f).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 336(f) (1983), contains the amendment verbatim.

"Subsection (f). This amendment is a technical change, permitting the court to grant ex parte relief from the automatic stay, with or without a hearing.".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 442(a) amending 11 U.S.C. § 363(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(a) (1983), contains the amendment verbatim.

"This amendment makes clear that 'cash collateral' as used in section 363 includes the proceeds of the secured party's collateral whether converted to cash prior to or after the commencement of the bankruptcy case."

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 442(b) amending 11 U.S.C. § 363(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(b) (1983), contains the amendment verbatim.

"This amendment inserts a new paragraph in subsection 363(b) concerning required notification under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a). It is a technical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 76 (1983).

Sec. 442(c) amending 11 U.S.C. § 363(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(c) (1983), contains the amendment verbatim.

"This amendment allows the court with or without a hearing to protect any interest in property under the administration of the trustee and makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(d) amending 11 U.S.C. § 363(f)(3).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(d) (1983), contains the amendment verbatim.

"This amendment is a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(e) amending 11 U.S.C. § 363(h).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(e) (1983), contains the amendment verbatim.

"This amendment is a technical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(f) amending 11 U.S.C. § 363(j).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(f) (1983), contains the amendment verbatim.

"This amendment is a typographical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(g) amending 11 U.S.C. § 363(k).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(g) (1983), contains the amendment verbatim.

"This amendment is a technical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(h) amending 11 U.S.C. § 363(l).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 337(h) (1983), contains the amendment verbatim.

"This amendment corrects printing and stylistic errors in section 363(l).".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(i) amending 11 U.S.C. § 363(n).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 337(i) (1983), contains the amendment verbatim.

"This amendment corrects typographical errors and makes technical changes in section 363(n).".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 442(j) amending 11 U.S.C. § 363.

DERIVATION.

S.445, 98th Cong. 1st Sess. § 337(j) (1983), contains the amendment verbatim.

"As a stylistic change, this amendment creates a new subsection delineating the burden of proof of the trustee and of the entity asserting an interest in property in any hearing under section 363.".

S. Rep. No. 65, 98th Cong., 1st Sess. 77 (1983).

Sec. 443 amending 11 U.S.C. § 366(a).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 339 (1983), contains the amendment verbatim.

"This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 444 amending 11 U.S.C. § 501(d).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 340 (1983), contains the amendment verbatim.

"This amendment makes a cross-referencing correction.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(a) amending 11 U.S.C. § 502(a).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(a) (1983), contains the amendment verbatim.

"(a). This is a technical change making clear that the creditors of a partner may object to a claim against a partnership only if the partner is a general partner.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(1)-(2) amending 11 U.S.C. § 502(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 341(b)(1)-(2) (1983), contain the amendments verbatim.

> Subsection (b). Paragraph (1) makes clear the rules governing the allowance of a reimbursement contribution claim of a co-debtor that becomes fixed after the commencement of the case which supersede the normal allowability rules for unsecured claims. Paragraph (2) makes clear that debts are to be determined in United States currency as of the date of the petition.

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(3) amending 11 U.S.C. § 502(b)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 341(b)(3) (1983), contains the amendment verbatim.

> Paragraph (3) prevents the recovery of a debt in the bankruptcy case that would not be recoverable outside of the bankruptcy court, such as can occur in the home mortgage situation where there is a State antideficiency law. Another example is the policy loan common to insurance companies. Under case law, policy loans are not debts. They cannot be recovered by the insurer. If they are not repaid, they serve to reduce the amount of benefits payable by

> the insured under the policy. Similarly, interest on policy loans is not recoverable and serves only to reduce the benefits paid under the policy.

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(4) amending 11 U.S.C. § 502(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 341(b)(5) (1983), contains the amendment verbatim.

"Paragraph (5) corrects conflicts between section 502(b)(3) and section 553.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(5) amending 11 U.S.C. § 502(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 341(b)(6) (1983), contains the amendment verbatim.

"Paragraph (6) corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(6) amending 11 U.S.C. § 502(b).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(b)(7)(A)-(B) (1983), contains the amendment verbatim.

"[The amendments m]ake a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(b)(7) amending 11 U.S.C. § 502(b).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(b)(9) (1983), contains the amendment verbatim.

"Paragraph (9) makes stylistic changes and a change to conform to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(c) amending 11 U.S.C. § 502(c).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(c) (1983), contains the amendment verbatim.

"This is a stylistic amendment that conforms section 502(c)(2) to the definition of 'claims' found in section 101(4)(b).".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(d) amending 11 U.S.C. § 502(e)(1).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(e) (1983), contains the amendment verbatim.

"This is a stylistic and clarifying amendment in the treatment and allowance of claims of a codebtor.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(e) amending 11 U.S.C. § 502(h).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(f) (1983), contains the amendment verbatim.

"Subsection (f). This amendment makes a cross-referencing correction.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 445(f) amending 11 U.S.C. § 502(j).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 341(h) (1983), contains the amendment verbatim.

"Subsection (h). This amendment permits reconsideration of a claim even after a case is closed. The claim may be reconsidered not only if it has been previously allowed but also if it has been previously disallowed.".

S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983).

Sec. 446 amending 11 U.S.C. § 503(b).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 342(1), (3)(A), (4)-(8) (1983), contain the amendments verbatim.

According to S. Rep. No. 65, 98th Cong., 1st Sess. 78 (1983), these amendments make minor technical and stylistic changes.

Sec. 447 amending 11 U.S.C. § 505(a)(2)(B)(i).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 343(3) (1983), contains the amendment verbatim.

"Paragraph (3) is an amendment to conform section 505(a)(2) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 448(a) amending 11 U.S.C. § 506(b).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 344(b) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 448(b) amending 11 U.S.C. § 506(d).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 344(c) (1983), contains the amendment verbatim.

> Subsection (c). Paragraph (1) makes technical correcting changes. Paragraph (2) adds a new provision, the purpose of which is to make clear that the failure of the secured creditor to file a proof of claim is not a basis for avoiding the lien of the secured creditor.

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 449(a) amending 11 U.S.C. § 507(a).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 345(a)(1)-(4) (1983), contains the amendment verbatim.

"Paragraphs (1), (2), (3), and (4) make stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 449(b) amending 11 U.S.C. § 507(c).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 345(c) (1983), contains the amendment verbatim.

"This amendment is a stylistic and clarifying change"."

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 450 amending 11 U.S.C. § 509.

DERIVATION.

S.445, 98th Cong. 1st Sess. § 346 (1983), contains the amendment verbatim.

"Sec. 346: (a) This amendment makes stylistic changes. Subsection (b). This amendment makes stylistic changes. Subsection (c). This amendment makes a technical cross-reference change in section 509(c).".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 451 amending 11 U.S.C. § 510(b).

DERIVATION.

> Section 510(b) of title 11 of the United States Code is amended to read as follows:
> "(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor or for damages arising from the purchase or sale of such a security shall be subordinated to all claims or interests that are senior to the claim or interest represented by such security.".

S.445, 98th Cong. 1st Sess. § 347 (1983).

"This amendment corrects a typographical error and makes a clarifying amendment. It makes clear that the subordination of a rescission claim for stock cannot be below the common stock class.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 452 amending 11 U.S.C. § 521[(4)].

DERIVATION.

S.445, 98th Cong. 1st Sess. § 348(b) (1983), contains the amendment verbatim.

"This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

COMMENT.

This section purports to amend section 521(3), but section 521(4) appears to have been intended.

Sec. 453(a) amending 11 U.S.C. § 522(a)(2).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 349(a) (1983), contains the amendment verbatim.

"This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 453(b) amending 11 U.S.C. § 522(c).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 349(b) (1983), contains the same substantive amendment.

"Subsection (b). This amendment makes technical changes in the effect of the exemptions upon a tax lien.".

S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983).

Sec. 453(c) amending 11 U.S.C. § 522(e).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 349(e)(1) (1983), contains the amendment verbatim.

"This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 454(a)(1) amending 11 U.S.C. § 523(a)(1).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 350(a)(1) (1983), contains the amendment verbatim.

"Paragraph (1) makes a stylistic change in the false financial statement exception to discharge.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 454(a)(2) amending 11 U.S.C. § 523(a)(5).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 350(a)(3) (1983), contains the amendment verbatim.

COMMENT.

There is no reference to this amendment in S. Rep. No. 65, 98th Cong., 1st Sess. (1983).

Sec. 454(b) amending 11 U.S.C. § 523(c).

LEGISLATIVE HISTORY.

> Mr. President, without a doubt, children are this Nation's most precious natural resource. As such, we should be sure that the laws of our country carefully protect their interests [sic] Judge Dale Fahrnbruch, district judge, Lincoln, Nebr., has called to my attention a matter that deserves prompt action. He has encountered the difficulties that this amendment will correct.
>
> Sadly, due to the high rate of divorce and the increasing number of children born out of wedlock, more and more children are living with only one of their natural parents.

Many of these children are being deprived of the support owed to them by their noncustodial parent. The number of parents who ignore their child support obligations is a national disgrace. Already, over 2 million parents a year are delinquent on their child support payments. In dollars, the children of this Nation are being cheated out of over $4 billion a year. This, of course, places a great strain on our country's public assistance programs, and puts at risk the welfare of our children.

I offer this amendment to impove [sic] the laws affecting child support enforcement. Several very good bills have been introduced relating to child support; however, I am not aware of any bills before the Senate which address two serious problems in the current Bankruptcy Code which affect child support obligations.

In the past, Congress has shown great wisdom in making child support payments nondischargeable in bankruptcy. Indeed a parent's obligation to his or her children, is worthy of special and extraordinary treatment. What this amendment does is simply make an obligation now [sic] dischargeable if the court has determined and directed paternity to out-of-wedlock born children.

Unfortunately, there is a significant loophole in the current law. Under section 423 [sic] of the Bankruptcy Code, debts owed

> . . . to a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse of child. In [sic] connection with a separation agreement, divorce decree or property settlement agreement. . .

shall be nondischargeable in bankruptcy. This is good and proper.

Unfortunately, however, this section of the Bankruptcy Code makes no provision for child support payments when a child is born out of wedlock. Additionally, under section 17a of the Bankruptcy Act debts:

> . . . for alimony due or to become due, or for maintenance or support of wife or child or for seduction of an unmarried female or breach of promise of marriage accompanied by seduction, or for criminal conversation . . .

are not dischargeable. In its attempt to eliminate the antiquated language of the prior law, Congress made a grave oversight and excluded from the protection of nondischargeability those children born out of wedlock. Such unequal treatment is unjust and must be eliminated.

The amendment I am offering today is identical to S.2553, a bill which I introduced on April 11. It corrects this inequity by striking the limiting language, "In connection with a separation agreement, divorce decree, or property settlement." Under this revision, the security of support would depend on parentage rather than the marital status of the child's natural parents.

Such a revision is fair and necessary. Children should not be punished for the acts of their parents, and parents should not be able to escape the obligation to provide financial assistance to their offspring.

Mr. President, my amendment also addresses a related issue. Section 2 of this amendment would make nondischargeable any debt arising out of child support assigned to a Government agency. Under the current law, a custodial parent may be required to assign his or her rights to receive child support to qualify for public assistance. If the delinquent parent, married or otherwise. Should [sic] file for bankruptcy, the governmental agency is prevented from recovering the full amount of the assigned child support payments.

I believe that this provision should be changed because it encourages parents to ignore their child support obligations. If a parent knew that his or her child-support obligations were inescapable, then the parent would have an incentive to make timely and full payments, or to appeal to the appropriate legal authorities to alter or amend the child-support decree or agreement.

130 Cong. Rec. S6094 (daily ed. May 21, 1984) (statement of Sen. Exon).

Sec. 454(c) amending 11 U.S.C. § 523(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 350(b) (1983), contains the amendment verbatim.

"This amendment makes a cross-referencing change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 455 amending 11 U.S.C. § 524(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 351 (1983), contains the amendment verbatim.

"This amendment makes two stylistic changes to the injunction provision of section 524(a).".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 456(a) amending 11 U.S.C. § 541(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 353(a) (1983), contains the amendment verbatim.

> Sec. 353: (a). Paragraph (1) corrects a typographical error. Paragraph (2) makes a stylistic change. Paragraph (3) adds to the property of the estate any recovery of the trustee under section 363(n), which permits recovery against collusive bidders at a trustee sale. This is a technical amendment. Paragraph (4) makes a grammatical change. Paragraph (5) conforms section 541(a) to section 102(5).

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

COMMENT.

Paragraph numbers in Report on S.445 correlate to paragraphs set out in section 456(a) of BAFJA.

Sec. 456(b) amending 11 U.S.C. § 541(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 353(b) (1983), contains the amendment verbatim.

"Subsection (b). This amendment makes technical amendments to the antiforfeiture provision in section 541.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 456(c) amending 11 U.S.C. § 541(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 353(c) (1983), contains the amendment verbatim.

"Subsection (c). This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 456(d) amending 11 U.S.C. § 541(e).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 353(d) (1983), contains the amendment verbatim.

"Subsection (d). This amendment deletes section 541(e). Its provisions have been replaced by a new section 555 created by section 56(a) of this bill.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

COMMENT.

There is no section 56(a). The new section the Report refers to was created in section 367(a) of S.445 (see Sec. 470, BAFJA).

Sec. 457 amending 11 U.S.C. § 542(e).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 354 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 458(a) amending 11 U.S.C. § 543(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 355(a) (1983), contains the amendment verbatim.

"This amendment makes technical changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 458(b) amending 11 U.S.C. § 543(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 355(b) (1983), contains the amendment verbatim.

"This amendment makes technical changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 458(c) amending 11 U.S.C. § 543(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 355(c) (1983), contains the amendment verbatim.

"This amendment makes technical changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 458(d) amending 11 U.S.C. § 543(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 355(d) (1983), contains the amendment verbatim.

"Subsection (d). This section amends section 543(d) for the purpose of providing certainty to business transactions involving an assignee if within four months neither the debtor nor the creditor seeks to replace the assignment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 80 (1983).

Sec. 459 amending 11 U.S.C. § 544(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 356 (1983), contains the amendment verbatim.

"This amendment makes clarifying changes and makes clear that a trustee's rights and powers under the strong arm clause are in the alternative rather than in the conjunctive.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 460 amending 11 U.S.C. § 545.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 357 (1983), contains the amendment verbatim.

"This amendment corrects typographical errors and makes clarifying amendments.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(a) amending 11 U.S.C. § 546(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 358(a) (1983), contains the amendment verbatim.

"This amendment is an amendment to conform section 546(a) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(b) amending 11 U.S.C. § 546(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 358(b) (1983), contains the amendment verbatim.

"This amendment is a necessary clarifying change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(c)(1)-(2) amending 11 U.S.C. § 546(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. §§ 358(c)(1)-(2) (1983), contain the amendments verbatim.

"Paragraphs (1), (2), . . . make stylistic and typographical corrections.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(c)(3)-(4) amending 11 U.S.C. § 546(c).

DERIVATION.

> (3) by inserting "of goods" after "seller" the first place it appears;
> (4) by striking out "of goods" after "business," and inserting in lieu thereof "that has sold goods"; and

S.445, 98th Cong. 1st Sess. § 358(c)(3)-(4) (1983).

"Paragraphs . . . (3), and (4) make stylistic and typographical corrections.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(c)(5) amending 11 U.S.C. § 546(c).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 358(c)(5) (1983), contains the amendment verbatim.

"Paragraph (5) is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 461(d) amending 11 U.S.C. § 546(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 358(d) (1983), contains the amendment verbatim, except it refers to subsection (d) which was redesignated as (e) by BAFJA.

"Conforming amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 462(a) amending 11 U.S.C. § 547(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(a) (1983), contains the amendment verbatim.

"This amendment makes clarifying and stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 462(b)(1) amending 11 U.S.C. § 547(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(b) (1983), contains the amendment verbatim.

"This amendment makes a clarifying change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 462(b)(2) amending 11 U.S.C. § 547(4)(B).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 211(a)(1) (1983), contains the amendment verbatim.

COMMENT.

Senate Report No. 65, 98th Cong. comments on section 211(a), are not instructive of the BAFJA changes because of the additional amendments proposed in sections 211(a)(2) and 211(a)(3). These latter sections proposed that to recover a preference from any creditor (insider, or not) it must be shown that the creditor had reasonable cause to know of the debtor's insolvency at the time of the transfer. In contrast, section 462(b)(2) of BAFJA eliminates 11 U.S.C. § 547(b)(4)(B)(ii) which requires a showing that the insider had reasonable cause to believe the debtor was insolvent in order to recover a preference from the insider. The Senate Report focuses its comments on the inclusion of the "reasonable cause" requirement.

Sec. 462(c) amending 11 U.S.C. § 547(c).

LEGISLATIVE HISTORY.

> MR. DeCONCINI. "I know that the Senator from Kansas, along with the Senator from South Carolina, was the principal sponsor of this provision deleting subsection (c)(2) of section 547 of the code, and I would like to clarify two points regarding the effect of this change."
>
> "Am I correct that the elimination of the 45-day restriction in subsection (c)(2) of section 547 will relieve buyers of commercial paper with maturities in excess of 45 days of the concern that repayments of such paper at maturity might be considered as preferential transfers?"
>
> MR. DOLE. "That is correct, assuming that the 'ordinary course of business or financial affairs' and 'ordinary business terms' requirements are met."
>
> MR. DeCONCINI. "Would there be any doubt that companies that have a need for short-term funds, and investors who wish to purchase short-term obligations, would both be acting in their respective 'ordinary course of business or financial affairs' if they were to deal

> directly or indirectly with each other in the commercial paper market? And would not the payment of a commercial paper note at maturity be in accordance with 'ordinary business terms'?"
>
> MR. DOLE. "Those understandings are correct. The commercial paper market is an established market, and participants in it would presumably be acting in the ordinary course of their business or financial affairs and on the basis of ordinary business terms."

130 Cong. Rec. S8897 (daily ed. June 29, 1984) (statements of Sens. Dole and DeConcini).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 211(b) (1983), contains the amendment verbatim.

"Sec. 211(b): This section eliminates the 45 day limitation contained in section 547(c)(2). The limitation places undue burdens upon creditors who receive payment under business contracts providing for billing cycles greater than 45 days.".

S. Rep. No. 65, 98th Cong., 1st Sess. 60 (1983).

Sec. 462(d) amending 11 U.S.C. § 547(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(c)(1)-(5) (1983) contain the amendments verbatim.

"Paragraphs 1-6 of this amendment make stylistic and typographical corrections.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

COMMENT.

Paragraph 6 was not incorporated into BAFJA.

Sec. 462(e) amending 11 U.S.C. § 547(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(d) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 462(f) amending 11 U.S.C. § 547(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(e)(2) (1983), contains the amendment verbatim.

COMMENT.

This amendment makes a stylistic change.

Sec. 462(g) amending 11 U.S.C. § 547(g).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 359(f) (1983), contains the amendment verbatim.

"As a stylistic change, this amendment adds a new subsection to section 547 delineating the burden of proof of the trustee under section 547(b) and of the party in interest under section 547(c).".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 463(a)(1) amending 11 U.S.C. § 548(a).

COMMENT.

There is no prior legislative authority for this amendment.

Sec. 463(a)(2)-(3) amending 11 U.S.C. § 548(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 360(a)(1)-(2) (1983), contain the amendments verbatim.

"Paragraph (1) corrects a stylistic error in the fraudulent transfer section. Paragraph (2) corrects an inadvertent omission in the Federal codification of the Uniform Fraudulent Conveyance Act.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 463(b) amending 11 U.S.C. § 548(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 360(c) (1980), contains the amendment verbatim.

> Subsection (c). This amendment would make a necessary technical change, which conforms the time within which a security interest may be perfected so as to be insulated from the trustee's power to set it aside as a preferential transfer to that provided for in the Uniform Commercial Code.

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 463(c) amending 11 U.S.C. § 548(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 360(d) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 464(a) amending 11 U.S.C. § 549(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 361(a) (1983), contains the amendment verbatim.

"This amendment corrects a typographical error and makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 464(a)(3)-(5) [sic]* amending 11 U.S.C. § 549[(b)].

DERIVATION.

S.445, 98th Cong., 1st Sess. § 361(b)(2)-(4) (1983), contain the amendments verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

COMMENT.

*NOTE, BAFJA omitted subsection (b) in section 464, as well as any reference to it amending section 549(b) of title 11.

Sec. 464(c) amending 11 U.S.C. § 549(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 361(c) (1983), contains the amendment substantially verbatim. There is one word variance.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 464(d) amending 11 U.S.C. § 549(d)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 361(d) (1983), contains the amendment verbatim.

"This amendment is an amendment to conform section 549(d)(1) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 81 (1983).

Sec. 465(a) amending 11 U.S.C. § 550(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 362(a)(2) (1983), contains the amendment verbatim.

COMMENT.

This amendment makes clarifying cross-referencing corrections.

Sec. 465(b) amending 11 U.S.C. § 550(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 362(c) (1983), contains the amendment verbatim with one exception: S.445 uses the word "estate" in section 362(c)(3) and BAFJA employs the word "trustee".

"Paragraphs (1) and (2) make stylistic changes. Paragraphs (3) and (4) correct an error of duplication in the definition of 'improvement' in section 550(d).".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 465(c) amending 11 U.S.C. § 550(e)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 362(d) (1983), contains the amendment verbatim.

"This amendment makes an amendment to conform section 550(e)(1) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 466 amending 11 U.S.C. § 552(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 364 (1983), contains the amendment verbatim.

"This amendment makes clarifying changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 467 amending 11 U.S.C. § 553(b)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 365 (1983), contains the amendment verbatim.

"This amendment corrects a cross-referencing error in section 553(b)(1).".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 468(a) amending 11 U.S.C. §§ 554(a)-(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 366(a) (1983), contains the amendment verbatim.

"This amendment makes a technical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 468(b) amending 11 U.S.C. § 554(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 366(b) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 468(c) amending 11 U.S.C. § 554(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 366(c) (1983), contains the amendment verbatim.

"This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 469 amending 11 U.S.C. § 555.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 366A (1983), contains the amendment verbatim.

"Conforming amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 470 amending 11 U.S.C. § 558.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 367 (1983), contains the amendment verbatim.

"(a) This amendment creates a new separate section 555 for defenses of the estate, replacing section 541(e). Section 541(e) is deleted by this bill. Subsection (b). This amendment makes conforming amendments to the table of sections of the United States Code.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 471 amending table of sections for chapter 7 of title 11.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 368 (1983), contains the amendment verbatim.

"This amendment makes conforming amendments to the table of sections of the United States Code.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 472(a) amending 11 U.S.C. § 702(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 369(a) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 472(b) amending 11 U.S.C. § 702(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 369(b) (1983), contains the amendment verbatim.

"This amendment makes a typographical correction and a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 472(c) amending 11 U.S.C. § 702(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 369(c) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 473 amending 11 U.S.C. § 703(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 370 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 474 amending 11 U.S.C. § 704.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 371(a) (1983), contains the amendment verbatim.

According to S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983), this is a typographical amendment.

Sec. 475 amending 11 U.S.C. §§ 707(1)-(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 372 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes making the conditions for dismissal under chapter 7 disjunctive and not conjunctive.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 476(a) amending 11 U.S.C. § 723(a).

COMMENT.

There is no prior legislative authority for this change.

Sec. 476(b) amending 11 U.S.C. § 723(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 373(b)(1), (2) and (4), contain the amendment verbatim.

"This amendment makes necessary and technical clarifying changes and a typographical correction in section 723(c).".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 477(a) amending 11 U.S.C. § 724(b).

COMMENT.

The corollary provision in S.445 is section 374(a). BAFJA incorporated two of the four technical changes proposed in this section of S.445.

Sec. 477(b) amending 11 U.S.C. § 724(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 374(b) (1983), contains the amendment verbatim.

"This section makes a technical stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 477(c) amending 11 U.S.C. § 724(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 374(c) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 478 amending 11 U.S.C. § 725.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 375 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 82 (1983).

Sec. 479(a) amending 11 U.S.C. § 726(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 376(b) (1983), contains the amendment verbatim.

"This amendment makes clarifying stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 479(b) amending 11 U.S.C. § 726(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 376(c) (1983), contains the amendment verbatim.

"This amendment also makes the same change in another provision as was made in paragraph (1) of subsection (b).".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 480(a) amending 11 U.S.C. § 727(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 377(a) (1983), contains the amendment verbatim.

"This amendment corrects typographical errors and makes a clarifying stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 480(b) amending 11 U.S.C. § 727(c)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 377(b) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 480(c) amending 11 U.S.C. § 727(e)(2)(A).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 377(c) (1983), contains the amendment verbatim.

"This amendment is an amendment to conform section 727(e)(2)(A) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 481(a) amending 11 U.S.C. § 728(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 378(a) (1983), contains the amendment verbatim.

"This amendment makes a minor stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 481(b) amending 11 U.S.C. § 728(d)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 378(b) (1983), contains the amendment verbatim.

"This amendment makes a minor stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 482 amending 11 U.S.C. § 741.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 379 (1983), contains the amendment verbatim.

"Stylistic changes and conforming amendments.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 483 amending 11 U.S.C. § 745(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 380 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 484(a) amending 11 U.S.C. § 752(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 381(a) (1983), contains the amendment verbatim.

"This amendment corrects a typographical error and makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 484(b) amending 11 U.S.C. § 752(b)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 381(b) (1983), contains the amendment verbatim.

"This amendment corrects a cross-referencing error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 485 amending 11 U.S.C. § 761(10)(A)(viii).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 382 (1983), contains the amendment verbatim.

"Conforming amendments.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 486 amending 11 U.S.C. § 763(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 383 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 487 amending 11 U.S.C. § 764(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 384 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 488 amending 11 U.S.C. § 765(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 385 (1983), contains the amendment verbatim.

"This amendment makes cross-referencing and stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 489 amending 11 U.S.C. § 766(j)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 386(c) (1983), contains the amendment verbatim.

"This amendment makes a cross-referencing change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 490 amending 11 U.S.C. § 901(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 387(3) (1983), contains the amendment verbatim.

COMMENT.

This is a technical amendment.

Sec. 491 amending 11 U.S.C. § 902(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 388 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 492 amending 11 U.S.C. § 903(2) .

DERIVATION.

S.445, 98th Cong., 1st Sess. § 389 (1983), contains the amendment verbatim.

"This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 493 amending chapter 9, title 11.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 390 (1983), contains the amendment verbatim.

"This amendment corrects a typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 494 amending 11 U.S.C. § 921.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 391 (1983), contains the amendment verbatim.

"This amendment makes typographical corrections.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 495 amending 11 U.S.C. § 922(a)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 392(a) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 496 amending 11 U.S.C. § 927(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 393(b) (1983), contains the amendment verbatim.

"This amendment makes technical changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 497 amending 11 U.S.C. § 943(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 394 (1983), contains the amendment verbatim.

"This amendment conforms the confirmation standard for chapter 9 with respect to the payment of administrative expenses to the same rules as found in chapter 11.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 498 amending 11 U.S.C. § 945(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 395 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 499 amending 11 U.S.C. § 1102(b)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 396 (1983), contains the amendment verbatim.

"This amendment is a clarifying amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

Sec. 500(a) amending 11 U.S.C. § 1103(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 214(a) (1983), contains the amendment verbatim.

> Sec. 214: This section amends section 1103(b) of title 11 to permit persons to represent an individual creditor and also a creditor's committee in a bankruptcy proceeding if there is no adverse interest. The verbatim language of this amendment was included in the 1980 Bankruptcy Amendments bill as it passed the House of Representatives on December 1980.
>
> Under present law a person, who generally is either the attorney, accountant or secretary for the creditors' committee, may not while employed by such committee, also represent any other entity in connection with the case. The provision was the result of hearings on the proposed Bankruptcy Code held in 1976, in which it was claimed that to permit simultaneous representation by an attorney, for example, of both a single creditor and the creditors' committee created an unacceptable potential for conflict of interest. In theory, that potential for conflict may exist, but, in practice, implementation of the stringent standards of 1103(b) has meant significant hardship to creditors in retaining the best, most informed counsel. Experience under the Code, particularly in rural areas, has shown that the cure for the potential conflict has been at great cost and is in all likelihood worse than the disease. Present 1103(b) is an example of paternalism on the part of the Federal Government that is hardly needed in the context of chapter 11

bankruptcy proceedings between businessmen dealing at arm's length.

As a result of oversight hearings that dealt in part with this provision, the committee concludes that 1103(b) should be modified. As presently written, 1103(b)(1) assumes a conflict that usually does not exist (and which professional rules of ethics already ban); (2) excludes from administration of the bankruptcy estate those professionals who are most experienced and knowledgeable about the estate (i.e., those who are already representing individual creditors); (3) inhibits expeditious bankruptcy administration and increases the cost of administration; and (4) may inhibit out-of-court settlements which should be encouraged.

The Committee feels the amendment adequately meets the concerns of those who see a potential for conflict by precluding dual representation by those who have an adverse interest. The courts are fully capable of making this determination. The Committee also feels that mere representation by a person of one or more creditors of the same class as are represented by a creditors' committee also represented by that person shall not per se constitute the representation of an adverse interest. The court should not presume to know better than the affected creditors except in clear instances of potential impropriety.

S. Rep. No. 65, 98th Cong., 1st Sess. 61 (1983).

Sec. 500(b) amending 11 U.S.C. § 1103(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 397 (1983), contains the amendment verbatim.

"Paragraph (1) makes clear that the creditors' committee is not required to make recommendations with respect to the plan and may solicit rejections as well as acceptances. Paragraph (2) deletes redundant language in section 1103(c).".

S. Rep. No. 65, 98th Cong., 1st Sess. 83 (1983).

COMMENT.

The paragraph numbers referred to in the Senate Report correlate to the paragraph numbers in the BAFJA amendment.

Sec. 501 amending 11 U.S.C. § 1105.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 398 (1983), contains the amendment verbatim.

"This amendment makes a necessary grammatical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 502 amending 11 U.S.C. § 1106(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 399 (1983), contains the amendment verbatim.

"This amendment gives the court explicit power to regulate the duties of an examiner.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 503 amending 11 U.S.C. § 1107(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 400 (1983), contains the amendment verbatim.

"This amendment makes clarifying changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 504 amending 11 U.S.C. § 1108.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 401 (1983), contains the amendment verbatim.

"This amendment makes a clarifying change. The court may not ex parte order the trustee or debtor in possession to cease operating the debtor's business.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 505 amending 11 U.S.C. § 1112.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 403 (1983), contains the amendment verbatim.

"Sec. 403: (a) This amendment makes a technical clarifying change and corrects a typographical error. Subsection (b) this [sic] amendment to makes stylistic changes."

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 506(a) amending 11 U.S.C. § 1121(c)(3).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 404(a) (1983), contains the amendment verbatim.

"This amendment makes a grammatical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 506(b) amending 11 U.S.C. § 1121(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 404(b) (1983), contains the amendment verbatim.

"This amendment makes a technical stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 507(a) amending 11 U.S.C. § 1123(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 405(a) (1983), contains the amendment verbatim, except section 507(a)(2)(B) of BAFJA, a cross-referencing amendment, was not proposed in S.445.

"[This amendment makes] technical stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 507(b) amending 11 U.S.C. § 1123(b)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 405(b) (1983), contains the amendment verbatim.

"This amendment makes necessary stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 508 amending 11 U.S.C. § 1124.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 406 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 509(a) amending 11 U.S.C. § 1125(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 407(a) (1983), contains the the same substantive amendment.

"This amendment makes clarifying amendments.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 509(b) amending 11 U.S.C. § 1125(d).

DERIVATION.

S.445, 98th Cong. 1st Sess. § 407(b) (1983), contains the amendment verbatim.

"This amendment makes clarifying amendments.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 509(c) amending 11 U.S.C. § 1125(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 407(c) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 510(a) amending 11 U.S.C. § 1126(b)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 408(a) (1983), contains the amendment verbatim.

"This amendment corrects a cross-referencing error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 510(b) amending 11 U.S.C. § 1126(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 408(b) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 510(c) amending 11 U.S.C. § 1126(f).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 408(c) (1983), contains the amendment verbatim, except in subsection (c)(1) of S.445, the words "are deemed" are employed, rather than "conclusively presumed".

"This amendment makes typographical stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 510(d) amending 11 U.S.C. § 1126(g).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 408(d) (1983), contains the amendment verbatim.

"This amendment makes a necessary clarifying change in section 1126(g).".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 511 amending 11 U.S.C. § 1127.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 409 (1983), contains the amendment verbatim.

"Sec. 409: (a). This amendment makes stylistic changes. Subsection (b). This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 512(a)(1)-(6) amending 11 U.S.C. § 1129(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(a)(1)-(6) (1983), contain the amendments verbatim.

"Paragraphs (1) through (6) make clarifying and stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 512(a)(7)(A) amending 11 U.S.C. § 1129(a)(7).

COMMENT.

No prior legislative history was found for this amendment.

Sec. 512(a)(7)(B) amending 11 U.S.C. § 1129(a)(7).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(a)(7)(B) (1983), contains the amendment verbatim.

"Paragraph (7) makes a stylistic change. The Code is keyed to 'holders of claims' for style as opposed to 'creditors'.".

S. Rep. No. 65, 98th Cong., 1st Sess. 84 (1983).

Sec. 512(a)(8) amending 11 U.S.C. § 1129(a)(8).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(a)(8) (1983), contains the amendment verbatim.

COMMENT.

This is a stylistic amendment.

Sec. 512(a)(9) amending 11 U.S.C. § 1129(a)(10).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(a)(10) (1983), contains the amendment verbatim.

"Paragraph (10) makes clear the intent of section 1129(a)(10) that one 'real' class of creditors must vote for the plan of reorganization.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 512(b) amending 11 U.S.C. § 1129(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(b)(2)-(4) (1983), contain the amendments verbatim.

"Paragraphs (2) and (3) make necessary technical changes omitting certain priority claims from the cram-down for unsecured claims. Paragraph (4) makes a technical correction.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 512(c) amending 11 U.S.C. § 1129(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 410(c)(2)-(3) (1983), contain the amendments verbatim.

"Subsection (c). This amendment makes stylistic changes and places the burden of proof on the government on the issue of avoidance in any hearing under section 1129(d).".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 513(a) amending 11 U.S.C. § 1141(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 411(a)(2) (1983), contains the amendment verbatim.

COMMENT.

This is a stylistic amendment.

Sec. 513(b) amending 11 U.S.C. § 1141(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 411(b) (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 514 amending 11 U.S.C. § 1142.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 412 (1983), contains the amendment verbatim.

According to S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983), these amendments make stylistic, conforming and typographical changes.

Sec. 515 amending 11 U.S.C. § 1144.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 413 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 516(a)(1)-(2) amending 11 U.S.C. § 1145(a)(3)(B).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 414(a)(3)-(4) (1983), contain the amendments verbatim.

> Paragraphs (3) and (4) contained in sections 1145(a)(3)(B)(i) and (ii) are overly restrictive. Securities of issuers who are required to comply with the reporting provisions of the Securities Exchange Act by virtue of section 15(d) should be eligible for the exemption provided by section 1145. Those amendments effect that purpose.

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 516(a)(3) amending 11 U.S.C. § 1145(a)(4).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 414(a)(7) (1983), contains the amendment verbatim.

"Paragraph (7) corrects typographical error.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 516(b) amending 11 U.S.C. § 1145(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 414(b) (1983), contains the amendment verbatim.

"Subsection (b). This amendment corrects a typographical error and makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 516(c) amending 11 U.S.C. § 1145(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 414(c) (1983), contains the amendment verbatim.

> Subsection (c). This amendment makes clear that the exception applies to any note provided that the maturity is no longer than 1 year from the effective date of the plan. "Commercial" is

not a defined concept in the Code and it is deleted as superfluous.

S. Rep. No. 65, 98th Cong., 1st Sess. 85 (1983).

Sec. 517(a) amending 11 U.S.C. § 1146(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 415(a) (1983), contains the amendment verbatim.

"This amendment makes a technical change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 517(b) amending 11 U.S.C. § 1146(d).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 415(b) (1983), contains the amendment verbatim.

"This amendment conforms section 1146(d)(1) to section 102(5).".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 518 amending 11 U.S.C. § 1166.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 417 (1983), contains the amendment verbatim.

"This amendment makes a cross-referencing change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 519 amending 11 U.S.C. § 1168(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 418 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 520 amending 11 U.S.C. § 1169(c).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 419 (1983), contains the amendment verbatim.

"This amendment makes a cross-referencing change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Section 521 amending 11 U.S.C. § 1170.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 420 (1983), contains the amendment verbatim.

According to S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983), this amendment makes stylistic changes.

Sec. 522 amending 11 U.S.C. § 1171(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 421 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 523 amending 11 U.S.C. § 1173(a)(4).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 422 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 524 amending 11 U.S.C. § 1301(c)(3).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 423(b) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 525(a) amending 11 U.S.C. § 1302(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 424(a)(2) (1983), contains the amendment verbatim.

"This amendment adds a new paragraph (3) to section 1302(b) concerning trustee handling of monies under chapter XIII of the old Bankruptcy Act.".

S. Rep. No, 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 525(b) amending 11 U.S.C. § 1302(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 424(b) (1983), contains the amendment verbatim. Both BAFJA and S.445 purport to amend a nonexistent subparagraph (4); subparagraph (1) appears to have been intended.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 526 amending 11 U.S.C. § 1304(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 425 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 527 amending 11 U.S.C. § 1307.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 426 (1983), contains the amendment verbatim.

According to S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983), this amendment makes stylistic changes.

Sec. 528(a) amending 11 U.S.C. § 1322(a)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 427(a) (1983), contains the amendment verbatim.

"This amendment makes clear that secured tax claims are to be paid under the chapter 13 plan.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

COMMENT.

The amendment appears to be a purely grammatical correction.

Sec. 528(b) amending 11 U.S.C. § 1322(b).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 427(b)(1)-(2), (4)-(5) (1983), contain the amendments verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 529 amending 11 U.S.C. § 1324.

DERIVATION.

S.445, 98th Cong., 1st Sess. § 429 (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 530 amending 11 U.S.C. § 1325(a)(1).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 430(a) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 531 amending 11 U.S.C. § 1326(b)(2).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 431 (1983), contains the amendment verbatim.

"This amendment makes a necessary stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 532 amending 11 U.S.C. § 1328(e).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 432 (1983), contains the amendment verbatim.

"Paragraph (1) in the revocation of discharge section of chapter 13 makes clear that fraud as a ground for revocation of discharge must be fraud by the debtor and not by any other party. Paragraph (2) makes a stylistic conforming amendment.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 533 amending 11 U.S.C. § 1329(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 433 (1983), contains the amendment verbatim.

"This amendment makes stylistic changes.".

S. Rep. No. 65, 98th Cong., 1st Sess. 86 (1983).

Sec. 534 amending 11 U.S.C. § 151302(a).

DERIVATION.

S.445, 98th Cong., 1st Sess. § 444(a) (1983), contains the amendment verbatim.

"This amendment makes a stylistic change.".

S. Rep. No. 65, 98th Cong., 1st Sess. 87 (1983).

Subtitle J - Collective Bargaining Agreements

Sec. 541 amending 11 U.S.C. § 1113.

LEGISLATIVE HISTORY.

> Congressman Hughes and I offered key amendments during the conferees' discussion of collective bargaining agreements during Chapter 11 proceedings. The purpose of this joint statement is to outline our understanding of the language adopted by the conferees.
>
> Any proposal by a trustee or debtor-in-possession to modify a collective bargaining agreement in a Chapter 11 case is to "provide for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor." This language makes plain that the trustee must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished in [sic]

the reorganization is to succeed. The key phrase is "necessary" modifications.

This same provision also includes language that requires assurance that "all creditors, the debtor and other affected parties are treated fairly and equitably." This language is similar to language in an amendment offered by the Junior Senator from Oregon in the other body. This section would ensure that, where the trustee seeks to repudiate a collective bargaining agreement, the covered employees do not bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices.

The phrase "without good cause" in subsection (c)(2) of new section 1113 of title 11, like similar language in the amendment offered by the junior Senator from Oregon in the other body, is intended to ensure that a continuing process of good faith negotiation will take place before court involvement, and does so by embodying the standard set out by Vern Countryman in (The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors, 57 American Bankruptcy Law Journal 299, 300, 319).

As in civil litigation generally, it is the appli- cant - the trustee - who must carry the burden of proving the elements of his case to secure from the court an order permitting the rejection of the agreement.

The trustee is permitted to "terminate or alter any provisions of the collective bargaining agreement" if the court does not rule on the rejection application within 30 days after the commencement of the hearing. The courts are expected as a matter of course to meet the time limits set by Congress. In the unlikely event that a particular court should not do so, expeditious mandamus relief would be available in the appellate courts.

The trustee has an affirmative obligation to provide all the relevant financial and other information necessary to adequately evaluate the proposal and if that obligation is not met or if the trustee otherwise delays the proceeding, the application should be denied.

If an application for rejection is denied by the court after a hearing on the merits, the covered employees are entitled to their wages and benefits lost by employer unilateral action as an administrative expense.

The House conferees accepted subsection (E) permitting the court to authorize interim changes in the collective bargaining agreement on the understanding; that, as the final sentence of the subsection makes clear, a motion for such interim relief may only be made in conjunction with an application for rejection and any authorization shall be effective only for the period for considering the ruling on the application stated in subsection (d). In deference to the overall policy of the provision which is to encourage the parties to reach their own agreement through collective bargaining, the court in framing any such relief may not go beyond the proposal made by the trustee pursuant to subsection (b)(1)(A). The statutory language of subsection (e) stating the standard for qualifying for interim relief is, in essence, the REA Express standard. After a full hearing and the court's consideration of the entire matter in depth on the merits if the application for rejection is denied and the collective bargaining agreement is continued in force, the employees are entitled to their wages and benefits lost under an interim order as an administrative expense.

Since an application to reject a collective bargaining agreement implicates national labor policy, as well as bankruptcy policy, if the union or trustee so move, such an application is to be heard by a U.S. district judge.

It was also our understanding that a chapter 11 reorganization case that is brought for the sole purpose of repudiating or modifying a collective bargaining agreement is a case brought in "bad faith."

Congressmen W. Hughes and B. Morrison, Statement on H.R.5174, 130 Cong. Rec. S8899 (daily ed. June 29, 1984).

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*/ Note: BAFJA purports to amend (3) but presumably meant (4)

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**/ BAFJA Sec. 464(a)(3)-(5) intended to amend Sec. 549(b) although such a reference was omitted.

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Office of the Attorney General
Washington, D. C. 20530

February 15, 1982

MEMORANDUM TO: Heads of All Offices, Bureaus, Boards, Divisions and All United States Attorneys

FROM: William French Smith
Attorney General

SUBJECT: Notification of Misconduct by Employees of the Department of Justice

The Department's Office of Professional Responsibility, which reports directly to me, or in appropriate cases, to the Deputy Attorney General, the Associate Attorney General, or the Solicitor General, is responsible for overseeing investigations of allegations of criminal or ethical misconduct by all employees of the Department of Justice. As head of that Office, the Counsel's function is to ensure that Departmental employees continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency. For this Office to perform its function properly, it must be promptly notified whenever allegations of serious misconduct against any employee of the Department are received.

It has come to my attention that such prompt notification has not been made in all instances and that confusion may exist as to the responsibilities of the heads of all Offices, Boards, Bureaus, Divisions and the United States Attorneys in this regard. All allegations against Departmental employees, legal and nonlegal, including violations of law, Departmental regulations, or Departmental standards of conduct, must immediately be brought to the attention of the Office of Professional Responsibility. That Office will then either monitor the conduct of the investigation into those allegations, or, in appropriate situations, will participate in or direct those investigations. Internal inspections units of the

Department should continue to submit monthly reports to the Counsel detailing the status and results of their current investigations. You are also reminded that Department employees have the option of reporting allegations of misconduct directly to the Office of Professional Responsibility, as opposed to their own internal inspection unit (or where there is no specific unit, any individual discharging comparable duties).

Please arrange for the distribution of a copy of this memorandum to each employee under your supervision. In addition, you should, at least semi-annually, remind your employees of the purpose and function of the Office of Professional Responsibility and of the reporting obligations set forth above.

fice of the
sistant Attorney General

Washington, D.C. 20530

OCT 4 1983

MEMORANDUM TO ALL DEPARTMENT OF JUSTICE
OFFICES, BOARDS, BUREAUS AND DIVISONS

I am enclosing herewith a copy of a compilation prepared by this Office of statutes and regulations applicable to professional standards and ethics of Justice Department employees. It is not a substitute for individual research and analysis but should serve as a helpful checklist in dealing with these issues. Feel free to distribute copies to your employees.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Enclosure

Office of the
Assistant Attorney General

Washington, D.C. 20530

SEP 23 1983

Ethics Standards for Department of Justice Employees

The following outline is intended as a summary reference to ethics and professional standards that apply to Department of Justice employees in a variety of situations. The outline is not exhaustive, and should not be used by employees as an exclusive guide in making decisions about their professional conduct or as a substitute for reading the relevant statutes and regulations. Employees who need additional information or assistance in interpreting the standards listed below should contact the Deputy Designated Agency Ethics Official (Deputy DAEO) for their Office, Board, Division or Bureau. */

I. PRINCIPAL SOURCES OF GOVERNING LAW

A. Federal Statutes

1. Bribery and Conflict of Interest - 18 U.S.C. §§ 201-209.

2. Disclosure of Information - 5 U.S.C. §§ 552, 552a; 18 U.S.C. §§ 798, 1905; 5 U.S.C § 783.

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*/ If you are having difficulty determining the identity of your Deputy DAEO, you should contact the Administrative Counsel's Office of the Justice Management Division (JMD), 633-3452, which handles the legal work for this Department's Designated Agency Ethics Official, the Assistant Attorney General for Administration.

Some of the restrictions set forth in this memorandum do not apply to certain short-term or part-time employees who are designated "special government employees." Special government employees should contact their Deputy DAEOs to determine whether any particular rule described in this memorandum or a more relaxed standard will apply to them in any given case.

3. Political Activities - 5 U.S.C. § 7324, 18 U.S.C. §§ 601-603.

4. Financial Disclosure - 5 U.S.C. App. §§ 201-211.

B. Federal Regulations and Executive Orders

1. Department of Justice Standards of Conduct - 28 C.F.R. Part 45.

2. Disclosure of Information - 28 C.F.R. Part 16.

3. Political Activities - 5 C.F.R. Part 733.

4. Financial Disclosure - 5 C.F.R. Part 734 and 28 C.F.R. § 45.735-22.

5. Post-Employment Restrictions - 5 C.F.R. Part 737.

6. Executive Order 11222 - Prescribing Standards of Ethical Conduct for Government Officers and Employees, 30 Fed. Reg. 6469 (1965).

C. Department of Justice Policy Statements

1. The most comprehensive collection of Departmental policy statements can be found in the United States Attorneys' Manual.

2. Various other policy statements are published at 28 C.F.R. Part 50.

3. DOJ Orders on specific subjects can be obtained through the Library.

D. Codes of Professional Responsibility

1. The American Bar Association Model Code has been incorporated by reference into the Department's Standards of Conduct. See 28 C.F.R. § 45.735-1.

2. State Codes are frequently incorporated by reference into the rules of procedure of federal courts.

3. Employees should consult with the Department, pursuant to Section IV, infra, whenever a provision of a Code of Professional Responsibility appears to conflict with their responsibilities as federal employees.

II. AREAS SUBJECT TO REGULATION

A. Acceptance of Things of Value from Outside Sources

1. 18 U.S.C. § 201 - Prohibits the acceptance of anything of value a) with the intent to influence an official act or b) for or because of an official act.

2. 18 U.S.C. § 203 - Prohibits the acceptance or sharing of fees derived from a matter involving the federal government when the fee is based on any person's representation before a Department or agency during the period of the employee's government service.

3. 18 U.S.C. § 209 - Prohibits the acceptance of any salary or supplementation of salary for services rendered to the government. The section permits the acceptance of some types of payments from a former employer (such as bona fide severance and retirement payments), but other payments (such as moving expenses) are prohibited. The section has been read to prohibit the acceptance of anything of value offered because of one's government position, such as below-market-rate loans, moving expenses, and free vacations.

4. Gifts

a) 28 C.F.R. § 45.735-14 - Employees may not solicit or accept gifts or other things of value, for themselves or others, from persons or entities that have business with the Department of Justice. The regulation contains exceptions governing 1) gifts from

friends and family, 2) certain food and refreshments, 3) loans from banks, and 4) unsolicited advertising or promotional material.

b) 5 U.S.C. § 7342 - Contains rules governing the acceptance of gifts from foreign governments. See also 28 C.F.R. § 45.735-14(d).

c) 5 U.S.C. § 7351 and 5 C.F.R. § 735.202(d) - Prohibit the acceptance of gifts from subordinates except on certain specified occasions.

5. 5 U.S.C. App. § 210 - Places an annual limit on outside earned income for Presidential appointees of 15% of their federal salaries.

6. 28 C.F.R. § 45.735-12(a) - Prohibits the acceptance of an honorarium for any speech or appearance that is part of an employee's official duties.

7. 2 U.S.C. § 441i - Prohibits the acceptance of honoraria (for non-official speeches or appearances) beyond $25,000 per year and/or $2,000 per event.

8. 28 C.F.R. § 45.735-14a(d) - Permits the acceptance of awards from certain types of organizations, but employees should consult with their Deputy DAEOs before accepting awards that have any relationship to their government employment.

B. Representational Activities

1. 18 U.S.C. § 205 - Prohibits employees from representing any other person or business before any court or agency of the federal government in any matter in which the Federal or District of Columbia government is a party or has an interest. There are exceptions for certain personnel administration, family, and personal matters.

2. 28 C.F.R. § 45.735-9 - Prohibits the private practice of law and other outside professional practice by employees. Teaching is not considered outside professional practice, see Section IIE(2), infra. There are exceptions for certain pro bono activities, and the representation of certain close relatives. Other exceptions may be granted by the Deputy Attorney General.

C. Financial Interests

1. 5 U.S.C. App. §§ 201-211 - Requires the filing of public financial disclosure reports by employees paid at the level of a GS-16 or above.

2. 18 U.S.C. § 208 - Prohibits employees from taking any action in a governmental matter that involves or affects a financial interest of themselves, their spouses, minor children, partners, private employers, persons or organizations with whom they are negotiating or have any arrangement concerning prospective employment, or entities in which they serve in a fiduciary capacity. The prohibition applies no matter how small the interest may be, but in cases of insubstantial interests, waivers of the prohibition may be granted by the Deputy Attorney General. See 28 C.F.R. § 45.735-5.

3. 28 C.F.R. § 45.735-11 - Prohibits investments that conflict with an employee's official responsibilities or that are made on the basis of inside information. See also 28 C.F.R. § 45.735-10.

D. Use of Government Property

1. 28 C.F.R. § 45.735-16 - Permits the use of federal property for officially approved purposes only. This regulation is read to prohibit the use of almost any federal property or personnel for personal purposes (e.g. the use of

FTS telephones or the services of support staff). See also 18 U.S.C. § 641 (theft of government property). There are also more specific statutes governing the personal use of government vehicles, 31 U.S.C. § 1344, and the franking privilege, 18 U.S.C. § 1719.

2. DOJ Order No. 2710.8 - Deals with the removal of "official records" by Department employees. While the definition of "official records" is broad, it does not include copies of records. Accordingly, copies of records (e.g. in a personal chronological file) may be removed by an employee so long as they do not contain classified information, other statutorily protected information or other information that could reveal or prejudice the interests of the United States in litigation. See also ABA Code, Canon 4.

E. Fundraising, Speeches, Publications and Teaching

1. 28 C.F.R. § 45.735-12(d) - Generally prohibits participation in fundraising activities if the employee's position in the Department is a significant element of the event or the invitation. Fundraising for charitable organizations (i.e. organizations exempt from taxation pursuant to 26 U.S.C. § 501(c)(3)) is permitted. Political fundraising is discussed in IIG, infra.

2. Generally the Department encourages employees to engage in speeches, lectures, publications and teaching so long as the activity (1) does not interfere with an employee's official responsibilities and (2) meets the criteria set forth in 28 C.F.R. § 45.735-12. These criteria can be summarized as follows:

a) No fees may be accepted if the activitiy is part of the employee's official duties.

b) No compensation may be accepted if the subject matter is devoted substantially to the activities or positions of this Department. But see IIF, infra (governing the acceptance of travel reimbursement).

c) Non-public information may not be used without the permission of the Deputy Attorney General.

When an honorarium is not precluded by a) or b) above, it may be accepted within the confines of IIA(5-7), supra.

3. Persons with access to Sensitive Compartmented Information (SCI) are required to sign a specific agreement accepting additional obligations relating to publications, speeches or lectures.

5. 18 U.S.C. § 798 and 50 U.S.C. § 783 - Contain rules governing the disclosure of classified information.

6. 18 U.S.C. § 1905 - Contains restrictions on the use of certain confidential information such as trade secrets.

7. 5 U.S.C. § 552a - Sets forth restrictions on the use of information about individuals when such information is contained in a system of records. See also 28 C.F.R. § 16.40 et seq.

8. 28 C.F.R. § 50.2 - Sets forth the Department's policy concerning statements to the press on matters in litigation. See also ABA Code of Professional Responsibility, DR 7-107 (Trial Publicity).

9. 28 C.F.R. §§ 16.21-22 - Sets forth rules governing the response to subpoenas and other demands for Department of Justice information.

F. Travel - 28 U.S.C. § 45.735-14a

1. Official travel must be paid for by the Government (which in most cases will mean by the Justice Department). There is an exception to this rule that permits charitable organizations (i.e. those that are tax exempt under 26 U.S.C. § 501(c)(3)) to pay for travel to training sessions or meetings. See 5 U.S.C. § 4111 and 5 C.F.R. § 410.702. Bar associations are seldom tax exempt pursuant to § 501(c)(3), and accordingly may not reimburse employee expenses for official travel. Official travel in private conveyances must be reimbursed by the Department pursuant to the Department's travel regulations. DOJ Order No. 2200.1.

2. Non-official travel may be reimbursed by outside sources so long as it does not otherwise create a conflict of interest. See IIA, supra.

3. Whether travel is official or non-official is essentially a question of judgment, which in close cases should be exercised in conjunction with your immediate supervisor or Deputy DAEO.

4. On certain limited occasions, the Department's travel regulation permits employees to accept travel reimbursement from certain types of organizations for the expenses of an accompanying spouse. § 45.735-14a(e). This regulation is presently under review and reconsideration by the Department and the Office of Government Ethics. For this reason, employees should consult with their Deputy DAEOs before accepting spousal expenses pursuant to this regulation.

G. Political Activities

1. Hatch Act, 5 U.S.C. § 7324(d) - Prohibits taking an active part in partisan political management or campaigns.

Prohibited conduct includes stuffing envelopes, working at a phone bank, canvassing or holding a position in a partisan political organization. See generally 5 C.F.R. § 733.121 for a list of prohibited conduct. Permissible activities include voting, making contributions (but see limitations below), being a member of a political organization and attending events. See generally 5 C.F.R. § 733.111. In many of the local jurisdictions in the D.C. area, employees may actively participate in partisan elections, so long as they do so as, or on behalf of, an independent candidate. See 5 C.F.R. § 733.124. There are other exemptions to the Hatch Act for certain types of employees (e.g. most Presidential appointees), but the Attorney General has directed that all DOJ employees should conduct themselves as if they fall within the purview of the Hatch Act. See Memorandum from the Attorney General to all Offices, Boards, Divisions and Bureaus, July 9, 1982.

2. 18 U.S.C §§ 600 and 601 - Make it illegal to promise to give, to deny or to threaten to deny federal employment or other federal benefits on the basis of a person's political contributions or lack thereof.

3. 18 U.S.C. § 602 - Prohibits one federal employee from soliciting a political contribution from another employee.

4. 18 U.S.C. § 603 - Prohibits employees from making political contributions to their employer or employing authority.

H. Leaving Government Service

1. 18 U.S.C. § 208 - Prohibits taking official action on any matter that involves the financial interests of any

party with whom the employee is negotiating, or has an arrangement concerning, prospective employment.

2. 18 U.S.C. § 207

a) Subsection (a) prohibits all employees from ever acting as agent or attorney for anyone (other than the U.S.) in any particular matters in which they participated personally and substantially while in government.

b) Subsection (b) prohibits all employees for a period of two years from acting as agent or attorney for anyone (other than the U.S.) in any particular matters that were under their official responsibilities during their last year of government service.

c) Subsection (c) prohibits certain senior level employees from having any business contact with the Justice Department or certain of its component offices, boards, divisions or bureaus for a period of one year after they leave government service. Generally employees below the level of Deputy Assistant Attorney General are not covered by this restriction, but all emloyees are encouraged to consult with their Deputy DAEOs for post-employment advice at the time that they decide to leave government service. At that time they can be advised concerning whether, and to what extent, Section 207(c) will restrict their contacts with the Department.

3. ABA and State Codes of Professional Responsibility

a) DR 5-104(D) - Imputes to an entire law firm any disqualification of a single lawyer that is required by the Code. This imputed disqualification can be lifted in the case of former government employees upon adequate screening of the disqualified lawyer and waiver by the government.

b) DR 9-101(B) - Prohibits virtually the same conduct as 18 U.S.C. § 207(a). See IIH(2)(a), supra.

c) Canon 4 - Requires lawyers to keep the confidences and secrets of their clients (including the United States Government).

4. See IID, supra, concerning the removal of government papers and files.

I. Miscellaneous Provisions

1. Nepotism, 5 U.S.C. § 3110 - Prohibits employees from appointing or recommending certain relatives to positions in the employee's own department or agency.

2. Lobbying, 18 U.S.C. § 1913 - Places restrictions on the use of appropriated funds (including personnel paid with such funds) to "lobby" Congress. The prohibition is generally read to prohibit only grass roots lobbying such as urging citizens or private groups to contact their Representatives or Senators about a particular issue.

3. Merit System Abuses, 5 U.S.C. §§ 2301-2302 - Prohibit certain personnel practices including, but not limited to, discrimination in employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation.

4. Foreign Agents, 18 U.S.C. § 219 - As a general matter, employees may not act as agents of foreign principals within the meaning of the Foreign Agents Registration Act of 1938, as amended.

III. REPORTING MISCONDUCT

A. Crimes, 28 U.S.C. § 535 - Federal employees are required to report to the Attorney General potential violations of the federal criminal laws by other federal employees. Within this Department, referrals of potential criminal matters involving federal employees should be made to the Criminal Division, Public Integrity Section. It is particularly important that referrals of matters concerning officials covered by the Special Prosecutor Act, 28 U.S.C. § 591 et seq., be made promptly because of the investigative time limits imposed by that Act.

B. Misconduct by Department of Justice Employees - Allegations of misconduct by Department employees may be sent to the Office of Professional Responsibility. See generally 28 C.F.R. § 0.39a. Allegations of criminal misconduct may also be referred to the Public Integrity Section of the Criminal Division.

IV. SOURCES OF ADVICE

1. The most direct and available source of advice for Department employees on matters of ethics or professional conduct is their Deputy DAEOs.

2. The Administrative Counsel, Justice Management Division is available to consult on ethics matters with any Deputy DAEO or with Department officials for whom no Deputy DAEO is available.

3. The Office of Legal Counsel also is available to consult on legal questions that cannot be resolved elsewhere in the Department.

4. The Office of Government Ethics is available to give ethics advice to this Department, but employees should first consult with their Deputy DAEOs, the Administrative Counsel or the Office of Legal Counsel before contacting the Office of Government Ethics.

3. Hatch Act Advice may be obtained from a Deputy DAEO or from the Special Counsel to the Merit Systems Protection Board. 653-7143.

5. Advice about prohibited personnel practices may be obtained from the Special Counsel to the Merit Systems Protection Board. 653-8968.

6. Department of Justice lawyers should not submit professional ethics questions to their local bar counsel without first consulting with the Office of Legal Counsel.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

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MEMORANDUM
issued 5/01/84 and amended 08/24/84

SUBJECT: Summary of Acceptance and Disclosure of Travel Expenses and Related Gifts

FROM: David H. Martin
Director

TO: Designated Agency Ethics Officials, General Counsels, and Inspectors General

Because this Office has consistently received a number of questions regarding the acceptance and disclosure by executive branch employees of travel reimbursements and related gifts from private sources and because the annual filing deadline for public financial disclosure reports is again drawing near, we believe it is important to provide you with the following outline of the considerations involved in answering any questions regarding this subject. The materials and the statements set forth in this outline are not new; this is simply a compilation of the various statutes, regulations and other considerations involved in this subject area. We urge you to distribute copies of this memorandum to your field offices and deputy ethics counselors for their use. Our regional training sessions have indicated a strong need and desire for this and other similar information. With regard to this specific guidance, because the first and most important determination is whether the traveling employee is on official duty or not, this guidance is separated under those headings.

If the traveling employee is on official business -

1. When an executive branch employee is offered payment for travel expenses from a private source for expenses incurred in carrying out his or her official duties, the travel reimbursement expense payments can only be accepted, if at all, by the agency employing the individual on the individual's behalf. The employee may not personally accept the travel expenses without potentially violating 18 U.S.C. 209. (Note: This statement refers to the situation where there is no statutory authority for either the individual or the agency to accept the travel expenses or where there is authority but the agency has determined it would not or the employee should not accept the travel expenses. It is not intended to include the situation where the employee is allowed either by 5 U.S.C. 4111 or other statutory authority to personally accept the travel expenses and that acceptance has been approved by the agency.)

2. The agency may accept the travel expenses only if it has statutory gift acceptance authority to do so or if the gift qualifies under 5 U.S.C. 4111 discussed in paragraph 3 below. Otherwise the agency will be improperly augmenting its appropriations and running afoul of the Comptroller General's Decision B-128527 dated March 7, 1967 (46 Comp. Gen. 689). Authority to accept gifts, if it exists, will generally be found in your agency's organic statute. The authority may limit the acceptance to gifts for specific purposes and your agency must have a process to determine which offers of gifts can be accepted under that authority. An agency's authority to accept gifts, including travel expenses, cannot be granted by regulation; the grant must be made by statute. (Note: Most agencies do not have this statutory authority.)

3. If the donor is a non-profit, tax exempt institution described by 26 U.S.C. 501(c)(3), the Employees Training Act, codified at 5 U.S.C. 4111, authorizes an employee to accept the payment of travel expenses from that donor if the agency follows the regulations set forth in 5 C.F.R. 410.701 et. seq. These regulations require prior written authorization for acceptance of such travel expenses and that acceptance of the expenses does not create an actual or apparent conflict. The important considerations involved here are two: First, the organization must be categorized by the I.R.S. under section 501(c((3). There are many tax-exempt non-profit organizations which do not fall under subsection (c)(3). The I.R.S. reading room can confirm the status of the organization if you provide the exact name of the organization and the state of incorporation. Second, simply because the organization is categorized under section 501(c)(3) does not mean that the offered travel expenses are always acceptable. If the organization seeks grants from your agency or does business with your agency, especially if its staff deals directly with the employee involved, such offered reimbursements should, in most cases, not be accepted. Again, refer to the implementing regulations.

Example: A grants official at an agency is asked to speak at a University in his official capacity and the University offers to pay his travel expenses. The University is a 501(c)(3) corporation but it has one grant and is seeking others from the agency. The employee should not be allowed to accept the travel expenses because of the appearance of a conflict of interest.

4. If your agency does not have gift acceptance authority and the donor is not a 501(c)(3) corporation, neither the agency nor the employee may accept payment for travel expenses of the employee on official business. Further, the agency may not put the employee in non-duty status to carry out what is essentially official business simply to allow the employee to accept the travel expenses.

**5. An employee who is on official business should never accept direct reimbursement of expenses (cash) if the payment of travel expenses is allowed pursuant to the method set forth in paragraph 2 above. Direct reimbursements must be made to the agency which has either advanced the money to the employee or will in turn reimburse the employee. Once given approval in advance, an employee may accept only in-kind gifts such as the travel tickets, meals and hotel room key. Further, the agency may wish to allow the employee only those expenses which would otherwise be covered by government travel regulations as if the agency were paying, and in no case should it allow the employee to accept excessive and lavish in-kind services. See Comptroller General's Opinion B-128527 and 5 C.F.R. 735.202(f).

An employee may accept direct cash reimbursements under the terms of 5 U.S.C. 4111 from a 501(c)(3) corporation. If the employee's agency does not have statutory gift acceptance authority allowing it to accept and retain voluntary contributions, the agency is bound by the provisions of 31 U.S.C. 484 to deposit in miscellaneous receipts any reimbursements made to the agency rather than the employee. See 55 Comp. Gen. 1293. Therefore, if the donor is a 501(c)(3) corporation but your agency does not have gift acceptance authority, direct cash reimbursements for travel approved pursuant to 5 C.F.R. 410.701 et. seq. should go to the employee and the employee should reimburse the agency for any travel advance given by the agency. As a policy, however, when a direct case reimbursement or payment to the employee is necessary, care should be taken that the payment or reimbursement is related to actual expenses and is not simply a flat per diem payment.

If the traveling employee is not on official business —

6. The employee may not accept any travel expenses or any gift from any organization which

   1) has, or is seeking to obtain, contractual or other business or financial relations with his or her agency;

   2) conducts operations or activities that are regulated by his or her agency; or,

   3) has interests that may be substantially affected by the performance or non performance of his or her official duty.

   These standards are set forth in 5 C.F.R. 735.202(a). Agencies may have regulations which are more strict and they may also have certain exceptions based on those in 5 C.F.R. 735.202(b). It is very rare that any of the exceptions will allow payment for travel expenses from an organization which is covered by section 735.202(a). Further, if the organization itself is not a prohibited source as outlined above, but all or a substantial majority of its members are, you should consider a travel reimbursement offer from the organization as if it were from one of the prohibited sources outlined in section 735.202(a).

   > Example: If a trade association comprised predominantly of members which are individually regulated by an agency offers an employee of your agency travel expenses so that he might, in his personal capacity, attend their annual convention, the employee may not accept the travel expenses. These travel expenses would be a gift from a prohibited source.

7. Finally, if the source of the payment of travel expenses or other gift is not otherwise prohibited and the employee attends the conference or meeting on annual or personal leave time, the employee may not use his or her official title as a title. These activities are prohibited by section 735.201a(a).** (The employee should also request that the host not misuse his or her title in an effort to make it appear the the employee is appearing officially or in order to draw business to a commercial endeavor.)

   > Example: The General Counsel of a Commission is asked to teach a course for a publisher of law texts. The agency determines that doing so is not within the mandate of the agency but approves her participating under its outside employment approval process. The General Counsel may not be "billed" by the publisher in its promotional materials listing the faculty of the course or at the course itself as Jane Doe, General Counsel, Government Commission X. If the materials provide a brief description of Ms. Doe's qualifications, it can state, along with such things as her education and other positions, the fact that she presently serves as the General Counsel of the Commission. The improper use of her position is the use of her government title as a title. She is not participating in her official capacity and it should not appear that she is, nor should the publisher be allowed to use the title to solicit business.

Public Disclosure (SF 278)

An employee required to file a public financial disclosure report (SF 278) should disclose travel expenses meeting the $250 threshold in the manner set forth below. Note that the law treats in-kind services such as travel tickets, hotel rooms and meals as one disclosure requirment and cash reimbursements for any of those same items as a separate disclosure requirement.

If the employee is on official business —

1. When the agency has gift acceptance authority and has made the appropriate determination to accept travel expenses for an employee's travel prior to the expenses being incurred, then the employee need not disclose these expenses as the agency has accepted them, not the employee. If for any reason prior approval was not received, these expenses must be disclosed because at the time they were accepted, it was the employee not the agency making the acceptance. For the employee's sake the agency may note subsequent approval on the form if it occurred.

2. When the employee accepts the travel expenses from a 26 U.S.C. 501(c)(3) corporation pursuant to 5 U.S.C. 4111, these expenses must be disclosed. Section 4111 specifically allows the employee to accept, albeit with agency approval, and because it is a personal acceptance it is governed by the public financial disclosure requirements. Again, the agency may wish to note on the form the date the agency gave acceptance approval.

3. If an employee accepts travel expenses without the benefit of agency gift acceptance authority or coverage of 5 U.S.C. 4111, the expenses must of course be disclosed.

If the employee is not on official business —

4. All travel expenses meeting the threshold values must be disclosed unless they are paid by a relative or are required to be reported under 2 U.S.C. 434.**

Gifts from a foreign government —

5. Because the reporting threshold for gifts from a foreign government covered by the Foreign Gifts Act is lower than the $250 threshold for reporting under the Ethics in Government Act, all such travel expenses should be disclosed under the procedures established pursuant to 5 U.S.C. 7342 and are therefore exempt from disclosure on the SF 278. (See Section 209(8)(B) of the Ethics in Government Act.) Note, however, that a gift other than reimbursement of travel expenses need only exceed the more than $100 threshold of the Ethics in Government Act disclosure requirements. Therefore, any gift, other than travel expenses from a foreign government valued at more than $100 but within the "minimal value" that triggers the acceptance and disclosure requirements of the Foreign Gifts Act, would have to appear on the SF 278. (In March, 1984, the GSA adjusted the "minimal value" to $165 or less.)

   Example: An employee is asked by a foreign government to participate in a symposium hosted by the government. The employee's travel expenses outside the United States are paid for

by the foreign government and as a participant she is also given a small piece of sculpture. The travel expenses have a value of $500 and the sculpture $125. The Foreign Gifts Act "minimal value" at the time was $140 or less. Because the travel expenses are more than the "minimal value" for Foreign Gifts Act purposes and are therefore subject to disclosure under 5 U.S.C. 7342, she need not disclose them on her SF 278. However, because the sculpture is within the "minimal value" for Foreign Gifts Act purposes but more than the over $100 reporting requirement of the Ethics in Government Act for gifts other than travel expenses, she must disclose the receipt of the sculpture on her SF 278.

Suggested Procedures

If your agency does not have procedures covering the acceptance of travel expenses, this Office considers the following to be essential elements which will protect not only the agency but the employee as well:

1. All offers of payment of official travel expenses must be approved in writing prior to acceptance.

2. If possible, all offers should be approved by the same office within an agency so as to provide consistency of interpretation of applicable statutes and regulations. Larger agencies which cannot centralize such approval should have a controlled delegation system.

3. All agency personnel should be made aware that such offers must be approved by the appropriate office. This is especially important for persons responsible for issuing travel orders.

4. Travel orders should note specifically what expenses are being accepted by the traveling employee and under what authority. For instance, the travel orders might note that an airline ticket and hotel room are being provided to the employee by the host and accepted pursuant to the agency's gift acceptance authority, whatever the appropriate statutory citation would be.

5. The traveling official should never be placed in a position of approving the acceptance of his or her own travel expenses.

6. If possible, a record of all travel expenses accepted should be kept by the agency in a central file.

If you have any questions concerning the acceptance of travel expenses, please feel free to contact this Office.

**Changes or additions to the citation or statement were made pursuant to a supplementary memorandum issued by this Office on August 24, 1984.

viewed and each custodian of record contacted that all information provided, including the source's identity, may be disclosed to the individual being investigated upon that individual's request. This notification must be made at some time during the interview. The agent may promise confidentiality if requested by the source, and in his discretion notify the source that he may have confidentiality where the agent feels that such notification is necessary to secure information pertinent to his investigation or inquiry. If such a request is made, the confidentiality will apply only to the source's identity, and any information furnished by the source that would reveal the identity of the source. A promise of confidentiality will require the investigative agency and all other agencies that receive information obtained under the promise to take all reasonable precautions to protect the confidentiality of the source's identity. Pledges of confidentiality may not be assumed, and the interviewing agent may not ask a source to request confidentiality. Each agency shall prepare implementing instructions for its investigators or agents consistent with these regulations.

§ 736.104 Written inquiry.

In requesting information by a written inquiry concerning the character, loyalty and qualifications of an individual to determine suitability, eligibility or qualifications for Federal employment, Federal contracts or access to classified information or restricted areas, the form, instructions or correspondence used by an agency will include:

(a) A notification that information provided, including the respondent's identity, will be disclosed to the individual on his or her request; and

(b) Except for law enforcement or educational custodians of records,

(1) Space for the respondent to request a pledge that his or her identity will not be disclosed to the subject of the inquiry, or

(2) An offer to make special arrangements to obtain significant information which the respondent feels he or she cannot provide without a pledge of confidentiality as to identity.

PART 737—REGULATIONS CONCERNING POST EMPLOYMENT CONFLICT OF INTEREST

Subpart A—General Provisions

Sec.

Subpart B—Substantive Provisions

AUTHORITY: Pub. L. 95-521, 92 Stat. 1862-1863 (5 U.S.C. Appendix), 92 Stat. 1864-1867 (18 U.S.C. 207), unless otherwise noted.

SOURCE: 45 FR 7406, Feb. 1, 1980; 45 FR 9253, Feb. 12, 1980, unless otherwise noted.

EDITORIAL NOTE: The following index of paragraphs is provided for the convenience of the reader:

Subpart A—General Provisions

Sec.

Subpart B—Substantive Provisions

Sec.

Subpart A—General Provisions

§ 737.1 Purpose and policy.

(a) *Authority.* Title IV of the Ethics in Government Act of 1978 ("the Act") established the Office of Government Ethics within the Office of Personnel Management ("OPM"). Section 402(a) of the Act provides in part that the Director, Office of Government Ethics ("the Director") shall provide, under the general supervision of OPM, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency as defined in section 105 of title 5, United States Code, and shall propose, in consultation with the Attorney General, rules and regulations to be promulgated by the President or by OPM. The purpose of this part is to issue regulations recommended by the Director which give content to the restrictions on post employment activity established by title V of the Act (18 U.S.C. 207) for administrative enforcement with respect to former officers and employees of the executive branch; generally to guide agencies in exercising the administrative enforcement authority reflected in section 18 U.S.C. 207(j); to set forth the procedures to be employed in making certain determinations and designations pursuant to the Act; and to provide guidance to individuals who must conform to the law. Criminal enforcement of the provisions of 18 U.S.C. 207 remains the exclusive responsibility of the Attorney General.

(b) *Consultation with the Attorney General.* In proposing these regulations, the Director consulted with the Attorney General as to the content of regulations governing substantive prohibitions as well as other matters. The Attorney General has advised that such regulations are consistent with his opinion as to the interpretation of the Act.

(c) *Policy and limitations.* These regulations bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations.

(1) When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such "switching of sides" undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.

(2) Similarly, when a former high-level employee assists in representing another by personal presence at an appearance before the Government regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others. Different consider-

ations are involved, however, with respect to assistance given as part of customary supervisory participation in a project funded by a Government contract or grant, since a former employee's knowledge may benefit the project and thus the Government, and regular communications with associates may properly be regarded as inherent in managerial responsibility. Such assistance, when not rendered by personal presence during an appearance, is not covered by the statute.

(3) When a former Senior Employee returns to argue a particular matter to the employee's former agency in the period immediately following the termination of official employment, it appears that Government-based relationships are being used for private ends.

(4) Former officers and employees may fairly be required to avoid such activities in the circumstances specified by statute and in these regulations.

(5) The provisions of 18 U.S.C. 207 do not, however, bar any former Government employee, regardless of rank, from employment with any private or public employer after Government service. Nor do they effectively bar employment even on a particular matter in which the former Government employee had major official involvement except in certain circumstances involving persons engaged in professional advocacy. Former Government employees may be fully active in high-level supervisory positions whether or not the work is funded by the United States and includes matters in which the employee was involved while employed by the Government. The statutory provisions are not intended to discourage the movement of skilled professionals in Government, to and from positions in industry, research institutions, law and accounting firms, universities and other major sources of expertise. Such a flow of skills can promote efficiency and communication between the Government and private activities, and it is essential to the success of many Government programs. Instead, only certain acts which are detrimental to public confidence in the Government are prohibited.

(6) Departments and agen primary responsibility for the trative enforcement of the ployment restrictions founc Act. The Department of Ju initiate criminal enforcemen involving aggravated circu agency heads are required substantiated allegations of of 18 U.S.C. 207 to the Depa Justice and the Director, OG sential that Title V of the A forced so as to advance its o which include improvement i ment efficiency, equal treat equal claims, greater public c in the integrity of their gov elimination of the use of pu for private gain, and securir tegrity of the government making processes. Departm agencies should avoid enforc tions that do not advance th tives but instead frustrate th ment's ability to employ t persons who are needed to programs of the Federal Go succeed. Special attention s given to the need to preserv flow of expertise, especially i ic, technological and other areas, from private activiti government.

(7) The examples contain regulations are intended to ance, but are illustrative, no hensive. Each agency may p ditional illustration and gu its own regulations, consist that contained herein, in or dress specific problems ari context of a particular agen ations.

(8) Agencies have the resp to provide assistance pro former Government emplo seek advice on specific probl Office of Government Ethic vide advice, promptly, upon r designated agency ethics o such situations, but will fir nate with the Department on unresolved or difficult iss

(9) These regulations do plant restrictions that may tained in laws other than 18 and do not incorporate re contained in the code of con

profession of which an employee may be a member.

§ 737.3 Definitions.

(a) *Statutory definitions.* The following are defined terms which largely repeat portions of the text of the statute. They are set out here to permit a simplified presentation of statutory requirements in the regulations which follow. Other definitions, which supplement the statutory language, are listed in paragraph (b) of this section and are set forth in detail in the substantive regulations.

(1) *"United States" or "Government"* means any department, agency, court, court-martial, or any civil, military or naval commission of the United States, the District of Columbia, or any officer or employee thereof.

(2) *"Agency"* includes an Executive Department, a Government corporation and an independent establishment of the executive branch, which includes an independent commission. (See 18 U.S.C. 6.)

(3) *"Government Employee"* includes any officer or employee of the Executive Branch (as defined in 18 U.S.C. 202 and, e.g., 5 U.S.C. 2104 and 2105); those appointed or detailed under 5 U.S.C. 3374, and a Special Government Employee, but shall not include an individual performing services for the United States as an independent contractor under a personal service contract.

(4) *"Former Government Employee"* means one who was, and is no longer, a Government employee.

(5) *"Special Government Employee"* means an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of three hundred and sixty five consecutive days, temporary duties either on a full time or intermittent basis (18 U.S.C. 202).

(6) *"Senior Employee"* means an officer or employee named in, or designated by the Director pursuant to, section 207(d) of title 18 U.S.C. to whom 207(b)(ii) and (c) shall apply (See § 737.25 of this part.)

(7) *"Particular Government matter involving a specific party"* means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest.

(b) *Interpretative definitions.* Other terms defined and interpreted in the substantive regulations are:

(1) *"Acting as Agent or Attorney"*: (See § 737.5(b).)

(2) *"Actually Pending"*: (See § 737.7(c).)

(3) *"Communicating with Intent to Influence"*: (See § 737.5(b).)

(4) *"Direct and Substantial Interest"*: (See § 737.11(f).)

(5) *"Participate Personally and Substantially"*: (See § 737.5(d).)

(6) *"Particular Matter Involving a Specific Party or Parties"*: (See § 737.5(c).)

(7) *"Particular Matter"* (without parties): (See § 737.11(d).)

(8) *"Official Responsibility"*: (See § 737.7(b).)

(9) *"Rate of Pay"*: (See § 737.25(b)(4).)

Subpart B—Substantive Provisions

§ 737.5 Restrictions on any former Government employee's acting as representative as to a particular matter in which the employee personally and substantially participated.

(a) *Basic prohibition of 18 U.S.C. 207(a).* No former Government employee, after terminating Government employment, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government employee.

(b) *Representation: Acting as agent or attorney, or other representative in*

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an appearance, or communicating with intent to influence— (1) *Attorneys and agents.* The target of this provision is the former employee who participates in a particular matter while employed by the Government and later "switches sides" by representing another person on the same matter.

[NOTE: The examples in these regulations do not incorporate the special statutory restrictions on Senior Employees, except where the terms "Senior Employee" or "Senior" are expressly used.]

Example 1: A lawyer in the Department of Justice personally works on an antitrust case involving Q Company. After leaving the Department, he is asked by Q Company to represent it in that case. He may not do so.

(2) *Others.* The statutory prohibition covers any other former employee, including managerial and technical personnel, who represents another person in an appearance or, by other communication, attempts to influence the Government concerning a particular matter in which he or she was involved. For example, a former technical employee may not act as a manufacturer's promotional or contract representative to the Government on a particular matter in which he or she participated. Nor could such employee appear as an expert witness against the Government in connection with such a matter. (See § 737.19 for specific rules relating to expert witnesses.)

(3) *Appearances; communications made with intent to influence.* An appearance occurs when an individual is physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application. A communication is broader than an appearance and includes for example, correspondence, or telephone calls.

Example 1: An appearance occurs when a former employee meets with an agency employee personally to discuss a matter, or when he submits a brief in an agency administrative proceeding in his own name.

Example 2: A former employee makes a telephone call to a present employee to discuss a particular matter that is not the subject of a formal proceeding. She has made a communication.

(4) *Government visits to others premises.* Neither a prohibited appearance nor communication occurs when a former Government employee communicates with a Government employee who, at the instance of the United States, visits or is assigned to premises leased to, or owned or occupied by, a person other than the United States which are or may be used for performance under an actual or proposed contract or grant, when such communication concerns work performed or to be performed and occurs in the ordinary course of evaluation, administration, or performance of the actual or proposed contract or grant.

(5) *Elements of "influence" and potential controversy required.* Communications which do not include an "intent to influence" are not prohibited. Moreover, acting as agent or attorney in connection with a routine request not involving a potential controversy is not prohibited. For example, the following are not prohibited: a question by an attorney as to the status of a particular matter; a request for publicly available documents; or a communication by a former employee, not in connection with an adversary proceeding, imparting purely factual information. (See also § 737.11(d) of this part.)

Example 1: A Government employee, who participated in writing the specifications of a contract awarded to Q Company for the design of certain education testing programs, joins Q Company and does work under the contract. She is asked to accompany a company vice-president to a meeting to state the results of a series of trial tests, and does so. No violation occurs when she provides the information to her former agency. During the meeting a dispute arises as to some terms of the contract, and she is called upon to support Q Company's position. She may not do so. If she had reason to believe that the contractual dispute would be a subject of the meeting, she should not have attended.

(6) *Assistance.* A former employee is not prohibited from providing in-house assistance in connection with the representation of another person.

Example 1: A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment,

she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice-president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort in increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

(7) *Project responses not included.* In a context not involving a potential controversy involving the United States no finding of a "intent to influence" shall be based upon whatever influential effect inheres in an attempt to formulate a meritorious proposal or program.

Example 1: The employee of Q Company in the previous example is asked to design an educational testing program, which she does and transmits it to the Government. This is not prohibited despite the fact that her well-designed program may be inherently influential on a question of additional funding under the contract. She may not argue for its acceptance.

(c) *"Particular matter involving a specific party or parties"*—(1) *Specific matters vs. policy matters.* The prohibitions of subsections (a) and (b) of 18 U.S.C. 207, are based on the former Government employee's prior participation in or responsibility for a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an insolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

Example 1: A Government employee formulated the policy objectives of an energy conservation program. He is not restricted from later representing a university which seeks a grant or contract for work emerging from such a program.

Example 2: A Government employee reviews and approves a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that project.

Example 3: An employee is regularly involved in the formulation of policy, procedures and regulations governing departmental procurement and acquisition functions. Participation in such activities does not restrict the employee after leaving the Government as to particular cases involving the application of such policies, procedures, or regulations.

Example 4: An employee of the Office of Management and Budget participates substantially on the merits of a decision to reduce the funding level of a program, which has the effect of reducing the amount of money which certain cities receive to conduct youth work programs. After leaving the Government she may represent any of the cities in securing funds for its youth program, since her participation was in connection with a program, not a particular matter involving specific parties.

Example 5: An agency attorney participates in drafting a standard form contract and certain "standard terms and clauses" for use in future contracts. He is not thereafter barred from representing a person in a dispute involving the application of such a "standard term or clause" in a particular contract in which he did not participate as a Government employee.

(2) *Technical matters.* In connection with technical work, participation in projects generally involving one or more scientific or engineering concepts, in feasibility studies, or in proposed programs prior to the formulation of a contract will not restrict former Government employees with respect to a contract or specific programs entered into at a later date.

Example 1: A Government employee participates significantly in formulating the "mission need" of a project pursuant to OMB Circular No. A-109, and the award of a contract to Z Company, the purpose of which is to propose alternative technical approaches. He is not barred, after leaving Government service, from representing Q Company which later seeks a contract to manufacture one of the systems suggested by the Z Company.

Example 2: A Government employee, who has worked for years on the design of a new satellite communications system, joins C

Company. Later, the Government issues a "request for proposals" ("rfp") to construct the new system, which is circulated generally to industry. The employee proposes to act as C Company's representative in connection with its anticipated proposals for the contract. He may do so. The satellite contract became a particular matter when the rfp was being formulated; it would ordinarily not become one involving a specific party or parties until initial proposals or indications of interest therein by contractors were first received. Moreover, if the employee's work for C Company were limited to the formulation and communication of a proposal in response to the rfp, it would not be prohibited to the extent it involved a communication for the purpose of furnishing scientific or technological information to the Government, exempt under 18 U.S.C. 207(f). See § 737.15 below. (See paragraph (3) below as to a case where the employee's own participation may cause a different result.)

(3) *Relationship of personal participation to specificity.* In certain cases, whether a matter should be treated as a "particular matter involving specific parties" may depend on the employee's own participation in events which give particularity and specificity to the matter in question. For example, if a Government employee (i) personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons was identified to perform services thereunder and (ii) actively urged that such a contract be awarded, but the contract was actually awarded only after the employee left, the contract may nevertheless be a particular matter involving a specific party as to such former Government employee.

Example 1: A Government employee advises her agency that it needs certain work done and meets with private firm X to discuss and develop requirements and operating procedures. Thereafter, the employee meets with agency officials and persuades them of the need for a project along the lines discussed with X. She leaves the Government and the project is awarded by other employees to firm X. The employee is asked by X to represent it on the contract. She may not do so.

(4) *The same particular matter must be involved.* The requirement of a "particular matter involving a specific party" applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

Example 1: A Government employee was substantially involved in the award of a long-term contract to Z Company for the development of alternative energy sources. Six years after he terminates Government employment, the contract is still in effect, but much of the technology has changed as have many of the personnel. The Government proposes to award a "follow on" contract, involving the same objective, after competitive bidding. The employee may represent Q Company in its proposals for the follow-on contract, since Q Company's proposed contract is a different matter from the contract with Z Company. He may also represent Z Company in its efforts to continue as contractor. If the agency determines on the basis of facts referred to above, that the new contract is significantly different in its particulars from the old. The former employee should first consult his agency and request a written determination before undertaking any representation in the matter.

Example 2: A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved. *Other examples:* See § 737.5(b)(1), Example 1, and (c), Example 2.

(5) *United States must be a party or have an interest.* The particular matter must be one in which the United States is a party, such as in a judicial or administrative proceeding or a contract, or in which it has a direct and substantial interest. The importance of the Federal interest in a matter can play a role in determining whether two matters are the same particular matter.

Example 1: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

Example 2: A member of a Government team providing technical assistance to a foreign country leaves and seeks to represent a private contractor in making arrangements with the Government to perform the same service. The proposed new contract may or may not be considered a separate matter, depending upon whether the United States has a national interest in maintaining the original contract. The agency involved must be consulted by the former employee before the representation can be undertaken.

(d) *"Participate personally and substantially"*—(1) *Basic requirements.* The restrictions of section 207(a) apply only to those matters in which a former Government employee had "personal and substantial participation," exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party." (See paragraph (c) of this section.) (See also § 737.9(f) of this part.)

Example 1: If an officer personally approves the departmental budget, he does not participate substantially in the approval of all items contained in the budget. His participation is substantial only in those cases where a budget item is actually put in issue. Even then, the former Government employee is not disqualified with respect to an item if it is a general program rather than a particular matter involving a specific party. The former Government employee may, however, have official responsibility for such matters. (See § 737.7(b).)

Example 2: A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter.

(2) *Participation on ancillary matters.* An employee's participation on subjects not directly involving the substantive merits of a matter may not be "substantial," even if it is time-consuming. An employee whose responsibility is the review of a matter solely for compliance with administrative control or budgetary considerations and who reviews a particular matter for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (See § 737.7(b)(3) of this part.) Such an employee could theoretically cause a halt in a program for noncompliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

(3) *Role of official responsibility in determining substantial participation.* "Official responsibility" is defined in § 737.7(b)(1). "Personal and substantial participation" is different from "official responsibility." One's responsibility may, however, play a role in determining the "substantiality" of an employee's participation. For example, ordinarily an employee's forbearance on a matter is not substantial participation. If, however, an employee is charged with responsibility for review of a matter and action cannot be undertaken over his or her objection, the result may be different. If the employee reviews a matter and passes it on,

his or her participation may be regarded as "substantial" even if he or she claims merely to have engaged in inaction.

(e) *Agency responsibility in complex cases.* In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations.

§ 737.7 Two-year restriction on any former Government employee's acting as representative as to a particular matter for which the employee had official responsibility.

(a) *Basic prohibition of 18 U.S.C. 207(b)(i).* No former Government employee, within two years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within period of one year prior to the termination of such responsibility.

(b) *"Official responsibility"—(1) Definition.* "Official responsibility" is defined in 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions."

(2) *Determining official responsibility.* Ordinarily, the scope of an employee's "official responsibility" is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. All particular matters under consideration in an agency are under the "official responsibility" of the agency hea and each is under that of any interm diate supervisor having responsibili for an employee who actually partic pates in the matter within the sco of his or her duties.

(3) *Ancillary matters and official r sponsibility.* "Administrative" autho ty as used in the foregoing definitic means authority for planning, organi ing and controlling matters rath than authority to review or make dec sions on ancillary aspects of a matt such as the regularity of budgetir procedures, public or community rel tions aspects, or equal employment o portunity considerations. Responsibi ty for such an ancillary considerati does not constitute responsibility f the particular matter, except whe such a consideration is also the subje of the employee's proposed represe tation.

Example 1: An agency's comptroller wou not have official responsibility for all pr grams in the agency, even though she mu review the budget, and all such prograr are contained in the budget.

Example 2: Within two years after term nating employment, an agency's form comptroller is asked to represent Q Comp ny in a dispute arising under a contra which was in effect during the comptroller tenure. The dispute concerns an accountir formula, under the contract, a matter as which a subordinate division of the com troller's office was consulted. She may n represent Q Company on this matter.

(4) *Knowledge of matter pending r quired.* In order for a former employe to be barred from representing a other as to a particular matter, he c she need not have known, while en ployed by the Government, that th matter was pending under his or he official responsibility. However, th former employee is not subject to th restriction unless at the time of th proposed representation of anothe he or she knows or learns that th matter had been under his or her r sponsibility. Ordinarily, a former em ployee who is asked to represent a other on a matter will become awar of facts sufficient to suggest the rel tionship of the prior matter to his c her former agency. If so, he or she under a duty to make further inquir including direct contact with an age

cy's designated ethics official where the matter is in doubt.

(5) *Self-disqualification.* A former employee cannot avoid the restrictions of this section on the ground by self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, self-disqualification is effective to eliminate the restriction of section 207(a).

(c) *"Actually pending."* "Actually pending" means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

Example 1: A staff lawyer in a department's Office of General Counsel is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies is referred to the Office of the General Counsel. The General Counsel has official responsibility for the determination of the Q Company matter. The other matters were never "actually pending" under that responsibility, although as a theoretical matter, such responsibility extended to all legal matters within the department.

(d) *Other essential requirements.* All other requirements of the statute must be met before the restriction on representation applies. The same considerations apply in determining the existence of a "particular matter involving a specific party," a representation in an "appearance," or "intent to influence," and so forth as set forth under § 737.5 of this part.

Example 2: During her tenure as head of an agency, an officer's subordinates undertook major changes in agency enforcement standards involving occupational safety. Eighteen months after terminating Government employment, she is asked to represent Z Company which believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the agency head terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving "a specific party." (Moreover, the time-period covered by 18 U.S.C. 207(c) has elapsed.)

(e) *Measurement of two-year restriction period.* The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination of such responsibility.

Example 1: The Director, Import/Export Division of A Agency retires after 26 years of service and enters private industry as a consultant. He will be restricted for two years with respect to all matters which were actually pending under his official responsibility in the year before his retirement.

Example 2: An employee transfers from a position in A Agency to a position in B Agency, and she leaves B Agency for private employment 9 months later. In 15 months she will be free of restriction insofar as matters which were pending under her responsibility in A Agency in the year before her transfer. She will be restricted for two years in respect of B Agency matters which were pending in the year before her departure for private employment.

§ 737.9 Two-year restriction on a former senior employee's assisting in representing as to a matter in which the employee participated personally and substantially.

(a) *Basic prohibition of 18 U.S.C. 207(b)(ii).* No former Senior Employee (see § 737.3(6)), within two years after terminating employment by the United States, shall knowingly represent or aid, counsel, advise, consult, or assist in representing any other person by personal presence at any formal or informal appearance, (1) before the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter he or she participated personally and substantially.

(b) *Limitation to "representational" assistance by "personal presence" at an appearance.* Section 207(b)(ii) is limited to assistance "in representing" another person by "personal presence" at an "appearance" before the United States. Different in scope from sections 207(a) and 207(b)(i), it does not apply to assistance in connection with an oral or written communication made with an intent to influence

which does not involve an appearance. Nor does it bar assistance in preparation for either a formal or informal personal appearance or an appearance by written submission in a formal proceeding where the former employee is not personally present before the Government or a Government employee. The provision is designed to prevent the former Senior Employee from playing any auxiliary role during a negotiation proceeding or similar transaction with the Government so that he or she does not appear to be lending personal influence to the resolution of a matter and cannot do so in fact.

Example 1: A former Senior Employee makes suggestions as to the content of a letter to be sent to the Government on a matter in which he had participated. No violation occurs.

(c) *Managerial and other off-scene assistance.* The statute does not prohibit a former Senior Employee's advice and assistance to his or her organization's representatives which does not involve his or her personal presence at an appearance before the Government. The former Senior Employee's preparation of documents to be presented in any formal or informal proceeding does not constitute personal presence at an appearance, even where submission of such a document might technically constitute an appearance.

Example 1: A former Senior Employee attends a hearing on a matter in which she had participated personally and substantially while in the Government. She speaks with the representative of a private party during the hearing. A violation occurs if the former Senior Employee lends assistance to the representative in that conversation.

Example 2: A Senior Justice Department lawyer personally works on an antitrust case against Z Company. After leaving the Department, she is asked to discuss legal strategy with lawyers representing Z Company on that same antitrust case, to write portions of a brief and to direct the research of the staff working on the case. Any such aid would not be prohibited by the statute, but would likely be prohibited by professional disciplinary rules.

(d) *Representational assistance.* The statute seeks to prevent a former Senior Employee from making unfair use of his or her prior governmental position by prohibiting all forms of assistance in the representation of another when personally present at an appearance, including giving advice as to how the representation in an appearance should be conducted, supplying information, participating in drafting materials, or dealing with forensic or argumentative matters (such as testimony, methods of persuasion, or strategy of presentation).

(e) *Measurement of restriction period.* The statutory two-year period is measured from the date of termination of employment in the Senior Employee position held by the former employee when he or she participated personally and substantially in the matter involved. (cf. § 737.7(e))

(f) *Other Essential Requirements.* All conditions of the statutory prohibition must be met. Specifically, the former employee, (1) must have been a "Senior Employee," (2) who "participated personally and substantially" (See § 737.5(d) of this part) in (3) a "particular matter involving a specific party." (See subpart § 737.5(c) of this part.)

(g) *General Examples:*

Example 1: A Senior Federal Trade Commission Employee, an economist by profession, participates in an investigation involving X Company, and a proceeding is commenced against X Company based on the investigation. After leaving the Commission, he offers to serve as a consultant to the lawyers for X Company on certain economic matters involved in the proceeding. He attends the proceeding and at the close of each day, meets in the lawyers' office to advise them. Such conduct violates the statute.

Example 2: A Senior Employee of the Department of the Treasury participates in a number of projects with universities and financial research institutions funded by Government grants. After leaving the Government, she becomes dean of a graduate school of business which performs work under a number of such grants. She may, in the discharge of her duties, supervise research and advise as to how funds under such a contract should be allocated, whether or not these matters are, as is likely, communicated to her former Department by the graduate school's representatives. (See § 737.11.)

Example 3: A Senior Defense Department official participated personally and substantially in a contract award to P Company for fighter planes. After leaving the Depart-

ment, the former official goes to work for F Company. Subsequently, F Company desires to renegotiate prices and a pension provision on the fighter plane contract, matters in which dispute is anticipated. The former official could not attend a meeting with Government employees at which such matters will be discussed and give assistance to those representing F Company in the negotiations. He could generally render advice as long as he remained absent from the negotiations.

Example 4: A Senior Justice Department lawyer participated in an antitrust case against Q Company, which is represented by Y law firm. Immediately after leaving the Department, she goes to work with Y law firm, and assists at a trial representing Q Company in a different antitrust case, not involving the allegations in the Government case. Such assistance would not be barred because it does not occur in connection with the same particular matter.

Example 5: A Senior Employee of the Department of Health and Human Services leaves to take a university position. The former official's new duties include various HHS contracts which the university holds. Some of the contracts were awarded by a division within HHS which was under her official responsibility. She is not barred from assistance in negotiations with respect to such contracts, because the restriction applies only to those matters in which she had participated personally and substantially, not to those matters for which she had official responsibility. Note, however, that any participation by her as a representative would be barred by 18 U.S.C. 207(b)(1) as described in § 737.7 of this part. (But see § 737.11.)

Example 6: A Senior scientist with the Food and Drug Administration was personally and substantially involved in a licensing proceeding concerning a specific drug. After leaving the FDA, he is employed by the manufacturer of the drug. There he engages in research, indicating that the drug is safe and effective, which his employer later presents to FDA in connection with the proceeding. He assists during this presentation. Such assistance would normally be restricted but may be allowed to the extent that the former official is furnishing scientific information to the Government. (See 18 U.S.C. 207(f) and § 737.15 of this part.)

Example 7: A former Senior Employee of the Federal Communications Commission leaves the agency to join a graduate school faculty. In one of his courses, which from time to time includes Government employees, he discusses, unfavorably to the Commission, a specific licensing case in which he was personally and substantially involved. The restriction does not apply because the conduct does not occur in connection with any representational activities.

§ 737.11 One-year restriction on a former senior employee's transactions with former agency on a particular matter, regardless of prior involvement.

(a) *Basic prohibition of 18 U.S.C. 207(c).* For a period of one year after terminating employment by the United States, no former Senior Employee (other than a special Government employee who serves for fewer than sixty days in a calendar year) shall knowingly act as an agent or attorney for, or otherwise represent, anyone in any formal or informal appearance before, or with the intent to influence, make any written or oral communication on behalf of anyone to (1) his or her former department or agency, or any of its officers or employees, (2) in connection with any particular Government matter, whether or not involving a specific party, which is pending before such department or agency, or in which it has a direct and substantial interest.

(b) *Transactions exempted from the basic prohibition of 18 U.S.C. 207(c).* The prohibition set forth above shall not apply to an appearance, a communication, or representation by a former Senior Employee, who is:

(1) An elected official of a State or local government, acting on behalf of such government, or

(2) Whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital or organization.

Example 1: A former Senior Employee of the Federal Highway Administration is appointed to the position of Secretary of Transportation for the State of Kansas. He would not be prohibited from transacting business with his former agency concerning new matters on behalf of the State. He would, however, be restricted as to 207(a) and 207(b) matters.

Example 2: A former Senior Employee of the Department of Housing and Urban De-

velopment establishes a consulting firm and is engaged by the City of Los Angeles to aid it in procuring a particular grant. He may not represent Los Angeles before his former Department because his "principal occupation or employment" is not with such city.

Example 3: A former Senior Employee of the Department of Education founds a vocational school for the training of legal paraprofessionals and associated staff. He desires to communicate with officials at his former Department for the purpose of establishing a program of assistance to such institutions. He may not do so, since the vocational school is not an "accredited, degree granting institution of higher education."

(c) *No prior involvement required.* The prohibition contained in this section applies without regard to whether the former Senior Employee had participated in, or had responsibility for, the particular matter and includes matters which first arise after the employee leaves Government service. The section aims at the possible use of personal influence based upon past Governmental affiliations to facilitate the transaction of business.

(d) *Specific parties unnecessary.* The particular matter in which the former Senior Employee proposes to act before his or her former agency need not be one "involving specific parties," and thus is not limited to disputed proceedings or contracts in which a party has already been identified. However, the restriction does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, i.e., any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest. Rulemaking is specifically included. Thus such matters as the proposed adoption of a regulation or interpretive ruling, or an agency's determination to undertake a particular project or to open such a project to competitive bidding are covered. Not included are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects. The particular matter must be pending before the agency or be one in which the agency has a "direct and substantial interest."

(NOTE: Each post employment activity i the examples in this section is assumed t take place within one year of termination o Government employment.)

Example 1: A Senior Employee of the De partment of Health and Human Service leaves Government employment for privat practice, and shortly thereafter telephone a former associate urging that the Depar ment (a) adopt a new procedure to put ceiling on hospital costs; (b) not adopt a pa ticular rule proposed for drug testing; an (c) oppose a bill pending in Congress rela ing to such drug testing. He is prohibite from attempting to influence his former c worker on any of these matters. The firs not yet pending, is of interest to the Depar ment; the second is pending in the Depar ment; and the third is pending elsewher and is of interest to the Department. No that the former Senior Employee may, hov ever, communicate the same views to Co gress, other agencies, the public or th press.

Example 2: A recently retired Senior Em ployee of the Department of Defense b lieves that the Department's general em phasis on manned aircraft is not in the n tional interest. After his departure, he ma continue to argue the point to the Depar ment.

(e) *Element of controversy or influence required.* The prohibition c acting as a representative or attemp ing to influence applies to situations which there is an appreciable eleme of actual or potential dispute or an a plication or submission to obtain Go ernment rulings, benefits or approva and not to a situation merely invol ing, for example: the transmission filing of a document that does not i volve an application for Governme benefit, approval or ruling; a reque for information; purely social or infc mational communications; or those r quired by law or regulations (in situ tions other than adversary proce ings). Each agency should, after co sulting with the Director or the Atto ney General, as appropriate, give gui ance on the kinds of applications, f ings and other matters which are n prohibited by section 207(c).

Example 1: A former Senior Employee the Internal Revenue Service prepares a mails a client's tax return. This is not a p hibited act. Should any controversy arise connection with the tax return, the form employee may not represent the client, b may be called upon to state how the retu was prepared.

Example 2: A former Senior Employee of the Securities and Exchange Commission prepared and transmitted for filing to the Commission a client's annual report on form 10-K. This is not a violation, because the 10-K is a disclosure report, not intended to obtain a Government benefit or ruling.

Example 3: A former Senior Employee of the Securities and Exchange Commission becomes executive vice-president of a major industrial corporation, registered under the Securities Exchange Act of 1934. Pursuant to Commission regulations, the officers of the corporation are required to sign certain filings on behalf of the corporation, which are transmitted to the Commission. The employee may review, concur or request changes in, and sign any such filing required to be transmitted to the Commission.

(f) *Agency activity or interest in matter.* The restriction applies to the former employee's contacts with his or her former agency in connection with a matter before or of "direct and substantial interest" to the agency.

Example 1: A former Senior Employee of the Securities and Exchange Commission is asked to represent Z Company in a new matter before the Commission, one in which the former employee had no prior involvement. He may not do so.

Example 2: The matter in the foregoing example is referred to the Department of Justice for prosecution, and the former employee is asked for the first time to represent Z Company in the criminal proceeding. The matter is likely to be of direct and substantial interest to the Commission. If so, the former employee may not communicate with the Commission in the matter. However, the former Senior Employee may communicate with the Commission in order to determine whether it asserts a direct and substantial interest in the criminal proceeding. In the event of a negative answer to the question, the former Senior Employee may communicate with the Commission.

Example 3: In connection with an entirely new matter a former Senior Employee of the Securities and Exchange Commission undertakes the representation of Z Company in private litigation brought by Q Company, (e.g., a private action arising under the Securities Exchange Act of 1934). Before the suit was commenced, there was no actual expression of interest by the Commission in the matter. As the litigation develops, an important question of statutory interpretation is raised, and the Commission files a brief as *amicus curiae* (friend of the court). The former Senior Employee may respond to the brief and need not withdraw from representation of Z Company, but he may not otherwise communicate with the Commission in the matter. If the Commission were to commence a proceeding or investigation again, Z Company on the basis of the same facts involved in the private litigation, the former employee could continue his representation in the private litigation, but could not represent Z Company in the Commission's proceeding until after the expiration of one year from the termination of his employment with the Commission.

(NOTE: Where an agency becomes a party to a proceeding subsequent to its commencement, the question whether a former Senior Employee may continue representation should ordinarily be decided by the court on a motion for disqualification in the particular circumstances.)

Example 4: In connection with a new matter, a former Senior Employee of the Federal Food and Drug Administration, since retired to private law practice, is asked to consult and assist in the preparation of briefs to be filed with the Administration on a new particular matter. He may do so, but he should not sign briefs or other communications or take any other action that might constitute an appearance.

(g) *Application or proposals for funding of research.* In connection with any application or proposal for Government funding of research, the restrictions of this section do not prevent a former Senior Employee from assuming responsibility for the direction or conduct of such research and from providing scientific or technological information to the Senior Employee's former agency regarding such research. The former Senior Employee may not, however, submit the application on behalf of the applicant or argue for its approval or funding by the agency.

Example 1: A former Senior Employee of the National Institute of Health (NIH), employed by a non-exempt research institute, prepares an application to NIH for a research contract. The application is submitted to NIH by the institute and lists the Senior Employee as principal investigator. The Senior Employee does not violate 18 U.S.C. 207(c) by preparing the application or by being listed as principal investigator, since these are not representational activities. He may also sign an assurance to NIH, as part of the application, that he will be responsible for the scientific and technical direction and conduct of the project if an award is made. He may also communicate with NIH to provide scientific or technical information on the application, including presentation to NIH personnel at the re-

search site, so long as he does not argue for approval or funding of the application.

(h) *Personal matters.* Unlike the provisions of subsections 207(a) and (b) the restrictions of this section apply when the former Senior Employee seeks to represent himself or herself. However, they do not apply to appearances or communications concerning matters of a personal and individual nature, such as personal income taxes, pension benefits, or the application of any provision of these regulations to an undertaking proposed by a Senior Employee. (See 18 U.S.C. 207(i).) A former Senior Employee may also appear *pro se* (on his or her own behalf) in any litigation or administrative proceeding, involving the individual's former agency. The former employee may not contact his or her former agency in order to secure an item of business, except for (1) discussions in contemplation of being employed by the agency as a consultant or otherwise; or (2) a proposal to furnish scientific or technological information to the Government.

Example 1: Any former Government Employee may contact his or her former agency to seek information or determinations as to matters in question under these regulations or under 18 U.S.C. 207, such as whether a particular matter is considered to have been under the employee's official responsibility, whether a matter is one in which the agency asserts a direct and substantial interest, or whether a current matter is considered to be the same as that in which the employee had been involved.

(i) *Statements based on special knowledge.* The restrictions of the section do not prevent a former Senior Employee from making or providing a statement, which is based on the former Senior Employee's own special knowledge in the particular area that is the subject matter of the statement, provided that no compensation is thereby received, other than that regularly provided by law or regulation for witnesses. (See 18 U.S.C. 207(i).)

Example 1: A former Senior Employee may make any statement of his own views to his former agency on any subject matter in which he has no substantial pecuniary interests, acting on his own behalf.

Example 2: A former Senior Employee is called by his successor at the agency for the purpose of eliciting some information on a matter in which he had been involved in an official capacity. His response is not prohibited.

Example 3: A former Senior Employee may recommend an individual to her former agency for employment, based on her own personal knowledge of the individual's qualifications and character.

(j) *Measurement of one-year restriction period.* The statutory one-year period is measured from the date when the individual's responsibility as a Senior Employee in a particular agency ends, not from the termination of Government service, unless the two occur simultaneously. (See § 737.7(e).)

§ 737.13 Limitation of restrictions of 18 U.S.C. 207(c) to less than that whole of a department or agency.

(a) *Authority.* There are two methods by which the application of the one-year "cooling-off" prohibition of 18 U.S.C. 207(c) may be limited to less than the entirety of a department or agency. First, 18 U.S.C. 207(e) provides that the Director may by rule designate as "separate" a statutory agency or bureau which exercises functions that are distinct and separate from the remaining functions of the parent department or agency of which it is part. (see 737.31) Second, under the provisions of 18 U.S.C. 207(d)(1)(C), the Director may restrict the application of the prohibition as to a former employee (other than one who served in an Executive Level position or at a uniformed service grade level of 0-9 and above) insofar as it affects his or her communications with persons in an unrelated agency or bureau within his former parent department or agency which has separate and distinct subject matter jurisdiction from the agency or bureau in which he or she served. (see § 737.32)

(b) *Distinctions between the 18 U.S.C. 207(e) and 207(d)(1)(C) provisions.* (1) The authority granted by 18 U.S.C. 207(e) is applicable solely to a separate *statutory* agency or bureau, that is, one created by statute or the functions of which are expressly referred to by statute in such a way that is appears that Congress intended that its functions were to be separable. A determination made under this 18 U.S.C. 207(e) does not, however, bene-

fit former heads of the separate statutory agency or bureau. Such a determination does, however, work to the benefit of other employees at Executive Level or at uniformed service grade level of 0-9 or above.

(2) The determination made pursuant to section 207(d)(1)(C) is intended to provide similar recognition of separability where the subordinate agency or bureau has been *administratively* created. A determination of such separability does inure to the benefit of the head of the separate component if he is a Senior Employee designated by the Director. However, the determination is not beneficial to persons, including the head of a separate component, in positions at Executive Level or serving at uniformed service grade level of 0-9 above.

(c) *Separate Statutory Components*—(1) *Procedure.* Each agency shall notify the Director, in writing, of any separate statutory agency or bureau which it desires to submit for such designation under 18 U.S.C. 207(e), providing:

(i) A description of the functions of the agency or bureau, indicating the basis on which such functions are claimed to be distinct and separate from the parent organization;

(ii) The separate statutory basis of the agency or bureau; and

(iii) Identification of those positions in the parent agency with official responsibility for supervision of such separate statutory agency or bureau.

(2) *Standards.* A parent agency may propose as a "separate" statutory agency an agency or bureau (i) created specifically by statute, (ii) the functions of which are expressly referred to by statute in such a way as to indicate that a separate component was intended or (iii) which is the successor to either of the foregoing; but a decision as to the sufficiency of the statutory authority as well as the separability of functions shall be reserved to the Director, OGE.

(3) *Effect of designation.* If a subordinate part of an agency is designated as "separate" by the Director, then Senior Employees of such separate agency and those of the parent agency are not subject to the restrictions of section 207(c) as to each others' agencies—except that the prohibition of section 207(c) remains applicable to the former head of a "separate" subordinate agency and to former Senior Employees of the parent agency whose official responsibility included supervision of the subordinate agency.

Example 1: A former Senior Employee of the Product Agency in Executive Department leaves and joins a law firm which represents Q Corporation. Product Agency has been designated by the Director as separate from Executive Department. The former employee is not restricted from representing the Q Corporation on a new matter before the Executive Department.

(d) *Separate Nonstatutory Components*—(1) *Procedure.* Each agency may notify the Director, in writing, of a component agency, bureau or office having separate and distinct subject matter jurisdiction which it desires to submit for designation under 18 U.S.C. 207(d)(1)(C), providing:

(i) A description of the subject matter jurisdiction of such component, indicating the basis on which such jurisdiction is claimed to be separate and distinct from certain other agencies, bureaus and offices of the parent agency;

(ii) A description of the nature of the connections and interactions between such component and certain other agencies, bureaus or offices of the parent agency indicating the basis on which the component is claimed to be unrelated;

(iii) A statement of the basis on which it is claimed that no potential exists for use by former Senior Employees of such component of undue influence or unfair advantage with respect to the named other agencies, bureaus or offices of the parent agency, based on past Government service; and

(iv) Identification of those organizational units of the parent agency having administrative or operational authority over such component agency, bureau or office.

(2) *Standards.* (i) A parent agency may propose as "separate" from other parts of a department or agency any agency or bureau having subject matter jurisdiction separate and distinct from one or more other portions of the department or agency accompanied by a showing that there would be

no potential for use of undue influence or unfair advantage based upon past Government service if a former employee of one such subordinate agency or bureau communicated with employees of such other portions of the department or agency.

(ii) A determination under this section rests solely with the Director, OGE, and is available only for those subordinate components which would, but for the lack of a statutory basis, qualify for separate agency treatment under 18 U.S.C. 207(e).

(iii) Where one component has supervisory authority over another, the two components may not be considered separate and distinct for purposes of this section.

(iv) The requirement of "separate and distinct subject matter jurisdiction" may be met in at least two ways. First, the substantive areas of coverage may be distinct. For example, an office or bureau within the parent agency may handle only maritime matters. Second, the regional area of coverage may be different. For example, one regional office may, on appropriate facts, be considered separate and distinct from other regional offices and from the parent agency—except for the bureau or office in the parent agency which is responsible for its supervision.

(v) It is necessary to specify the "unrelated agency or bureau within the same department or agency" as to which it is recommended that post employment communication be permitted. For example, one bureau may involve a subject matter distinct from some, but not all, parts of the parent department. Attempts to fractionalize a department could, however, become deeply complicated and involve difficult judgments and fact-finding. OGE will not usually act on such cases, and submissions should be confined to relatively clear cases.

(3) *Effect of determination.* If a component agency, bureau or office is determined to be separate by the Director, then Senior Employees of such component are not subject to the restrictions of 18 U.S.C. 207(c) and § 737.11 as to the remaining agencies, bureaus or offices of the parent agency (except certain such agencies, bureaus or offices as specified in § 737.32)—except that the prohibition of section 207(c) and § 737.11 shall remain applicable (i) to those former Senior Employees of such component who served in positions designated by 18 U.S.C. 207(d)(1)(A) and (B) and (ii) to former Senior Employees of such component with respect to the parent agency (as defined in § 737.13(e)). Such limited application of 18 U.S.C. 207(c) may be available for the head of a separate component, unlike the limitation of 18 U.S.C. 207(e), as determined by the Director.

Example 1: In the Department of Justice, while the Antitrust Division may be "separate" from other Divisions, it is not separate from the immediate office of the Attorney General.

§ 737.15 Exemption for scientific and technological information.

(a) *Exemption.* The making of communications solely for the purpose of furnishing scientific or technological information pursuant to agency procedures is exempt from all prohibitions and restrictions set forth in §§ 737.5 737.11 of these regulations (subsections (a), (b), and (c) of 18 U.S.C. 207 This exemption allows the free exchange of such information regardless of a former Government employee's prior participation in or responsibility for the matter. The former Senior Employee should not argue for the acceptance of a proposal. The exemption is not limited to communications constituting the furnishing of information, but includes those "for the purpose of" doing so. No violation occurs when, for example, a former Government employee working on a project makes contact to determine the kind and form of information required, the adequacy of information already supplied, so long as agency procedures are satisfied.

Example 1: A project manager, regardless of prior involvement in a particular matter may contact the Government to determine deficiencies in system design or performance, furnish scientific or technological information relating to a solution or approach to a problem, seek related information from the Government; advise and supervise others who are involved as to such matters and meet with Government technical

perts for such purpose; provided in each case that there is compliance with such agency regulations as have been issued.

(b) *Necessary information.* Scientific and technological information includes feasibility, risk, cost, and speed of implementation, when necessary to appreciate fairly the practical significance of the information. The Government may and should be fully informed of the significance of scientific and technological alternatives.

(c) *Intent to influence.* The furnishing of meritorious or convincing scientific or technological proposals does not constitute an intent to influence. (See § 737.5(b)(7) of this part.)

(d) *Expert testimony.* This exemption does not include testimony as an "expert" in adversary proceedings in a matter in which the United States is involved or has an interest. Such testimony is governed by regulations set forth in § 737.19. As to assistance as an expert or consultant, see § 737.9(g), Example 7.

(e) *Agency responsibility for procedures.* The primary responsibility for developing procedures to guide activity under this exemption lies with each agency, so that such procedures comport with the particular characteristics of agency programs and needs. Such procedures will be reviewed periodically by the Director. In promulgating procedures, an agency may take into consideration: Limiting communications to certain formats which are least conducive to the use of personal influence; segregating, to the extent possible, meetings and presentations involving matters of technical substance from those involving other aspects of the relationship; requiring that the designated agency ethics official be informed of instances where the exemption is used; or employing more restrictive practices in circumstances involving either immediate competition for contracts or applications for grants than in those involving an ongoing project.

§ 737.17 Exemption for persons with special qualification in a technical discipline.

(a) *Applicability.* A former Government employee may be exempted from the restrictions on post employment practices if the head of the agency concerned with the particular matter, in consultation with the Director, executes a certification published in the FEDERAL REGISTER that such former Government employee has outstanding qualifications in a scientific, technological, or other technical discipline; is acting with respect to a particular matter which requires such qualifications; and that the national interest would be served by such former Government employee's participation.

(b) *When appropriate.* This exemption should generally be utilized only where the former Government employee's involvement is needed on so continuous and comprehensive a basis that compliance with the procedures adopted for the communication of technical information (see § 737.15), or other actions to isolate the former Government employee from other aspects of the matter, would be burdensome and impractical.

(c) *Certification authority.* Certification should take place at no lower level than the head of the agency, the deputy thereof, or in the absence of both, the acting agency head. Consultation with the Director shall precede any certification. The exemption takes place upon the execution of the certification, provided that it is transmitted to the FEDERAL REGISTER for publication.

(d) *Agency registry.* An agency may establish a registry for current employees, wherein the nature of their qualifications in one or more technical fields is certified after review by a supervisor, as a basis for establishing such qualifications in connection with, and to expedite, a later request for certification, should the necessity for such request arise.

§ 737.19 Testimony and statements under oath or subject to penalty of perjury.

(a) *Statutory basis.* Section 207(h) provides:

"Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury."

(b) *Applicability.* A former Government employee may testify before any

court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. 207 (a), (b), or (c) to testify on behalf of another as an expert witness except: (1) To the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise, or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same subject to be obtained by other means, and that the former Government employee's testimony is required in the interest of justice.

(c) *Statements under penalty of perjury.* A former Government employee may make any statement required to be made under penalty of perjury, such as those required in registration statements for securities, tax returns, or security clearances. The exception does not, however, permit a former employee to submit pleadings, applications, or other documents in a representational capacity on behalf of another merely because the attorney or other representative must sign the documents under oath or penalty of perjury.

§ 737.21 Partners of present or former Government employees.

(a) *Scope.* Section 207(g) of 18 U.S.C. prohibits a partner of a current Government employee from acting as agent or attorney before the United States in a particular Government matter in which such Government employee participates, or did participate, personally and substantially. To the extent such section involves the activities of current Government employees and their partners, it is beyond the scope of these regulations.

(b) *Imputation.* Neither the Act nor these regulations impute the restrictions on former employees to partners or associates of such employees. Imputation of the restrictions of sections 207 (b)(ii) and (c) to partners of former employees would be inappropriate for the additional reason that section 207(b)(ii) itself restricts secondary-level activity, and section 207(c) is directed at the exercise of influence personal to the former Senior Employee.

§ 737.23 Officials of a State; officials of corporations created by an Act of Congress and public international organizations.

For purposes of sections 207 (a), (b) and (c) of title 18 U.S.C.:

(a) An official whose powers are established by the constitution of any State of the United States does not act on behalf of "any other person" or "anyone" when acting in his or her official capacity, but rather constitutes the official authority of the State; and

(b) A former employee does not engage in unlawful activity when he or she acts on behalf of (1) a corporation specifically created by an Act of Congress if any of its directors is currently appointed by the United States; or (2) any public international organization if he or she serves by nomination or request of the United States or on temporary assignment from any agency.

§ 737.25 Standards and procedures for designating senior employee positions pursuant to 18 U.S.C. 207(d).

(a) *Definitions.* As used in these regulations, "Senior Employee" refers to any person specified in or designated pursuant to 18 U.S.C. 207(d)(1); that is, employed by the United States:

(1) At a rate of pay specified or fixed according to subchapter II of chapter 53 of title 5, U.S.C., generally known as "Executive Level;" or

(2) On active duty as a commissioned officer of a uniformed service in a pay grade of O-9 or above as described in 37 U.S.C. 201; or

(3) In a position in any pay system for which the basic rate of pay is equal to or greater than that for GS-17 as prescribed by 5 U.S.C. 5332 or positions which are established within the Senior Executive Service (SES) pursuant to the Civil Service Reform Act of

1978, or positions of active duty commissioned officers of the uniformed services assigned to pay grade 0-7 and 0-8, as described in 37 U.S.C. 201, and who has significant decision-making or supervisory responsibilities, as designated by the Director, pursuant to paragraph (b) of this section.

(b) *Designation procedures.* The following procedures will be followed in designation of Senior Employee positions pursuant to 18 U.S.C. 207(d)(1)(C):

(1) *Positions at GS-17 and 18 level, Senior Executive Service, and pay grades 0-7 and 0-8 of the uniformed services.* The following are designated effective February 28, 1980, unless exempted as provided in paragraph (b)(2) of this section: All positions classified at GS-17 or above in the General Schedule; those in any other pay system, the rate of pay for which is at least that of grade GS-17; those in the Senior Executive Service; and those active duty uniformed service officers serving in pay grades 0-7 and 0-8. Each agency head shall submit to the Director, by May 15, 1979 and on every May 15 thereafter, a report consisting of: (i) a description of all positions as set forth in this paragraph; (ii) the agency's recommendation as to those positions that should not be designated, based on standards established in these regulations or any other reason; and (iii) the basis and reasons for each such recommendation. After making such additional inquiries as appear desirable, the Director will determine which positions should be exempt. Notwithstanding the foregoing, the effective date for Executive Level positions, whether or not included in the Senior Executive Service, is July 1, 1979.

(2) *Standards for designation and exemption.* Positions, or classes of positions, which do not have significant decision-making or supervisory responsibility will be exempted from designation. Initial exemptions will be retroactive. Classes of positions which may be considered for exemption are those in which decision-making responsibility does not regularly extend to major policy issues within the agency or in which supervisory responsibility extends to less than all of a directorate, bureau or department which has major policy or operational responsibility. The foregoing may include, without limitation, special assistants, technical and professional advisors to persons who make policy decisions, those involved primarily in research and technical work, and administrative law judges.

(3) *Senior Executive Service.* The establishment of positions within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978 is the responsibility of the Office of Personnel Management. The choice of an individual to enter or not to enter the Senior Executive Service is not a relevant factor in the designation under these regulations of a position held by such person.

(4) *"Rate of pay."* As used in the definition of Senior Employee, the "rate of pay" is that specified by or pursuant to law without regard to the ceiling limitations of section 5308 or section 5373 of title 5 U.S.C.; except that an individual in an executive level or GS-17 or 18 position is deemed to be employed at the rate of pay specified for that position. Increases in pay due to "steps" are not considered in determining pay grade or level.

(c) *Differential designation.* Where appropriate, the Director may designate positions for purposes of 18 U.S.C. 207(c) without designating the positions for purposes of 18 U.S.C. 207(b)(ii).

Example 1: It may be determined that a given position or class of positions will be restricted as to contact in the first post employment year, but not as to assisting in representation.

(d) *Fair notice of designation.* No Senior Employee designation made pursuant to 18 U.S.C. 207(d)(1)(C) will be effective until the last day of the fifth full calendar month after the first publication of a notice by the Director of intention to designate; except as indicated in paragraph (i) of this section, and as to a person first occupying the position after such notice is published. The designation in paragraph (b)(1) of this section and the comparable designation in the interim regulations of April 3, 1979 (44 FR 19974) constitutes notice.

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(e) *"Acting" or temporary positions.* An individual may serve in a position designated pursuant to 18 U.S.C. 207(d) for up to 60 days in an "acting" or temporary capacity without being subject to those restrictions which specially apply to such positions, unless such individual (1) was transferred or detailed from another designated position, or (2) without a significant break in continuity, is named permanently to such position.

(f) *Special Government Employee.* A Special Government Employee who serves on 60 days or less in a given calendar year may serve in a designated position without being subject to the restrictions which specially apply to such position. A Special Government Employee is deemed to serve only on those days actually engaged in work for the Government under his or her Special Government Employee arrangement.

(g) *Publication.* Positions designated by the Director pursuant to 18 U.S.C. 207(d)(1)(C) and not exempted will be published in the FEDERAL REGISTER.

(h) *Computation of time.* An individual who transfers from a designated position to one that is not designated shall compute the commencement of the time periods contained in 18 U.S.C. 207 (b)(ii) and (c) from the time of such transfer, except as indicated in paragraph (i) of this section. (See § 737.7(e).)

(i) *Position shifting.* In any case where a person transfers from a designated position to one that is not, the agency head shall within one month transmit to the Director a report reciting the functions of each position, the reason for the transfer, and the identities of the prior holder of the position assumed and the successor, if any, to the position departed. If the Director designates the newly assumed position pursuant to section 207(d)(1)(C) of title 18 U.S.C., such designation shall be effective retroactively to the date of transfer notwithstanding paragraph (d) of this section. 10

(j) *Revocation of Designations.* In the event the Director determines that a position previously designated should not have been, the designation will be revoked. Except for designations made under paragraph (i) of this section, the revocation may be made retroactive if the initial designation is determined to have been erroneous or if there is a change in standards for designation applicable to the position. Retroactive effect will not be given where the basis for revocation is a change in the functions or importance of a position.

§ 737.27 Administrative enforcement proceedings.

(a) *Basic procedures.* The following basic guidelines for administrative enforcement of restrictions on post employment activities are designed to expedite consultation with the Director as required pursuant to section 207(j) of title 18 U.S.C.

(1) *Delegation.* The head of an agency may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.* (i) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears substantiated, the agency head shall expeditiously provide such information, along with any comments of agency regulations, to the Director and to the Criminal Division, Department of Justice. The agency should coordinate any investigation on administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Agency that it does not intend to initiate criminal prosecution.

(ii) Whenever an agency has determined after appropriate review that there is reasonable cause to believe that a former Government employee has violated any of these regulations or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Government employee with notice as defined in paragraph (a)(3) of this section. Agencies may establish procedures to protect the privacy of former employees as to allegations made prior to a determination of sufficient cause to initiate an administrative disciplinary hearing.

(3) *Adequate notice.* (i) An agency must provide a former Governme

employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Government employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Government employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.* (i) The presiding official at proceedings under this subpart shall be the agency head or an individual to whom the agency head has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) Appropriate qualifications shall be established for examiners.

(iii) An examiner shall be impartial. No individual who has participated in any manner in the decision to initiate the proceedings may serve as an examiner in those proceedings.

(5) *Time, date and place.* (i) The hearing shall be conducted at a reasonable time, date, and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Government employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel,

(ii) To introduce and examine witnesses and to submit physical evidence,

(iii) To confront and cross-examine adverse witnesses,

(iv) To present oral argument, and

(v) To receive a transcript or recording of the proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the agency has the burden of proof and must establish substantial evidence of a violation.

(8) *Hearing decision.* (i) The presiding official shall make a determination exclusively on matters of record in the proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, as set by the agency, either party may appeal the decision to the agency head. The agency head shall base his or her decision on such appeal solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the agency head modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the hearing examiner.

(9) *Administrative sanctions.* The agency head may take appropriate action in the case of any individual who was found in violation of 18 U.S.C. 207 (a), (b), or (c) of these regulations after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on any matter of business for a period not to exceed five years, which may be accomplished by directing agency employees to refuse to participate in any such appearance or to accept any such communication; or

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) of these regulations may seek judicial review of the administrative determination.

(11) *Consultation and review.* Each agency shall submit a copy of its procedures for administrative enforcement to the Director.

§ 737.29 Effective date of restrictions.

(a) *Persons affected.* Any person who holds a Government position after June 30, 1979, becomes subject to any additional restrictions relating to the holder of that position contained in

the amendments to 18 U.S.C. 207 as set forth in these regulations. Restrictions which depend on the designation of a position by the Director shall become applicable on the date such designation becomes effective.

(b) *Fair notice of—substantive changes.* No change in the substance of these regulations shall become effective with respect to a Government employee who is adversely affected by such change until and unless such employee remains in a position to which such change is applicable for a period of five months following the first publication of a regulation in final form, reflecting or prescribing such change, or unless such employee accepts such a position after the publication.

§ 737.31 Separate statutory agencies: Designations.

In accordance with the provisions of 18 U.S.C. 207(e) and § 737.13 of this Chapter, each of the following departments or agencies is determined, for purposes of 18 U.S.C. 207(c), to have within it separate statutory agencies or bureaus as set forth below:

Parent Agency: DEPARTMENT OF THE TREASURY
Separate Statutory Components:
- Bureau of Alcohol, Tobacco and Firearms
- Bureau of Engraving and Printing
- Bureau of the Mint
- Comptroller of the Currency
- Internal Revenue Service
- United States Customs Service
- United States Secret Service

Parent Agency: FEDERAL EMERGENCY MANAGEMENT AGENCY
Separate Statutory Components: United States Fire Administration
Parent Agency: OFFICE OF PERSONNEL MANAGEMENT
Separate Statutory Components: Office of Government Ethics
Parent Agency: DEPARTMENT OF HEALTH AND HUMAN SERVICES
Separate: Statutory Components:
- Food and Drug Administration
- Public Health Service
- Social Security Administration

Parent Agency: DEPARTMENT OF TRANSPORTATION
Separate Statutory Components:
- Federal Aviation Administration
- Federal Highway Administration
- Federal Railroad Administration
- Maritime Administration
- National Highway Traffic Safety Administration
- Saint Lawrence Seaway Development Corporation
- United States Coast Guard
- Urban Mass Transportation Administration

Parent Agency:DEPARTMENT OF LABOR
Separate Statutory Components:
- Bureau of Labor Statistics
- Mine Safety and Health Administration
- Occupational Safety and Health Administration

Parent Agency: DEPARTMENT OF JUSTICE
Separate Statutory Components:
- Bureau of Prisons (including Federal Prison Industries, Inc.)
- Community Relations Service
- Drug Enforcement Administration
- Federal Bureau of Investigation
- Foreign Claims Settlement Commission
- *National Institute of Justice
- *Bureau of Justice Statistics
- *Office of Justice Assistance, Research and Statistics
- Immigration and Naturalization Service
- United States Parole Commission

Parent Agency: DEPARTMENT OF DEFENSE
Separate Statutory Components:
- Department of the Army
- Department of the Navy
- Department of the Air Force
- Defense Civil Preparedness Agency
- Defense Mapping Agency

Parent Agency: DEPARTMENT OF ENERGY
Separate Statutory Components:
- Federal Energy Regulatory Commission

Parent Agency: DEPARTMENT OF COMMERCE
Separate Statutory Components:
- Economic Development Administration
- Patent and Trademark Office
- National Oceanic and Atmospheric Administration
- Bureau of the Census

Parent Agency: NATIONAL CREDIT UNION ADMINISTRATION
Separate Statutory Component:
- Central Liquidity Facility

[48 FR 8188, Feb. 25, 1983]

§ 737.32 Separate components of agencies or bureaus: Designations.

In accordance with the provisions of 18 U.S.C. 207(d)(1)(C) and § 737.14 of this chapter, each of the component agencies or bureaus as set forth below

*These three components shall not, for purposes of 18 U.S.C. 207(c), be considered separate from one another but only from other separate components of the Department of Justice.

is determined, for purposes of 18 U.S.C. 207(c) and this Part 737, to be separate from the remaining agencies and bureaus of its parent agency (except such agencies and bureaus as specified):

Parent Agency: DEPARTMENT OF HEALTH AND HUMAN SERVICES
Separate Components.
Health Care Financing Administration
Parent Agency: DEPARTMENT OF TRANSPORTATION
Separate Components:
Alaska Railroad
Parent Agency: DEPARTMENT OF LABOR
Separate Components:
Employment and Training Administration
Employment Standards Administration
Labor-Management Services Administration
Parent Agency: DEPARTMENT OF DEFENSE
Separate Components:
Defense Communications Agency
Defense Intelligence Agency
Defense Nuclear Agency
National Security Agency
Parent Agency: DEPARTMENT OF STATE
Separate Components:
Foreign Service Grievance Board
International Joint Commission, United States and Canada (American Section)
Parent Agency: DEPARTMENT OF JUSTICE
Separate Components:
Office of United States Attorney (for each judicial district (95))—however, each such Office is not designated as separate from the Office of the U.S. Marshal for the same judicial district.
Office of the United States Marshal (for each judicial district (95))—however, each such Office is not designated as separate from the Office of the U.S. Attorney for the same judicial district.
Antitrust Division
Civil Rights Division
Land and Natural Resources Division
Tax Division
Criminal Division
Office for Improvements in the Administration of Justice
Parent Agency: DEPARTMENT OF COMMERCE
Separate Components:
International Trade Administration
Minority Business Development Administration
National Telecommunication and Information Administration
Bureau of Industrial Economics

[48 FR 8189, Feb. 25, 1983]

§ 737.33 "Senior Employee" designations.

In accordance with § 737.25(b)(1) of this chapter, the following employee positions have been designated as "Senior Employee" positions for purposes of subsections 207 (b)(ii) and (c) of title 18, U.S.C., as amended.[1]

AGENCY: EXECUTIVE OFFICE OF THE PRESIDENT, (OFFICE OF ADMINISTRATION)

Positions: No section 207(d)(1)(C) designations.

AGENCY: EXECUTIVE OFFICE OF THE PRESIDENT, (COUNCIL OF ECONOMIC ADVISERS)

Positions: No section 207(d)(1)(C) designations.

AGENCY: EXECUTIVE OFFICE OF THE PRESIDENT, (COUNCIL ON ENVIRONMENTAL QUALITY)

Positions: No section 207(d)(1)(C) designations.

AGENCY: EXECUTIVE OFFICE OF THE PRESIDENT, (PRESIDENT'S COMMISSION ON EXECUTIVE EXCHANGE)

Positions: No section 207(d)(1)(C) designations.

AGENCY: EXECUTIVE OFFICE OF THE PRESIDENT, (OFFICE OF MANAGEMENT AND BUDGET)

Positions:

SES** Executive Associate Director for Budget and Legislation
SES* Associate Director for Operations and Communications
SES Counsel to the Director for Policy Analysis and Law
SES General Counsel
SES Deputy General Counsel
SES Assistant Director for Public Affairs
SES Assistant Director for Legislative Affairs
SES Assistant Director for Legislative Affairs (Senate)

[1] All positions designated pursuant to section 207(d)(1)(C) not previously designated are marked by an asterisk (*). Those positions marked by a double asterisk (**) are former Executive level positions which were converted to SES positions. Positions automatically designated by section 207(d)(1)(A) and (B) are not shown.

Subject: U.S. Trustees and Assistant U.S. Trustees

Date: September 10,

To: Mr. Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

From: Richard L. Levine
Director, Executive
for United States

Could I confirm that under applicable statutes and provisions of Justice Department regulations, a U.S. Trustee or Assistan U.S. Trustee, after leaving office, is not precluded:

a) from practicing bankruptcy law, even in the district in which the individual had been serving, provided that the individual does not handle cases which were pending in his or her office at the time that he or she was the incumbent; or

b) from practicing law with a law firm which is handling matters which were pending in the office of the former incumbent at the time of the incumbency, provided that that former official does not appear before any government agency or court in connection with that matter.

It is my further understanding that, subject to discretion and ordinary ethical standards about improprieties, the applicable regulations and statute would not preclude a forme U.S. Trustee or Assistant U.S. Trustee from giving advice within the confines of the law firm or to the client, even concerning a matter described in paragraph b) above, provided that no confidential D.O.J. information is used or disclosed. However, it is my further understanding that the Department considers the Code of Professional Responsibility (the "CPR") applicable to its employees, as do many courts. The CPR provides for "screening" within a law firm, in the event that any of its attorneys previously worked on a particular matter Thus, notwithstanding that neither federal regulations nor statute requires "screening", in many cases the CPR does. The corollary of this, as I understand it, is that with prope "screening," even the CPR would permit a former U.S. Trustee or Assistant U.S. Trustee to practice under the circumstances outlined in this memorandum.

The U.S. Trustees' and Assistant U.S. Trustees' salaries are limited by 28 U.S.C. §587 to GS 16/1. Notwithstanding this statute, no U.S. Trustee or Assistant U.S. Trustee rece a salary greater than $100 less than that set for GS 16/1.

A-1.9

Subject: U.S. Trustees and Assistant U.S. Trustees

Date: 16 SEP 1980

To: Richard L. Levine
Director, Executive Office
for United States Trustees

From: Leon Ulman
Deputy Assistant Attorney Gener
Office of Legal Counsel

This is in response to your memorandum of September 10, 1980, regarding the postemployment conflict-of-interest and ethical restraints to which U.S. Trustees and Assistant Trustees are subject.

We believe the second and third sentences of the second paragraph of your memorandum, while generally accurate, would best be recast along the following lines if the contents of the memorandum are to be relayed to the Trustees and Assistant Trustees:

> However, since Justice Department attorneys are subject to the ABA's Code of Professional Responsibility (CPR), 28 C.F.R. 45.735-2(b), the restrictions of the Code, as interpreted by the ABA, are honored by the Department. The ABA takes the view that generally, a law firm is barred from handling a case in which one of its lawyers had formerly participated whil serving the Government. Nevertheless, it recognizes that if effective "screening" of the lawyer from the case is possible, the firm may accept and carry out the retainer upon a showing that satisfactory screening measures are in operation.

We are in agreement with the remainder of your memorandum.

A-1.10

Subject | Date

25 Oct 1980

To: Richard L. Levine
Director, Executive Office
for United States Trustees

From: Leon Ulman
Deputy Assistant Attorney Gene
Office of Legal Counsel

This responds to your inquiry of October 22, 1980, regarding the applicability of post-employment restraints to a lawyer who worked in a United States Trustee's office in a non-attorney position.

Since the post-employment restrictions of 18 U.S.C. 207 apply to "former officers or employees of the Executive Branch" generally and are not concerned with professional status, or its lack, in position descriptions, it is immaterial for the purposes of that statute whether a lawyer formerly employed in a Government agency served in a non-legal post.

Disciplinary Rule 9-101(B) of the ABA's Code of Professional Responsibility, which is similar in thrust to 18 U.S.C. 207, reads as follows:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

It is apparent that this prohibition by its terms is not limited to an individual who was in an attorney's position. Thus, it applies to a lawyer who once held a non-legal slot in a United States Trustee's office.

In short, the discussions in your memorandum of September 10, 1980, and my response of September 16, apply to any attorney who has left a United States Trustee's office, regardless of the nature or grade of the job he held.

SUMMARY OF THE MAIN CONFLICT OF INTEREST PROVISIONS OF PUB. L. 87-849

A regular officer or employee of the Government—that is, one appointed or employed to serve more than 130 days in any period of 365 days—is in general subject to the following major prohibitions (the citations are to the new sections of Title 18):

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest. This prohibition applies both to paid and unpaid representation of another (18 U.S.C. 203 and 205).

2. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate or person with whom he is negotiating for employment has a financial interest (18 U.S.C 208).

3. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)).

4. He may not, for 1 year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility* during the last year of his Government service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restraint described in paragraph 3 if the matter is one in which he participated personally and substantially.

5. He may not receive any salary, or supplementation of his Government salary, from a private source as compensation for his services to the Government (18 U.S.C. 209).

A special Government employee is in general subject only to the following major prohibitions:

1. (a) He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest and in which he has at any time participated personally and substantially for the Government (18 U.S.C. 203 and 205).

(b) He may not, except in the discharge of his official duties, represent anyone else in a matter pending before the agency he serves unless he has served there no more than 60 days during the past 365 (18 U.S.C. 203 and 205). He is bound by this restraint despite the fact that the matter is not one in which he has ever participated personally and substantially.

The restrictions described in subparagraphs (a) and (b) apply to both paid and unpaid representation of another. These restrictions in combination are, of course, less extensive than the one described in the corresponding paragraph 1 in the list set forth above with regard to regular employees.

2. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate or person with whom he is negotiating for employment has a financial interest (18 U.S.C. 208).

3. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)).

4. He may not, for 1 year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility during the last year of his Government Service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restriction described in paragraph 3 if the matter is one in which he participated personally and substantially.

It will be seen that paragraphs 2, 3 and 4 for special Government employees are the same as the corresponding paragraphs for for regular employees. Paragraph 5 for the latter, describing the bar against the receipt of salary for Government work from a private source does not apply to special Government employees.

As it appears below, there are a number of exceptions to the prohibitions summarized in the two lists.

COMPARISON OF OLD AND NEW CONFLICT OF INTEREST SECTIONS OF TITLE 18, UNITED STATES CODE

New 18 U.S.C. 203. Subsection (a) of this section in general prohibits a Member of Congress and an officer or employee of the United States in any branch or agency of the Government from soliciting or receiving compensation for services rendered on behalf of another person before a Government department or agency in relation to any particular matter in which the United States is a party or has a direct and substan-

*The term "official responsibility" is defined by the new 18 U.S.C. 202(b) to mean "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."

tial interest. The subsection does not preclude compensation for services rendered on behalf of another in court.

Subsection (a) is essentially a rewrite of the repealed portion of 18 U.S.C. 281. However, subsections (b) and (c) have no counterparts in the previous statutes.

Subsection (b) makes it unlawful for anyone to offer or pay compensation the solicitation or receipt of which is barred by subsection (a).

Subsection (c) narrows the application of subsection (a) in the case of a person serving as a special Government employee to two, and only two, situations. First, subsection (c) bars him from rendering services before the Government on behalf of others, for compensation, in relation to a matter involving a specific party or parties in which he has participated personally and substantially in the course of his Government duties. And second, it bars him from such activities in relation to a matter involving a specific party or parties, even though he has not participated in the matter personally and substantially, if it is pending in his department or agency and he has served therein more than 60 days in the immediately preceding period of a year.

New 18 U.S.C. 205. This section contains two major prohibitions. The first prevents an officer or employee of the United States in any branch or agency of the Government from acting as agent or attorney for prosecuting any claim against the United States, including a claim in court, whether for compensation or not. It also prevents him from receiving a gratuity, or a share or interest in any such claim, for assistance in the prosecution thereof. This portion of section 205 is similar to the repealed portion of 18 U.S.C. 283, which dealt only with claims against the United States, but it omits a bar contained in the latter—i.e., a bar against rendering uncompensated aid or assistance in the prosecution or support of a claim against the United States.

The second main prohibition of section 205 is concerned with more than claims. It precludes an officer or employee of the Government from acting as agent or attorney for anyone else before a department, agency or court in connection with any particular matter in which the United States is a party or has a direct and substantial interest.

Section 205 provides for the same limited application to a special Government employee as section 203. In short, it precludes him from acting as agent or attorney only (1) in a matter involving a specific party or parties in which he has participated personally and substantially in his governmental capacity, and (2) in a matter involving a specific party or parties which is before his department or agency, if he has served therein more than 60 days in the year past.

Since new sections 203 and 205 extend to activities in the same range of matters, they overlap to a greater extent than did their predecessor sections 281 and 283. The following are the few important differences between sections 203 and 205:

1. Section 203 applies to Members of Congress as well as officers and employees of the Government; section 205 applies only to the latter.

2. Section 203 bars services rendered for compensation solicited or received, but not those rendered without such compensation; section 205 bars both kinds of services.

3. Section 203 bars services rendered before the departments and agencies but not services rendered in court; section 205 bars both.

It will be seen that while section 203 is controlling as to Members of Congress, for all practical purposes section 205 completely overshadows section 203 in respect of officers and employees of the Government.

Section 205 permits a Government officer or employee to represent another person, without compensation, in a disciplinary, loyalty or other personnel matter. Another provision declares that the section does not prevent an officer or employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.[1]

Section 205 also authorizes a limited waiver of its restrictions and those of section 203 for the benefit of an officer or employee, including a special Government employee, who represents his own parents, spouse or child, or person or estate he serves as a fiduciary. The waiver is available to the officer or employee, whether acting for any such person with or without compensation, but only if approved by the official making appointments to his position. And in no event does the waiver extend to his representation of any such person in matters in which he has participated personally and substantially or which, even in the absence of such participation, are the subject of his official responsibility.

Finally, section 205 gives the head of a department or agency the power, notwith-

[1] These two provisions of section 205 refer to an "officer or employee" and not, as do certain of the other provisions of the Act, to an "officer or employee, including a special Government employee." However, it is plain from the definition in section 202(a) that a special Government employee is embraced within the comprehensive term "officer or employee." There would seem to be little doubt, therefore, that the instance provisions of section 205 apply to special Government employees even in the absence of an explicit reference to them.

standing any applicable restrictions in its provisions or those of section 203, to allow a special Government employee to represent his regular employer or other outside organization in the performance of work under a Government grant or contract. However, this action is open to the department or agency head only upon his certification, published in the FEDERAL REGISTER, that the national interest requires it.

New 18 U.S.C. 207. Subsections (a) and (b) of this section contain postemployment prohibitions applicable to persons who have ended service as officers or employees of the executive branch, the independent agencies or the District of Columbia.[8] The prohibitions for persons who have served as special Government employees are the same as for persons who have performed regular duties.

The restraint of subsection (a) is against a former officer or employee's acting as agent or attorney for anyone other than the United States in connection with certain matters, whether pending in the courts or elsewhere. The matters are those involving a specific party or parties in which the United States is one of the parties or has a direct and substantial interest and in which the former officer or employee participated personally and substantially while holding a Government position.

Subsection (b) sets forth a 1-year postemployment prohibition in respect of those matters which were within the area of official responsibility of a former officer or employee at any time during the last year of his service but which do not come within subsection (a) because he did not participate in them personally and substantially. More particularly, the prohibition of subsection (b) prevents his personal appearance in such matters before a court or a department or agency of the Government as agent or attorney for anyone other than the United States.[9] Where, in the year prior to the end of his service, a former officer or employee has changed areas of responsibility by transferring from one agency to another, the period of his postemployment ineligibility as to matters in a particular area ends 1 year after his responsibility for that area ends. For example, if an individual transfers from a supervisory position in the Internal Revenue Service to a supervisory position in the Post Office Department and leaves that department for private employment 9 months later, he will be free of the restriction of subsection (b) in 3 months insofar as Internal Revenue matters are concerned. He will of course be bound by it for a year in respect of Post Office Department matters.

The proviso following subsections (a) and (b) authorizes an agency head, notwithstanding anything to the contrary in their provisions, to permit a former officer or employee with outstanding scientific qualifications to act as attorney or agent or appear personally before the agency for another in a matter in a scientific field. This authority may be exercised by the agency head upon a "national interest" certification published in the FEDERAL REGISTER.

Subsections (a) and (b) describe the activities they forbid as being in connection with "particular matter(s) involving a specific party or parties" in which the former officer or employee had participated. The quoted language does not include general rulemaking, the formulation of general policy or standards, or other similar matters. Thus, past participation in or official responsibility for a matter of this kind on behalf of the Government does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of such matter.

Subsection (a) bars permanently a greater variety of actions than subsection (b) bars temporarily. The conduct made unlawful by the former is *any action as agent or attorney*, while that made unlawful by the latter is a *personal appearance as agent or attorney*. However, neither subsection precludes postemployment activities which may fairly be characterized as no more than aiding or assisting another.[10] An individual who has

[8] The prohibitions of the two subsections apply to persons ending service in these areas whether they leave the Government entirely or move to the legislative or judicial branch. As a practical matter, however, the prohibitions would rarely be significant in the latter situation because officers and employees of the legislative and judicial branches are covered by sections 203 and 205.

[9] Neither section 203 nor section 205 prevents a special Government employee, during his period of affiliation with the Government, from representing another person before the Government in a particular matter only because it is within his official responsibility. Therefore the inclusion of a *former* special Government employee within the 1-year postemployment ban of subsection (b) may subject him to a temporary restraint from which he was free prior to the end of his Government service. However, since special Government employees usually do not have "official responsibility," as that term is defined in section 202(b), their inclusion within the 1-year ban will not have a widespread effect.

[10] Subsection (a), as it first appeared in H.R. 8140, the bill which became Pub. L. 87-849, made it unlawful for a former officer or employee to act as agent or attorney for, or

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left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility—or, for that matter, in relation to one he helped the agency negotiate. On the other hand, he is forbidden for a year, in the first case to appear personally before the agency as the agent or attorney of his company in connection with a dispute over the terms of the contract. And he may at no time appear personally before the agency or otherwise act as agent or attorney for his company in such dispute if he helped negotiate the contract.

Comparing subsection (a) with the antecedent 18 U.S.C. 284 discloses that it follows the latter in limiting disqualification to cases where a former officer or employee actually participated in a matter for the Government. However, subsection (a) covers all matters in which the United States is a party or has a direct and substantial interest and not merely the "claims against the United States" covered by 18 U.S.C. 284. Subsection (a) also goes further than the latter in imposing a lifetime instead of a 2-year bar. Subsection (b) has no parallel in 18 U.S.C. 284 or any other provision of the former conflict in interest statutes.

It will be seen that subsections (a) and (b) in combination are less restrictive in some respects, and more restrictive in others, than the combination of the prior 18 U.S.C. 284 and 5 U.S.C. 99. Thus, former officers or employees who were outside the Government when the Act came into force on January 21, 1963, will in certain situations be enabled to carry on activities before the Government which were previously barred. For example the repeal of 5 U.S.C. 99 permits an attorney who left an executive department for private practice a year before to take certain cases against the Government immediately which would be subject to the bar of 5 U.S.C. 99 for another year. On the other hand, former officers or employees became precluded on and after January 21, 1963, from engaging or continuing to engage in certain activities which were permissible until that date. This result follows from the replacement of the 2-year bar of 18 U.S.C. 284 with the lifetime bar of subsection (a) in comparable situations, from the increase in the variety of matters covered by subsection (a) as compared with 18 U.S.C. 284 and from the introduction of the 1-year bar of subsection (b).

Subsection (c) of section 207 pertains to an individual outside the Government who is in a business or professional partnership with someone serving in the executive branch, an independent agency or the District of Columbia. The subsection prevents such individual from acting as attorney or agent for anyone other than the United States in any matters, including those in court, in which his partner in the Government is participating or has participated or which are the subject of his partner's official responsibility. Although included in a section dealing largely with postemployment activities, this provision is not directed to the postemployment situation.

The paragraph at the end of section 207 also pertains to individuals in a partnership but sets forth no prohibition. This paragraph, which is of importance mainly to lawyers in private practice, rules out the possibility that an individual will be deemed subject to section 203, 205, 207(a) or 207(b) solely because he has a partner who serves or has served in the Government either as a regular or a special Government employee.

New 18 U.S.C. 208. This section forbids certain actions by an officer or employee of the Government in his role as a servant or representative of the Government. Its thrust is therefore to be distinguished from that of sections 203 and 205 which forbid certain actions in his capacity as a representative of persons outside the Government.

Subsection (a) in substance requires an officer or employee of the executive branch, an independent agency or the District of Columbia, including a special Government employee, to refrain from participating as such in any matter in which, to his knowledge, he, his spouse, minor child or partner has a financial interest. He must also remove himself from a matter in which a business or nonprofit organization with which he is connected or is seeking employment has a financial interest.

Subsection (b) permits the agency of an officer or employee to grant him an *ad hoc* exemption from subsection (a) if the outside financial interest in a matter is deemed not substantial enough to have an effect on the integrity of his services. Financial interests of this kind may also be made nondisqualifying by a general regulation published in the FEDERAL REGISTER.

Section 208 is similar in purpose to the former 18 U.S.C. 434 but prohibits a greater variety of conduct than the "transaction of business with * * * [a] business entity" to which the prohibition of section 434 was limited. In addition, the provision in section 208 including the interests of a spouse and

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aid or assist, anyone in a matter in which he had participated. The House Judiciary Committee struck the underlined words, and the bill became law without them. It should be noted also that the repealed provisions of 18 U.S.C. 283 made the distinction between one's acting as agent or attorney for another and his aiding or assisting another.

others is new, is in the provisions authorizing exemptions for insignificant interests.

New 18 U.S.C. 209. Subsection (a) prevents an officer or employee of the executive branch, an independent agency or the District of Columbia from receiving, and anyone from paying him, any salary or supplementation of salary from a private source as compensation for his services to the Government. This provision uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance. The remainder of section 209 is new.

Subsection (b) specifically authorizes an officer or employee covered by subsection (a) to continue his participation in a bona fide pension plan or other employee welfare or benefit plan maintained by a former employer.

Subsection (c) provides that section 209 does not apply to a special Government employee or to anyone serving the Government without compensation, whether or not he is a special Government employee.

Subsection (d) provides that the section does not prohibit the payment or acceptance of contributions, awards or other expenses under the terms of the Government Employees Training Act (72 Stat. 327, 5 U.S.C. 2301-2319).

STATUTORY EXEMPTIONS FROM CONFLICT OF INTEREST LAWS

Congress has in the past enacted statutes exempting persons in certain positions—usually advisory in nature—from the provisions of some or all of the former conflict of interest laws. Section 2 of the Act grants corresponding exemptions from the new laws with respect to legislative and judicial positions carrying such past exemptions. However, section 2 excludes positions in the executive branch, an independent agency and the District of Columbia from this grant. As a consequence, all statutory exemptions for persons serving in these sectors of the Government ended on January 21, 1963.

RETIRED OFFICERS OF THE ARMED FORCES

Public Law 87-849 enacted a new 18 U.S.C. 206 which provides in general that the new sections 203 and 205, replacing 18 U.S.C. 281 and 283, do not apply to retired officers of the armed forces and other uniformed services. However, 18 U.S.C. 281 and 283 contain special restrictions applicable to retired officers of the armed forces which are left in force by the partial repealer of these statutes set forth in section 2 of the Act.

The former 18 U.S.C. 284, which contained a 2-year disqualification against postemployment activities in connection with claims against the United States, applied by its terms to persons who had served as commissioned officers and whose active service had ceased either by reason of retirement or complete separation. Its replacement, the broader 18 U.S.C. 207, also applies to persons in those circumstances. Section 207, therefore applies to retired officers of the armed forces and overlaps the continuing provisions of 18 U.S.C. 281 and 283 applicable to such officers although to a different extent than did 18 U.S.C. 284.

VOIDING TRANSACTIONS IN VIOLATION OF THE CONFLICT OF INTERESTS OR BRIBERY LAWS

Public Law 87-849 enacted a new section, 18 U.S.C. 218, which did not supplant a preexisting section of the criminal code. However, it was modeled on the last sentence of the former 18 U.S.C. 216 authorizing the President to declare a Government contract void which was entered into in violation of that section. It will be recalled that section 216 was one of the two statutes repealed without replacement.

The new 18 U.S.C. 218 grants the President and under presidential regulations, an agency head the power to void and rescind any transaction or matter in relation to which there has been a "final conviction" for a violation of the conflict of interest or bribery laws. The section also authorizes the Government's recovery, in addition to any penalty prescribed by law or in a contract, of the amount expended or thing transferred on behalf of the Government.

Section 218 specifically provides that the powers its grants are "in addition to any other remedies provided by law." Accordingly, it would not seem to override the decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), a case in which there was no "final conviction."

BIBLIOGRAPHY

Set forth below are the citations to the legislative history of Public Law 87-849 and a list of recent material which is pertinent to a study of the Act. The listed 1960 report of the Association of the Bar of the City of New York is particularly valuable. For a comprehensive bibliography of earlier material relating to the conflict of interest laws, see 13 Record of the Association of the Bar of the City of New York 223 (May 1958).

LEGISLATIVE HISTORY OF PUB. L. 87-849 (H.R. 8140, 87TH CONG.)

1. Hearings of June 1 and 2, 1961, before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, 87th Cong., 1st sess., ser. 3, on *Federal Conflict of Interest Legislation.*
2. H. Rept. 748, 87th Cong., 1st sess.
3. 107 Cong. Rec. 14774.
4. Hearing of June 21, 1962, before the Senate Judiciary Committee, 87th Cong., 2d sess., on *Conflict of Interest.*
5. S. Rept. 2213, 87th Cong., 2d sess.

6. 108 Cong. Rec. 20805 and 21130 (daily ed., October 3 and 4, 1962).

OTHER MATERIAL

1. President's special message to Congress, April 27, 1961, and attached draft bill, 107 Cong. Rec. 6835.

2. President's Memorandum of February 8, 1962, to the heads of executive departments and agencies entitled *Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government*, 27 FR 1341.

3. 42 Op. A.G. No. 6, January 31, 1962.

4. Memorandum of December 10, 1956, for the Attorney General from the Office of Legal Counsel re conflict of interest statutes, Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of House Judiciary Committee, 86th Cong., 2d sess., ser. 17, pt. 2, p. 619.

5. Staff report of Antitrust Subcommittee (Subcommittee No. 5) of House Judiciary Committee, 85th Cong., 2d sess., *Federal Conflict of Interest Legislation* (Comm. Print 1958).

6. Report of the Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (Harvard Univ. Press 1960).

[28 FR 985, Feb. 1, 1963]

SUMMARY OF POST-EMPLOYMENT RULES FOR GOVERNMENT LAWYERS

Subject of restriction	Statutory requirements	Bar requirements*
MATTERS IN WHICH FORMER EMPLOYEE HAD PERSONAL AND SUBSTANTIAL PARTICIPATION	18 U.S.C. § 207(a) - prohibits all employees from acting as agent or attorney for anyone (other than the U.S.) in any particular matters involving specific parties in which they participated personally and substantially while in government. Behind-the-scenes assistance and counselling are permitted but the parallel bar requirements prohibit all aspects of legal representation. This prohibition never expires.	New Model Rule 1.11, Old DR 9-101(B) and DR 5-105(D) - prohibit essentially the same conduct as 18 U.S.C. § 207 except that they prohibit all aspects of legal representation and counselling. The restrictions on the former employee never expire.
(imputed disqualification)	The federal post-employment restrictions carry no imputed disqualification to a former employee's partners or associates.	The above restriction is imputed to the former employee's law firm. See also, confidentiality restrictions below. An imputed disqualification can be eliminated by 1) screening (Chinese Wall) the disqualified attorney and 2) obtaining a waiver from the government (old rule) or giving notice to the government (new rule). The D.C. bar requires notice to the government and all other interested parties.)
MATTERS UNDER FORMER EMPLOYEE'S OFFICIAL RESPONSIBILITY	18 U.S.C. § 207(b)(i) - prohibits all employees from acting as agents or attorneys in particular matters involving specific parties that were under their official responsibility during their last year of government service. Behind-the-scenes assistance is permitted, but see bar rules re: confidentiality.	There is no parallel bar requirement and accordingly no imputation to the law firm.

*The precise requirements of the bar will depend upon whether the applicable rule is the new ABA Model Rule (new rule), the old ABA Disciplinary Rule (old rule), or a state variant of either one. This chart only paraphrases the ABA rules, but notes instances in which the essence of the old and new rules differs.

Subject of restriction	Statutory requirements	Bar requirements*
MATTERS UNDER FORMER EMPLOYEE'S OFFICIAL RESPONSIBILITY (Cont'd)	This prohibition is effective for two years. 18 U.S.C. § 207(b)(ii) - has no practical meaning because it is completely subsumed by subsections (a) and (b)(i).	
CONTACT WITH FORMER AGENCY	18 U.S.C. § 207(c) - prohibits senior employees from having any business contact with their former agency (or certain of its components). Personnel and ethics inquiries are permitted. This prohibition is effective for one year.	There is no parallel bar requirement and accordingly no imputation to the law firm.
CONFIDENTIALITY	There is no parallel statutory requirement, but former employees who had access to National Security information have special respon- sibilities of confidentiality. See also 28 C.F.R. § 16.21 (dealing with the disclosure of Department of Justice information in Federal and State proceedings.)	New Model Rules 1.6, 1.9 and 1.11(b) and Old Canon 4 - require lawyers to keep the confidences and secrets of their clients, unless they have a waiver. The requirement is enforced by prohibiting representation of new clients in matters that are "substantially related" to matters in which the lawyer acquired confidences for a former client and which are potentially adverse to the interests of the former client. In the case of former government lawyers, New Model Rule 1.11(b) prohibits such subsequent representation without regard to its adverseness to the government or the willingness of the government to permit the use of the information. This new rule extends to third parties the protection of client confidentiality for information acquired by lawyers working for the government. These restrictions never expire.
(imputed disqualification)		The above restrictions are also imputed to the law firm, but can be eliminated by screening. See discussion above.

Subject of restriction	Statutory requirements	Bar requirements*
FEES	18 U.S.C. § 203 - prohibits present and former employees from accepting any fee for services rendered, by themselves or another, before a government agency (excluding courts), if those services were rendered during the period of their government employment. For former government lawyers who become partners in firms practicing before federal agencies, this restriction may require some special accounting methods for their first several months in private practice. The restriction never experts, but as a practical matter the Department will only require special accounting procedures for a period reasonably calculated to serve the purposes of the statute. The payment of such fees is also prohibited, so in this sense a former employee's law firm is also subject to the restriction.	There is no parallel bar restriction.

§ 552a. Records maintained on individuals

(a) Definitions

For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; and

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a

notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his r[illegible]ts under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willfu .he United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal

laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records

Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision

shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report

The President shall annually submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding year;

(2) describing the exercise of individual rights of access and amendment under this section during such year;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(Added Pub. L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub. L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Pub. L. 97-365, § 2, Oct. 25, 1982, 96 Stat. 1749; Pub. L. 97-375, title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub. L. 97-452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478.)

REFERENCES IN TEXT

For effective date of this section, referred to in subsecs. (a)(2), (5), (7), (l)(2), (3), and (m), see Effective Date note below.

For classification of the Privacy Act of 1974, referred to in subsec. (p)(4), see Short Title note below.

Section 6 of the Privacy Act of 1974, referred to in subsec. (p)(1), is section 6 of Pub. L. 93-579, set out below.

CODIFICATION

Section 552a of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2244 of Title 7, Agriculture.

AMENDMENTS

1983—Subsec. (b)(12). Pub. L. 97-452 substituted "section 3711(f) of title 31" for "section 3(d) of the Federal Claims Collection Act of 1966 (31 U.S.C. 952(d))".

Subsec. (m)(2). Pub. L. 97-452 substituted "section 3711(f) of title 31" for "section 3(d) of the Federal Claims Collection Act of 1966 (31 U.S.C. 952(d))".

1982—Subsec. (b)(12). Pub. L. 97-365, § 2(a), added par. (12).

Subsec. (e)(4). Pub. L. 97-375, § 201(a), substituted "upon establishment or revision" for "at least annually" after "Federal Register".

Subsec. (m). Pub. L. 97-365, § 2(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (p). Pub. L. 97-375, § 201(b), substituted provisions requiring the annual submission of a report by the President to the Speaker of the House and President pro tempore of the Senate relating to the Director of the Office of Management and Budget, individual rights of access, changes or additions to systems of records, and other necessary or useful information, for provisions which had directed the President to submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicate efforts to administer fully this section.

1975—Subsec. (g)(5). Pub. L. 94-183 substituted "to September 27, 1975" for "to the effective date of this section".

EFFECTIVE DATE

Section 8 of Pub. L. 93-579 provided that: "The provisions of this Act [enacting this section and provisions set out as notes under this section] shall be effective on and after the date of enactment [Dec. 31, 1974], except that the amendments made by sections 3 and 4 [enacting this section and amending analysis preceding section 500 of this title] shall become effective 270 days following the day on which this Act is enacted."

DELEGATION OF FUNCTIONS

Functions of the Director of the Office of Management and Budget under this section were delegated to the Administrator for the Office of Information and Regulatory Affairs by section 3 of Pub. L. 96-511, Dec. 11, 1980, 94 Stat. 2825, set out as a note under section 3503 of Title 44, Public Printing and Documents.

SHORT TITLE

Section 1 of Pub. L. 93-579 provided: "That this Act [enacting this section and provisions set out as notes under this section] may be cited as the 'Privacy Act of 1974'."

CONGRESSIONAL FINDINGS AND STATEMENT OF PURPOSE

Section 2 of Pub. L. 93-579 provided that:

"(a) The Congress finds that—

"(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

"(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

"(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

"(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

"(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance,

use, and dissemination of information by such agencies.

"(b) The purpose of this Act [enacting this section and provisions set out as notes under this section] is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

"(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

"(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

"(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

"(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

"(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

"(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

PRIVACY PROTECTION STUDY COMMISSION

Section 5 of Pub. L. 93-579, as amended by Pub. L. 95-38, June 1, 1977, 91 Stat. 179, which established the Privacy Protection Study Commission and provided that the Commission study data banks, automated data processing programs and information systems of governmental, regional and private organizations to determine standards and procedures in force for protection of personal information, that the Commission report to the President and Congress the extent to which requirements and principles of section 552a of title 5 should be applied to the information practices of those organizations, and that it make other legislative recommendations to protect the privacy of individuals while meeting the legitimate informational needs of government and society, ceased to exist on September 30, 1977, pursuant to section 5(g) of Pub. L. 93-579.

GUIDELINES AND REGULATIONS FOR MAINTENANCE OF PRIVACY AND PROTECTION OF RECORDS OF INDIVIDUALS

Section 6 of Pub. L. 93-579 provided that:

"The Office of Management and Budget shall—

"(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

"(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies."

DISCLOSURE OF SOCIAL SECURITY NUMBER

Section 7 of Pub. L. 93-579 provided that:

"(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

"(2) The provisions of paragraph (1) of this subsection shall not apply with respect to—

"(A) any disclosure which is required by Federal statute, or

"(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

AUTHORIZATION OF APPROPRIATIONS TO PRIVACY PROTECTION STUDY COMMISSION

Section 9 of Pub. L. 93-579, as amended by Pub. L. 94-394, Sept. 3, 1976, 90 Stat. 1198, authorized appropriations for the period beginning July 1, 1975, and ending on September 30, 1977."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 552b, 3111, 7133 of this title; title 7 section 2204b; title 16 sections 410cc-35, 1536; title 20 section 1080; title 26 section 6103; title 31 sections 3701, 3711, 3716; title 38 section 3301; title 39 section 410; title 42 sections 423, 1306, 3525; title 44 sections 2906, 3501, 3504.

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

[*See main edition for text of* (2) *and* (3); (m) *to* (p)]

(q) Effect of other laws

(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(As amended Pub. L. 98-477, § 2(c), Oct. 15, 1984, 98 Stat. 2211; Pub. L. 98-497, title I, § 107(g), Oct. 19, 1984, 98 Stat. 2292.)

AMENDMENTS

1984—Subsec. (b)(6). Pub. L. 98-497, § 107(g)(1), substituted "National Archives and Records Administration" for "National Archives of the United States", and "Archivist of the United States or the designee of the Archivist" for "Administrator of General Services or his designee".

Subsec. (l)(1). Pub. L. 98-497, § 107(g)(2), substituted "Archivist of the United States" for "Administrator of General Services" in two places.

Subsec. (q). Pub. L. 98-477 designated existing provisions as par. (1), and added par. (2).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-497 effective Apr. 1, 1985, see section 301 of Pub. L. 98-497, set out as a note under section 2102 of Title 44, Public Printing and Documents.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 552b, 3111, 7133 of this title; title 7 section 2204b; title 16 sections 410cc-35, 1536; title 20 section 1080; title 25 sections 6103, 7852; title 31 sections 3701, 3711, 3718; title 38 section 3301; title 39 section 410; title 42 sections 402, 405, 1306, 3525; title 44 sections 2906, 3501, 3504; title 46 sections 7702, 9303.

§ 552a. Records maintained on individuals

[*See main edition for text of* (a)]

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

[*See main edition for text of* (1) *to* (5)]

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

[*See main edition for text of* (7) *to* (12); (c) *to* (k)]

(l) Archival records

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

~~(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.~~

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an age y to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1002.	June 11, 1946, ch. 324, § 3, 60 Stat. 238.

In subsection (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsection (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 [of Pub. L. 90-23] amends section 552 of title 5, United States Code, to reflect Public Law 89-487.

In subsection (a)(1)(A), the words "employees (and in the case of a uniformed service, the member)" are substituted for "officer" to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words "A final order * * * may be relied on * * * only if" are substituted for "No final order * * * may be relied upon * * * unless"; and the words "a party other than an agency" and "the party" are substituted for "a private party" and "the private party", respectively, on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words "the responsible employee, and in the case of a uniformed service, the responsible member" are substituted for "the responsible officers" to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words "shall maintain and make available for public inspection a record" are sub-

stituted for "shall keep a record * * * and that record shall be available for public inspection".

In subsection (b)(5) and (7), the words "a party other than an agency" are substituted for "a private party" on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (c), the words "This section does not authorize" and "This section is not authority" are substituted for "Nothing in this section authorizes" and "nor shall this section be authority", respectively.

5 App. U.S.C. 1002(g), defining "private party" to mean a party other than an agency, is omitted since the words "party other than an agency" are substituted for the words "private party" wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

1978—Subsec. (a)(4)(F). Pub. L. 95-454 substituted references to the Special Counsel for references to the Civil Service Commission wherever appearing therein and reference to his findings for reference to its findings.

1976—Subsec. (b)(3). Pub. L. 94-409 added provision excluding section 552b of this title from applicability of exemption from disclosure and provision setting forth conditions for statute specifically exempting disclosure.

1974—Subsec. (a)(2). Pub. L. 93-502, § 1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and added provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a)(3). Pub. L. 93-502, § 1(b)(1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a)(4). Pub. L. 93-502, § 1(b)(2), added par. (4). Former par. (4) redesignated (5).

Subsec. (a)(5). Pub. L. 93-502, § 1(b)(2), redesignated former par. (4) as (5).

Subsec. (a)(6). Pub. L. 93-502, § 1(c), added par. (6).

Subsec. (b)(1). Pub. L. 93-502, § 2(a), designated existing provisions as cl. (A), and, as so designated, substituted "authorized under criteria established by an" for "required by", and added cl. (B).

Subsec. (b)(7). Pub. L. 93-502, § 2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b), foll. par. (9). Pub. L. 93-502, § 2(c), added provision relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. 93-502, § 3, added subsecs. (d) and (e).

1967—Subsec. (a). Pub. L. 90-23 substituted the introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, covered in subsec. (b) (1) and (2) of this section.

Subsec. (a)(1). Pub. L. 90-23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and deleting publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec. (b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b)(3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading "A person may not be required to resort to organization or procedure not so published" and added provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference in the Federal Register with the approval of its Director.

Subsec. (a)(2). Pub. L. 90-23 incorporated provisions of former subsec. (c), provided for public copying of records, eliminated requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including therein provision for availability of concurring and dissenting opinions, added provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a)(3). Pub. L. 90-23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for federal district court proceedings de novo for enforcement by contempt of noncompliance with court's orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision superseded by subsec. (b) of this section.

Subsec. (a)(4). Pub. L. 90-23 added par. (4).

Subsec. (b). Pub. L. 90-23 added subsec. (b) which superseded provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub. L. 90-23 added subsec. (c).

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 4 of Pub. L. 93-502 provided that: "The amendments made by this Act [amending this section] shall take effect on the ninetieth day beginning after the date of enactment of this Act [Nov. 21, 1974]."

EFFECTIVE DATE OF 1967 AMENDMENT

Section 4 of Pub. L. 90-23 provided that: "This Act [amending this section] shall be effective July 4, 1967, or on the date of enactment [June 5, 1967], whichever is later."

SHORT TITLE

This section is popularly known as the Freedom of Information Act.

EXECUTIVE ORDER No. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, set out as a note under section 601 of this title.

CROSS REFERENCES

Federal Register Act, see section 1502 et seq. of Title 44, Public Printing and Documents.

Section applicable to functions exercised under International Wheat Agreement Act of 1949, see section 1642 of Title 7, Agriculture.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 551, 552a, 552b, 1206, 7133 of this title; title 2 sections 472, 501, 502; title 7 section 1642; title 15 sections 18a, 57b-2, 78m, 78w, 78x, 78ggg, 719d, 773, 796, 1314, 1418, 2055, 2217, 2613, 3364, 3705; title 16 sections 1100b-5, 1402; title 20 sections 2836, 2837; title 21 sections 360d, 360j, 379, 830; title 22 section 3902; title 25 section 1951; title 26 section 6110; title 30 section 1604; title 31 sections 716, 5319; title 33 sections 524, 941, 1513; title 35 sections 202, 209; title 39 section 410; title 42 sections 242k, 300v-2, 1306, 2167, 2168, 2996d, 3527, 4332, 5916, 5919, 6272-6274, 6346, 7135, 8103, 8717, 9122, 9208; title 44 sections 2201, 2204, 2206; title 45 section 546; title 46 sections 93, 1463; title 49 sections 10310, 10706, 11164, 11346; title 49 App. sections 1357, 1805, 1806, 1905; title 50 App. sections 463, 2158, 2158a, 2159, 2406, 2411.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

[See main edition for text of (1) to (3)]

(4) [*See main edition for text of (A) to (C)*]
[(D) Repealed. Pub. L. 98-620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

[See main edition for text of (E) to (G), (5) and (6); (b) to (e)]

(As amended Pub. L. 98-620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.)

AMENDMENTS

1984—Subsec. (a)(4)(D). Pub. L. 98-620 repealed subpar. (D) which provided for precedence on the docket and expeditious disposition of district court proceedings authorized by subsec. (a).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 551, 552a, 552b, 1206, 7133 of this title; title 2 sections 472, 501, 502; title 7 sections 608d, 1642; title 10 section 2304; title 15 sections 18a, 57b-2, 78m, 78w, 78x, 78ggg, 633, 719d, 773, 796, 1314, 1335a, 1418, 2029, 2032, 2055, 2217, 2613, 3364, 3705, 4019, 4104, 4107, 4305; title 16 section 1402; title 19 sections 1431, 2415; title 20 sections 2836, 2837; title 21 sections 360d, 360j, 379, 830; title 22 sections 2200a, 3902, 4415, 4604, 4607; title 25 section 1951; title 26 sections 6110, 7611; title 28 section 1657; title 30 section 1604; title 31 sections 716, 5319; title 33 sections 524, 941, 1513; title 35 sections 202, 209; title 39 section 410; title 41 section 253; title 42 sections 242k, 300v-2, 405, 1306, 1320c-9, 2167, 2168, 2996d, 3527, 4332, 5916, 5919, 6272-6274, 6346, 7135, 8103, 8717, 9122, 9208, 10704; title 44 sections 2201, 2204, 2206; title 45 section 546; title 46 sections 4309, 7702, 9303; title 46 App. sections 93, 1705; title 49 sections 10310, 10706, 11164, 11346; title 49 App. sections 1357, 1805, 1806, 1905, 2511, 2608; title 50 section 431; title 50 App. sections 463, 2158, 2158a, 2159, 2406, 2411.

§ 7324. Influencing elections; taking part in political campaigns; prohibitions; exceptions

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to—

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Mayor of the District of Columbia, the members of the Council of the District of Columbia, or the Chairman of the Council of the District of Columbia, as established by the District of Columbia Self-Government and Governmental Reorganization Act; or

(5) the Recorder of Deeds of the District of Columbia.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 525; Pub. L. 93-268, § 4(a), Apr. 17, 1974, 88 Stat. 87.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
(a)	5 U.S.C. 118i(a) (1st 2 sentences).	Aug. 2, 1939, ch. 410, § 9(a) (1st 2 sentences), 53 Stat. 1148.
		Mar. 27, 1942, ch. 199, § 701, 56 Stat. 181.
	5 U.S.C. 118k-3 (1st 33 words).	July 19, 1940, ch. 640, § 4 "Sec. 14 (1st 33 words)", 54 Stat. 771.
	5 U.S.C. 118l (less applicability to 5 U.S.C. 118k).	July 19, 1940, ch. 640, § 4 "Sec. 15 (less applicability to § 12 of the Act of Aug. 2, 1939; added July 19, 1940, ch. 640, § 4, 54 Stat. 767)", 54 Stat. 771.
(b)	5 U.S.C. 118i(a) (3d sentence).	Aug. 2, 1939, ch. 410, § 9(a) (3d sentence), 53 Stat. 1148.
		July 19, 1940, ch. 640, § 2, 54 Stat. 767.
(c)	5 U.S.C. 118k-1 (less applicability to 5 U.S.C. 118k).	Oct. 24, 1942, ch. 620, "Sec. 21 (less applicability to § 12 of the Act of Aug. 2, 1939; added July 19, 1940, ch. 640, § 4, 54 Stat. 767)" 56 Stat. 986.
(d)	5 U.S.C. 118i(a) (4th sentence).	Aug. 2, 1939, ch. 410, § 9(a) (4th sentence), 53 Stat. 1148.
	5 U.S.C. 118k-3 (less 1st 33 words).	July 19, 1940, ch. 640, § 4 "Sec. 14 (less 1st 33 words)", 54 Stat. 771.

In subsection (a), the words "July 19, 1940" are substituted for "at the time this section takes effect". The amendment made by the Act of Mar. 27, 1942, is omitted because it expired Mar. 31, 1947, under section 1501 of that Act, as added June 29, 1946, ch. 526, § 1, 60 Stat. 345; 50A U.S.C. 645.

In subsection (c), the reference in the Act of Oct. 24, 1942, to section 2 of the Act of Aug. 2, 1939, is omitted as that section was repealed by the Act of June 25, 1948, ch. 645, § 21, 62 Stat. 867, and is now covered by section 595 of title 18.

In subsection (d), the exception for the President and Vice-President of the United States is omitted as unnecessary, as they are not "employees" under the definition in section 2105. In subsection (d)(2), the words "or military departments" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this subsection, which was in effect in 1949, remained applicable to the head or assistant head of a military department by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1974—Subsec. (d)(4). Pub. L. 93-268 substituted "the Mayor of the District of Columbia, the members of the Council of the District of Columbia, or the Chairman of the Council of the District of Columbia, as established by the District of Columbia Self-Government and Governmental Reorganization Act" for "the Commissioners of the District of Columbia".

COMMISSIONER OF THE DISTRICT OF COLUMBIA AND MEMBERS OF THE DISTRICT OF COLUMBIA COUNCIL EXEMPTED FROM PROHIBITIONS

Section 4(b) of Pub. L. 93-268 provided that: "Notwithstanding any other provision of law, the provisions of section 7324(a)(2) of title 5, United States Code, shall not be applicable to the Commissioner of the District of Columbia or the members of the District of Columbia Council (including the Chairman and Vice Chairman), as established by Reorganization Plan Numbered 3 of 1967 [set out in the Appendix to this title]."

CROSS REFERENCES

Political activities of State and local officers and employees, see section 1501 et seq. of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7325, 7326, 7327 of this title; title 42 sections 1973d, 2000e-4; title 50 App. section 463.

§ 7325. Penalties

An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 526; Pub. L. 96-54, § 2(a)(44), Aug. 14, 1979, 93 Stat. 384.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1... .b) (less last proviso, and less last sentence).	Aug. 2, 1939, ch. 410, § 9(b), 53 Stat. 1148. Aug. 25, 1950, ch. 784, § 1 "Sec. 9(b) (less last proviso, and less last sentence)", 64 Stat. 475. Oct. 5, 1962, Pub. L. 87-753, 76 Stat. 750.

The word "removed" is substituted for "removed immediately" because of the provisions of the Veterans' Preference Act of 1944, 58 Stat. 387, as amended, which is carried into this title. The words "or office" are omitted as included in "position". The words "by any Act of Congress" are omitted as unnecessary.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1979—Pub. L. 96-54 substituted "Merit Systems Protection Board" for "Civil Service Commission" and "Board" for "Commission".

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as an Effective Date of 1979 Amendment note under section 305 of this title.

§ 7326. Nonpartisan political activity permitted

Section 7324(a)(2) of this title does not prohibit political activity in connection with—

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 526.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 118n (less applicability to 5 U.S.C. 118k(a)).	July 19, 1940, ch. 640, § 4 "Sec. 18 (less applicability to § 12 of the Act of Aug. 2, 1939; added July 19, 1940, ch. 640, § 4, 54 Stat. 767)", 54 Stat. 772.

The words "or political part of a territory or possession of the United States" are added on authority of former section 118k-2, which is carried into section 1501.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 7327. Political activity permitted; employees residing in certain municipalities

(a) Section 7324(a)(2) of this title does not apply to an employee of The Alaska Railroad who resides in a municipality on the line of the railroad in respect to political activities involving that municipality.

(b) The Office of Personnel Management may prescribe regulations permitting employees and individuals to whom section 7324 of this title applies to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside, to the extent the Office considers it to be in their domestic interest, when—

(1) the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or is a municipality in which the majority of voters are employed by the Government of the United States; and

(2) the Office determines that because of special or unusual circumstances which exist in the municipality or political subdivision it is in the domestic interest of the employees and individuals to permit that political participation.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 526; Pub. L. 96-54, § 2(a)(14), (15), Aug. 14, 1979, 93 Stat. 382.)

REPEAL OF SUBSEC. (a)

Pub. L. 97-468, title VI, § 615(b)(1)(E), Jan. 14, 1983, 96 Stat. 2578, provided that, on the date of transfer of the Alaska Railroad to the State pursuant to section 1203 of Title 45, Railroads, or other disposition pursuant to section 1210 of Title 45, whichever occurs first, this section is amended by striking out subsection (a), and by striking the subsection designation "(b)".

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(a)	5 U.S.C. 118l(a) (less 1st 4 sentences).	Aug. 8, 1946, ch. 904, 60 Stat. 937.
(b)	5 U.S.C. 118m.	July 19, 1940, ch. 640 § 4 "Sec. 16", 54 Stat. 771.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1979—Subsec. (b). Pub. L. 96-54 substituted "Office of Personnel Management" for "Civil Service Commission", and "Office" for "Commission" wherever appearing therein.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as an Effective Date of 1979 Amendment note under section 305 of this title.

§ 7328. General Accounting Office employees

The preceding provisions of this subchapter shall not apply to employees of the General Accounting Office

(Added Pub. L. 96-191, § 8(e)(1), Feb. 15, 1980, 94 Stat. 33.)

EFFECTIVE DATE

Section effective Oct. 1, 1980, see section 10(a) of Pub. L. 96-191.

Office of the Attorney General
Washington, D.C. 20530

May 26, 1983

MEMORANDUM TO ALL OFFICES, BOARDS, DIVISIONS AND BUREAUS

Re: Partisan Political Activity by Department of Justice Employees

It is important that the Department of Justice and its employees refrain from participation in partisan political activities. The American people must be assured that the administration of justice is not a partisan matter. Accordingly I take this opportunity to reiterate a long standing policy of this Department which is fully set forth in my memorandum of July 9, 1982, a copy of which is attached. Please take the steps necessary to ensure that all employees under your supervision are aware of its contents.

William French Smith
Attorney General

Attachment

A-1.16.2

Office of the Attorney General
Washington, D. C. 20530

July 9, 1982

MEMORANDUM TO ALL OFFICES, BOARDS, DIVISIONS and BUREAUS

Re: The Hatch Act

The Hatch Act, 5 U.S.C. §§ 7324 et seq., restricts the ability of Federal employees to participate actively in partisan political management and partisan political campaigns. The Department of Justice has maintained a longstanding policy requiring compliance with the Hatch Act by all of its officers and employees, including those who are exempt from coverage by the statute. See 5 U.S.C. § 7324(d). I want to take this opportunity to reaffirm that policy, and to remind you of some of the substantive restrictions on political activity that apply to Federal employees.

Generally, the Hatch Act prohibits employees from using their official authority or influence to interfere with or affect the result of an election and from taking an active part in partisan political management or campaigns. You should be aware that the prohibitions of the Hatch Act are in effect whether an employee is on or off duty, and that they apply to employees on leave, including employees on leave without pay. */ The following list of prohibited and permissible activities was developed from the Hatch Act regulations published by the Office of Personnel Management. 5 C.F.R. §§ 733.111 and 733.122.

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*/ Most municipalities and political subdivisions in the Washington, D.C. vicinity have been exempted from certain of the Hatch Act's restrictions. These are listed in 5 C.F.R. § 733.124. Employees who reside in these localities may take an active part in political management or in political campaigns in connection with partisan elections for local offices, so long as the participation is as, on behalf of, or in opposition to an independent candidate. Generally, independent candidates are ones who have not been nominated by a political party. Questions concerning the "independence" of a particular candidate should be addressed to the Office of Personnel Management.

Permissible Activities

Each employee retains the right to - A-1.16.3

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button in situations that are not connected to his official duties;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with the restrictions set forth below.

(6) Attend a political convention, rally, fund-raising function, or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization; (but see 18 U.S.C. § 603 [dealing with contributions to one's Federal employer.]);

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election in a local city listed in 5 C.F.R. § 733.124 (see footnote on preceding page);

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

Prohibited Activities

Employees may not take an active part in political management or campaigns. Prohibited activities include, but are not limited to the following:

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election or of a political party, or political club;

(5) Taking an active part in managing the political campaign of a candidate for public office in a partisan election or a candidate for political party office.

(6) Becoming a candidate for, or campaigning for, an elective public office in a partisan election;

(7) Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate in a partisan election;

(9) Driving voters to the polls on behalf of a political party or a candidate in a partisan election;

(10) Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

William French Smith
Attorney General

United States
Department of Justice

Order

OBD 2110.13

Sep. 28, 1978

Subject: APPROVAL OF, AND RATES FOR, EXPERT WITNESS EXPENSES

1. PURPOSE. This order establishes a new schedule of rates to be used as a basis for negotiating compensation payable to expert witnesses. Also, this order serves to reemphasize the need to have prior approval before incurring expenses for expert witnesses.

2. SCOPE. This order is applicable to all U. S. Attorneys' Offices and the Legal Division attorneys.

3. CANCELLATION. Notice OBD N 2110, dated September 10, 1976, is canceled.

4. PRIOR APPROVAL. The Assistant Attorney General for Administration is responsible for the control of Appropriation 15-0311, Fees and Expenses of Witnesses.

   a. In order for the control to be maintained, all expert witness expenses must have the PRIOR approval of the Assistant Attorney General for Administration, the Deputy Assistant Attorney General for Administration or one of the following officials to whom authority is hereby delegated:

      (1) Authority to approve or disapprove requests within or exceeding the established rates, or not covered by the rate schedule, is delegated to the Director, Administrative Programs Management Staff, and the Assistant Director, Procurement Management Group, APMS.

      (2) Authority to approve or disapprove requests within the established rates is delegated to the Chief and the Senior Special Authorizations Technician, Procurement Operations Section, Procurement Management Group, APMS.

   b. All requests must be submitted to the:

      Office of Management and Finance
      ATTN: Special Authorizations
      U. S. Department of Justice
      Washington, D. C. 20530

   The teletype routing indicator for the Special Authorizations on the Departmental teletype network (JUST SYSTEM) is JACCT. Procedures covering the preparation of the request forms are contained in the JUST System directive .

OBD 2110.13
Sep. 28, 1978

5. SCHEDULE OF RATES.

a. The rates listed below are the rates normally paid to expert witnesses for services most commonly required. The higher rates are applicable to those metropolitan areas having generally higher costs. Attorneys shall negotiate with EACH expert witness to insure that his services are obtained at the lowest possible rate.

b. Daily rates should be negotiated in cases where more than two hours service is anticipated. Hourly rates may be negotiated if the cost does not exceed the maximum daily rate.

c. For experts in categories other than those listed, attorneys should use prevailing rates in their local area as guidelines for negotiations. When local prevailing rates are used as a guideline instead of those listed in the Department's rate schedule, a copy of the source for these rates shall be submitted with the request to support the rates. Rates for these experts should not exceed $250 per day.

d. In addition to the fees listed below, REASONABLE travel and other miscellaneous expenses necessary to the case may be allowed. Travel expenses should be limited to the same expenses allowed for government employee travel. Travel expenses requested in excess of the applicable Standard Government Travel Regulations shall be supported by a complete justification. Other miscellaneous expenses will be limited to actual costs. NOTE: The expert fee will not be paid for travel time.

An estimate of these expenses should be submitted with the request for authorization of fees.

TYPE OF EXPERT	HOURLY RATE (2 HOURS MAXIMUM)	DAILY RATE
Accountants and Auditors		
Preparation	$25 to $60	$75 to $250
Testimony	$25 to $75	$75 to $300
Appraisers (Real estate)		
Preparation	$30 to $75	$75 to $250
Testimony	$30 to $90	$75 to $250
Appraisers (Stock, jewelry, coins, etc.)		
Preparation	$25 to $50	$75 to $175
Testimony	$25 to $60	$75 to $200

TYPE OF EXPERT	HOURLY RATE (2 HOURS MAXIMUM)	DAILY RATE
Chemists		
Analysis	$15 to $25	$30 to $100
Testimony	$25 to $35	$50 to $100
Economists		
Preparation	$35 to $60	$150 to $250
Testimony	$40 to $75	$150 to $300
Engineers		
Preparation	$25 to $40	$75 to $200
Testimony	$25 to $50	$75 to $250
Handwriting Experts (Voice print, polygraph, etc.)		
Examinations	$25 to $50	$50 to $125
Testimony	$35 to $50	$50 to $175
Geologists and Mining Experts		
Preparation	$25 to $40	$75 to $200
Testimony	$25 to $50	$75 to $250
Obscenity Experts		
Preparation	$35 to $50	$75 to $175
Testimony	$35 to $50	$75 to $200
Physicians (Nonspecialists)		
Examinations	$35 to $60	$75 to $250
Testimony	$40 to $75	$100 to $300
Physicians (Specialists other than psychiatrists)		
Examinations	$50 to $100	$75 to $300
Testimony	$50 to $100	$100 to $500
Psychiatrists		
Examinations	$25 to $100	$50 to $250
Testimony	$35 to $100	$75 to $300

TYPE OF EXPERT	HOURLY RATE (2 HOURS MAXIMUM)	DAILY RATE
Psychologists -		
Examinations	$25 to $50	$50 to $200
Testimony	$25 to $50	$75 to $300

for KEVIN D. ROONEY
Assistant Attorney General
for Administration

Department of Justice

Request and Authorization For Fees and Expenses Of Witnesses

Justice Management Division, Office of Personnel and Administration, Property Management and Procurement Staff, Procurement Management Section, Special Authorizations Unit

Part I–Request

ne/Title of Recommending Official	1a Signature of Recommending Official	2. Date	2a. DJ File Number
ne of Person to be Contacted	4. Telephone Number	5. Case and Number	
ision or Judicial District	7. Location	8. Request ☐ a. Original ☐ b. Supplemental ☐ c. Prior Telephone Date _____	

ison for Request

- ☐ a. Expert Witness Testifying on Behalf of U.S. (*Specify Type*) _____
- ☐ b. Medical Examination of Plaintiff, Witness or Defendant in Contemplation of Testimony on behalf of U.S.
- ☐ c. Examination Under Sec. 4244, Title 18 U.S.C. Mental Competency to Stand Trial
- ☐ d. Dual Purpose Examination (*Psychiatric*) (1) On Motion of _____ (2) Court Order Number _____ (3) Under Criminal Justice Act Yes _____ No _____
- ☐ e. Unusual Witness Expenses (*Specify*) _____

ame and Address of Payee	11. Anticipated Dates of Service (*In Conjunction with Block 12*) Indicate Amounts to be Charged to each Fiscal Year a. Examination _____ b. Preparation _____ c. Court Attendance _____

xpense Detail	PAYABLE BY DOJ		PAYABLE BY DOJ
Examination Hours or ____ Days Rate $ ____	$	d. Other (*Specify*)	$
. Preparation . Hours or ____ Days Rate $ ____	$		
Court Attendance . Hours or ____ Days Rate $ ____	$	e. Total Estimated Expense (a–d)	$

lanation and Justification

Part II–Authorization

ate _____

pproved/Disapproved

mount Authorized $

iscal Control Number

6. Remarks

TO: CR NO: _____

FROM: DATE: _____

UNITED STATES TRUSTEE CRIMINAL REFERRAL FORM

I. SYNOPSIS OF REFERRAL

NATURE OF COMPLAINT:
( ) "bankruptcy crime" 18 U.S.C. § 151, et seq.
( ) other crime, _____
_____

SUSPECTED LOSS $_____

REFERRAL PERTAINS TO:
( ) debtor (or principals)
( ) trustee
( ) attorney/accountant
( ) creditor
( ) public official **
( ) other _____

II. DEBTOR CASE INFORMATION

(1) debtor(s) name(s) _____
address _____
_____ (zip) _____
phone number(s) (home) _____ (office) _____
social security no. _____
employer I.D. no. _____

debtor's attorney _____
business address _____
_____ (zip) _____
office phone number _____

(2) case no._____ date filed:_____
court where petition pending:_____
judge assigned to case:_____
case administered as:
( ) voluntary
( ) involuntary
( ) chapter 7
( ) chapter 11
( ) chapter 13
assets reported _____
liabilities reported _____
number of creditors _____ secured _____ unsecured
trustee appointed _____
address _____
_____ (zip) _____
phone number _____
date appointed _____

(**Please consult with EOUST to determine whether initial referral should be made at national, rather than local, level.)

III. IF DEBTOR ENGAGED IN BUSINESS, PLEASE COMPLETE FOLLOWING:

(1) Form of business ownership ( ) sole proprietorship
( ) partnership
( ) corporation

(2) Briefly describe nature of business (e.g. retail merchandiser, service industry, manufacturer):

(3) Where and in whose possession are the business records currently located?

(4) Give names and addresses of all principals, partners, shareholders, directors, officers, insiders and managers.

(5) How long has the business operated and at what location(s)?

(6) How long has the business operated under the current ownership?

IV. IF DEBTOR IS IN CHAPTER 11, COMPLETE THE FOLLOWING:

(1) If a creditors' committee was formed, please furnish the name, address and phone number for the contact:

(2) Is the business still operating and, if so, under whose control and to what extent?

P. 3 CR NO._____

V. COMPLAINT

(1) Name and address of the person suspected of criminal violation (include date of birth and social security number if known):

(2) Give a chronological and complete account of suspected violation (include, to the extent possible, date, time and place of violation, description and value of any property involved, the person(s) who benefited from the violation, the person(s) who suffered a loss, statements made by the suspect).

(if necessary, please use continuation statement to complete narrative and attach copies of pertinent documentation)

(3) Please furnish names, addresses and phone numbers for all persons with information and indicate, generally, what information they may possess, whether they have been questioned in connection with the allegations contained in this referral, and whether they have already agreed to cooperate.

(4) Who discovered the suspected violation and when?

(5) Indicate whether the suspected violation appears to be an isolated incident or whether it relates to other transactions or bankruptcies and explain.

(6) What actions, if any, have been taken to recover the loss?

(7) Has this violation been reported to any other law enforcement authority or to any other federal or state agency? If so, by whom, to whom, when and disposition?

(8) Has this debtor or the subject of this referral been the subject of any other criminal referral? If so, state by whom, to whom, when and briefly describe the nature of the charges.

(9) For each person who is the subject of this referral, furnish any known aliases or prior names and former addresses (at least city and state).

P. 5 CR NO._____

The preparer of this form is available to assist the recipient in locating documents or explaining any matters related to the subject of this referral.

Form prepared by _____

Position _____

Agency _____

_____

Telephone _____

A copy of this criminal referral form has been filed with the Executive Office of United States Trustees, Department of Justice, Washington, D.C. 20530. Copies have also been distributed to the following agencies: (check and complete, as appropriate)

( ) United States Attorney Office
address:_____
_____
_____
contact:_____

( ) Federal Bureau of Investigation
address:_____
_____
_____
contact:_____

( ) _____
_____
_____
_____
contact:_____

DETAILED TABLE OF CONTENTS FOR CHAPTER 41

9-41.000 BANKRUPTCY FRAUDS

The criminal provisions relating to bankruptcy were enacted to preserve honest administration in bankruptcy proceedings and to ensure the distribution to creditors of as large a portion of the bankrupt's estate as possible. These criminal sanctions are embodied in Title 18, United States Code, Sections 151-155.

Section §151 makes it clear that the following provisions, 18 U.S.C. §§152-155, are applicable not only to bankruptcy proceedings but to any proceeding, arrangment or plan under the Bankruptcy Act, Title 11, United States Code. As defined:

> The term "bankrupt" means a debtor by or against whom a petition has been filed under Title 11.
>
> The term "bankruptcy" includes any proceeding, arrangement, or plan to Title 11.
>
> The term "debtor" means a debtor concerning whom a petition has been filed under Title 11. .

9-41.100 18 U.S.C. §152 VIOLATIONS

The prinicipal criminal violations in connection with bankrutcy proceedings are set forth in 18 U.S.C. §152, which covers not only a bankrupt but anyone who could possibly attempt to defeat the purpose of the Bankruptcy Act through fraudulent means. The nine paragraphs of the section denounce the following activities:

A. The concealment of property belonging to the estate of a debtor,

B. The making of false oaths or accounts in or in relation to any case under Title 11,

C. The making of a false declaration, certificate, verification or statement under penalty or perjury as permitted under Section 1746 of Title 28 or in relation to any case under Title 11,

D. The making of false claims against the estate of a debtor,

E. The fraudulent receipt of property from a debtor,

F. Bribery and extortion in connection with a case under Title 11,

G. Transfer or concealment of property in contemplation of a case under Title 11,

H. The concealment or destruction of documents relating to the property or affairs of a debtor, and

I. The withholding of documents from the administrators of a case under Title 11.

It should be noted that although 18 U.S.C. §152 creates nine separate crimes, each offense may be charged separately. United States v. Gordon, 379 F. 2d 788 (2d Cir. 1967); United States v. Arge, 418 F. 2d 721 (10th Cir. 1969). However, it is not appropriate to allege two offenses and impose two convictions as a result of one set of facts, all of which are essential elements of each crime. United States v. Ambrosiani, 610 F.2d 65 (1st Cir. 1979).

An essential element in the commission of all offenses under 18 U.S.C. §152 is that they must be committed "knowingly and fraudulently". United States v. Yasser, 114 F.2d 558 (3d Cir. 1940); United States v. Peery, 678 F.2d 856 (10th Cir. 1982). An indictment must charge both terms or their equivalents. United States v. Comstock, 161 F. 644 (R.I. Cir. 1908). United States v. Martin, 408 F.2d 949 (7th Cir. 1969), cert. denied, 396 U.S. 824 (1969). Also, a jury must be charged with the importance of the two terms. Hersh v. United States, 68 F.2d 799 (9th Cir. 1934).

9-41.110 Concealment Of Property

> Whoever knowingly and fraudulently conceals from the custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under Title 11 any property belonging to the estate of a debtor.

The elements of the offense are as follows: that the act was done "knowingly and fraudulently"; that it was an act of "concealment" of property belonging to the "estate of a debtor" from either an "officer of the court" or "creditors"; and that it was done by a "person". 2 COLLIER ON BANKRUPTCY para. 29.05, p.1156 (14th Ed.).

The term "conceal" is no longer statutorily defined. However, an indictment for concealment of assets must, standing alone, allege time and place, description of property concealed, names or identification of parties from whom concealed, that property was part of bankrupt estate and that acts were committed knowingly and fraudulently, United States v. Arge, supra. United States v. Ivers, 512 F.2d 121 (10th Cir. 1975). Since a bankrupt has a duty to list all of his/her property, the withholding of information is within the definition of conceal. Coghalan v. United States, 147 F.2d 233 (8th Cir. 1945), cert. denied, 325 U.S. 888 (1945); United States v. Zimmerman, 158 F.2d 559 (7th Cir. 1946), United States v. Klupt, 475 F.2d 1015 (2d Cir. 1973). In United States v. Greenbaum, 252 F. 259 (E.D. Mich 1918), reversed on other grounds, 280 F. 474 (6th Cir. 1922), the court stated that the gist of the offense charged is the knowing and fraudulent withholding of property no matter what means were used. It has been held that failing to schedule assets fraudulently transferred prior to the filing of a petition, followed by a failure to reveal the transfer to the trustee, is a concealment. Goetz v. United States, 59 F.2d 511 (7th Cir. 1932), cert. denied, 287 U.S. 649 (1932). It is not necessary for the trustee to make a demand in order to establish concealment. Douchan v. United States, 136 F.2d 144 (6th Cir. 1943), cert. denied, 319 U.S. 773 (1943); United States v. Young, 339 F.2d 1003 (7th Cir. 1964).

For the first paragraph of 18 U.S.C. §152 to apply, there must be a concealment during the bankruptcy proceeding. This does to mean, however, that the initial act of concealing must occur after the filing of the petition; it merely means that the property must remain concealed after the commencement of the bankruptcy proceeding. Early cases found this to be a "continuing concealment". United States v. Cohen. 142 F. 983 (D.N.Y. 1906), affd, 157 F. 65, cert. denied, 207 U.S. 596 (1907); Glass v. United States, 231 F. 65 (3d Cir. 1916). United States v. Arge, supra; United States v. Ivers, supra. This term is still useful in those cases in which there has been a concealment of property prior to bankruptcy and a failure to disclose after a petition has been filed. See United States v. Fallman, 28 F. Supp. 251 (D. Mass. 1939); Sultan v. United States, 249 F.2d 385 (5th Cir. 1957).

It makes no difference where the assets are physically secreted, the act of concealment occurs at the time and place where the bankruptcy proceeding is commenced. United States v. Schireson, 116 F.2d 881 (3d Cir. 1940). The court stated that the offense was not hiding away or secreting

of the property, but rather the withholding knowledge of the property from the trustee. See also United States v. Gordon, 379 F.2d 788 (2d Cir. 1967), cert. denied, 389 U.S. 927 (1967).

There must be a concealment from one of the persons enumerated in the first paragraph of 18 U.S.C. §152. If there is a concealment from more than one of those persons mentioned, it is a separate and independent offense as to each person. The prosecution charging concealment against one will not bar the subsequent indictment charging concealment from another. United States v. Yacht, 135 F. Supp. 911 (S.D.N.Y. 1955). However, regardless of the number of items concealed, there is only one concealment. Where there are multiple items charged the proof of concealment of any one will sustain the charge. Bisno v. United States, 299 F.2d 711 (9th Cir. 1961). But see United States v. Kaldenberg, 429 F.2d 161 (9th Cir.), cert. denied, 400 U.S. 929 (1970) where in a chapter XI proceeding rental payments were withheld from a receiver, the court held that where there are separate and distinct concealments there may be a count for each concealment. See also United States v. Moss, 562 F.2d 155 (2d Cir. 1977).

All the essential elements of the offense must be charged in the indictment. Generally, the indictment is sufficient if it describes the offense in the terms of the statute. There must be an allegation of time and place. But it has been held sufficient if the indictment stated that the concealment took place at a given city "in this district" on a given day. United States v. Greenbaum, 252 F. 259 (E.D. Mich. 1918), rev'd on other grounds, 280 F. 474 (6th Cir. 1922).

The description of the property in an indictment is a most important requirement and one about which there is disagreement. Generally, an indictment is held sufficient if the description is in somewhat general terms, such as "certain goods, wares, money, merchandise, shoes, and personal property." United States v. Schireson, supra. The description as assets of a certain value and "assets belonging to the estate in bankruptcy" were held to be too vague in Beitel v. United States, 306 F.2d 665 (5th Cir. 1962); "merchandise commonly sold in a self-service department store"" was likewise held not sufficient, United States v. Mathies, 202 F. Supp 797 (W.D. Penn. 1962). It is sufficient to aver that a certain amount of money has been concealed. United States v. Lake, 129 F. 499 (E.D. Ark. 1904). As previously mentioned, it is not necessary to allege the manner of concealment.

Although it is essential that guilt be established beyond a reasonable doubt, the proof may be wholly circumstantial. United States v. Ayotte, 385 F.2d 988 (6h Cir. 1967), rev'd on other grounds, 394 U.S. 310 (1969); Metheany v. United States, 365 F.2d 90, (9th Cir. 1966), United States v. Martin, 408 F.2d 949 (7th Cir. 1969). Unexplained shortages of property of bankruptcy, shown to have been in debtor's possession prior thereto is sufficient to go to the jury. Bisno v. United States, 299 F.2d 711 (9th Cir. 1971); Gunzberg v. United States, 297 F.2d 829 (5th Cir. 1962). However, the jury cannot be charged that this is an inference of guilt, United States v. Stone, 282 F.2d 547 (2d Cir. 1960).

It is for the jury to determine the truth of the defendant's explanation. Cohen v. United States, 67 F.2d 449 (4th Cir 1933); rev'd on other grounds, 280 F. 474 (6th Cir. 1922), United States v. Stone, supra.

9-41.120 False Oath Or Account

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11.

This paragraph sets out the offense of perjury in a bankruptcy proceeding. It was held prior to the 1926 Act that false swearing in bankruptcy proceedings should be charged under the appropriate provision of the Bankruptcy Act and not under the general provision for perjury, which is now 18 U.S.C. §1621, Rosenthal v. United States, 248 F. 684 (8th Cir. 1918). This case may be doubtful authority under the present section. It is to be noted that under the present paragraph of 18 U.S.C. §152 the possible punishment is not greater than the perjury provisions of 18 U.S.C. §1621. It is settled law that a man cannot be convicted under both statutes on the same facts. Rosenthal v. United States, supra.

The offense is more analagous to the false statement statute, 18 U.S.C. §1001, than perjury, however, see, Meer v. United States, 235 F.2d 65 (1956); United States v. Lynch, 180 F.2d 696 (1950), and the strict requirement of perjury prosecutions do not apply; Marachowsky v. United States 201 F.2d 5 (7th Cir. 1953); Morshium v. United States, 285 F.2d 949 (5th Cir. 1960) and United States v. Curry, 313 F.2d 337 (3d Cir. 1963). The elements of the offense are as follows: that the false oath must be knowingly and fraudulently made; that the oath must be false; that the

statement is material to the issue; and that the oath is made in any proceeding or in relation to any proceeding under the act. In the indictment, it must be alleged that the statement was false. United States v. Baker, 243 F. 741 (D. R.I. 1917) and United States v. Curry, supra. It is suggested that such allegations be made even though there is authority to the contrary. See United States v. Freed, 179 F. 236 (2d Cir. 1910).

In view of the strictness with which indictments are sometimes construed, it is undoubtedly safer to follow the practice of giving complete details concerning the false oath. There should be an allegation that the testimony was material. See however, United States v. Lake, 129 F. 499 (D. Ark. 1904); United States v. Phillips, 606 F.2d 884 (9th Cir. 1979). Ulmer v. United States, 219 F. 641 (6th Cir. 1915) cert. denied 238 U.S. 638 (1915). In proving the crime, it must be shown that the oath was properly administrated to the defendant. See Cameron v. United States, 192 F. 548 (2d Cir. 1911), rev'd on other grounds, 231 U.S. 710 (1914). Recantation does not in and of itself cure an original false statement under oath in a case under Title 11. United States v. Diorio, 451 F.2d 21 (2d Cir. 1971).

It is well established that the immunity provisions of the Bankruptcy Act do not aply for perjury charges. Glickstein v. United States, 222 U.S. 139 (1911).

A false oath is perjury to the extent that an indictment for subornation of perjury will lie under 18 U.S.C. §1632. Hammer v. United States, 271 U.S. 620 (1926).

18 U.S.C. §152 was amended in November 1978 to read as follows:

> Whoever knowingly and fraudulently makes a false declaration certification, verification or statement under penalty (of) perjury as permitted under Section 1746 of Title 28, United States Code, in or in relation to any case under Title 11.

Thus unsworn declaration made under penalty of perjury in bankruptcy proceedings are to be treated in the same manner as sworn statements. Until the courts rule differently the cases cited under sworn false statement prohibitions may be used as guidelines for matters involving this paragraph.

9-41.130 False Claims

> Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney.

The obvious purpose of this provision is to prevent fraud by the presentation of inflated or fictitious claims or the use of such claims. The elements of the offense are as follows: the claim must be filed or used with criminal intent; it is necessary to show that the claim was false; and that it was presented or used in any case under Title 11. 2 COLLIER ON BANKRUPTCY para. 29.07 (14th Ed.).

The court ruled in Levinson v. United States, 263 F. 257 (3d Cir. 1920), that the defense of reliance upon the advice of counsel is not a valid defense when apparently the defendant had not told the truth to his attorney. The court allowed evidence that defendant's claim of loan was in reality a purchase of stock. In United States v. Abraham, 347 F.2d 395 (7th Cir. 1965), the court held that even though the bill reflected the customary procedure for billing, it was intentionally inflated and therefore was false and fraudulent as to the bankrupt's estate and its other creditors.

9-41.140 Fraudulent Receipt Of Property

> Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under Title 11 with intent to defeat the provisions of Title 11.

This paragraph is to some extent the counterpart of the first paragraph in that it is aimed at preventing concealment of assets by those who would so assist the debtor. An important difference is that this paragraph also may apply to a creditor.

The essential elements of the offense are as follows: that there was receipt of a material amount of property, from a bankrupt; that this occurred after the filing of a proceeding under the Act; that this was knowingly and fraudulently done with the intent to defeat the Act.

Although it has not been decided what constitutes the material amount, it would appear that this requirement was inserted in the section to

prevent prosecutions for relatively insignificant transfers. The term "property" has been held to include money under the provision of this paragraph. United States v. Wernikove, 206 F. Supp. 407 (E.D. Pa. 1962). In reference to the term "material amount" a conviction has been sustained in which the amount involved was about $500.00. Knoell v. United States, 239 F. 16 (3d Cir. 1971), writ of error dismissed, 246 U.S. 648 (1918).

Property which was received both physically and legally before the filing is not covered by this paragraph. However, a conspiracy to receive the property could be charged even though physical transfer preceded the petition if further overt acts subsequently occurred, under the authority of Knoell, supra.

The additional intent, to defeat the act, means only that the conduct must have been willful. United States v. Lawson, 255 F. Supp. 261 (D. Minn. 1966). In charging intent to defeat the act, it is not necessary to specify which provision of the act is "intended to be defeated." Lurie v. United States, 20 F.2d 589 (6th Cir. 1927).

9-41.150 Extortion And Bribery

> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under Title 11.

This paragraph covers any extortion and bribery and any attempt to extort to bribe, and is basically directed at creditors who attempt to gain a preference by forebearing to impede the bankruptcy proceeding.

The two essential elements of the offense are the criminal intent and the bribery or extortion or the attempt to bribe or to extort. The statute in question does not say one shall not extort money from another as a consideraion for acting or forebearing to act unlawfully, but for acting or forebearing to act at all. United States v. Dunkley, 235 F. 1000 (D. Cal. 1916), United States v. Weiss, 168 F. Supp. 728 (W.D. Penn. 1958).

Two other statutes may possibly be used in prosecuting bribery violations. Where the attempt is made to bribe a judicial officer, section 210 of Title 18 may be used; this section denounces the attempted bribery of the judicial officer. Section 1503 of Title 18 denounces an intent corruptly to influence any officer of any court of the United States.

9-41.160 Fraudulent Transfer Or Concealment

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under Title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of Title 11 knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation.

This paragraph prohibits the concealment or transfer by anyone acting individually or as an agent or officer of any person or corporation. The elements of the offense are as follows: that it was committed knowingly and fraudulently; that it was committed by an agent or officer of a person or corporation; that the property concealed or tranferred belonged to the person or corporation; that the transfer was in contemplation of a proceeding or with intent to defeat the provisions of Title 11. The words "concealed or transferred" are to be read in the disjunctive, and therefore it is not necessary that there be concealment where property has been transferred. United States v. Switzer, 252 F.2d 139 (2d Cir. 1958), cert. denied, 357 U.S. 922 (1958). It is now practically impossible for officers to shift assets about among interrelated corporations and avoid violating the prohibitions of the sixth paragraph merely because the shift is not concealed. 2 COLLIER ON BANKRUPTCY para. 29.10. This paragraph does not name the persons from whom the property must be concealed as is done in the first paragraph; however, it seems logical that in establishing concealment there must be someone who had a right to know about the existence of the property such as that class enumerated in the first paragraph. Establishing a case under this paragraph is similar to establishing one under the first paragraph.

Although it is safe to couple the alternative elements in one count, i.e., "in contemplation of a case under Title 11 and with intent to defeat the provisions of Title 11" "concealed and transferred", it is probably preferrable to set out the offenses in separate counts. It need not be alleged that the property was "concealed and transferred", since either the transfer or the concealment is a violation. Burchinal v. United States, 342 F.2d 982 (10th Cir. 1965).

9-41.170 Fraudulent Treatment Of Documents

> Whoever after the filing of a case under Title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor.

This paragraph prohibits the concealment, obstruction, mutilation or falsification of a document. It must be shown that this was knowingly and fraudulently done after filing a proceeding or in contemplation of such a filing and that the document related to the property or affairs of debtor. The few prosecutions under this clause have been tied to other counts.

9-41.180 Fraudulent Withholding Of Documents

> Whoever after the filing of a case under Title 11 knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officr of the Court entitled to its possession, any document affecting or relating to the property or affairs of a debtor.

This paragraph covers the withholding of a document from an officer of the court. Prosecutions under the eighth paragraph have ben coupled with counts involving other offenses under this section. As with the seventh paragraph, the principal use of the withholding charge may be as an offense on which a jury might convict even though not satified that there was a concealment or fraudulent transfer. 2 COLLIER ON BANKRUPTCY para. 29.12.

9-41.200 EMBEZZLEMENT AND ABUSE OF POSITION

Two of the sections proscribing criminal acts in connection with bankruptcy proceedings are directed at court officers, and a third applies to all participants in a case under Title 11.

9-41.210 18 U.S.C. §153: Embezzlement By Trustee Or Officer

> Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any

> property or secrets or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be finded not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. §153 is comprehensive enough to cover every intentional and fraudulent withholding of, or parting with, the property of the estate of a debtor by the court officers enumerated therein. The essential elements of the offense are as follows: that at the time property or documents came into the defendant's possession he was an officer of the court in charge of the estate of a debtor; that the property or documents belong to the estate; (however, the indictment need not specifically state that property belonged "to the estate" and the duty imposed continues after the closing of the case under Title 11), United States v. Ivers, 512 F.2d 121 (8th Cir. 1975); that the property was embezzled in one way or another or that the document was secreted or destroyed; and that the activity was done knowingly and fraudulently. United States v. Lynch, 180 F.2d 696 (7th Cir. 1950); United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971).

The Court stated In re Biro, 107 F.2d 386 (2d Cir. 1939), that "[w]hile embezzlement is, indeed, an offense punishable by imprisonment it is not such an offense under the Bankruptcy Act unless the embezzled property came into the charge of the accused as trustee, receiver, custodian, marshal, or other officer of the court." It has been held that although an indictment charging violation of another criminal embezzlement provision (18 U.S.C. §645) is defective, the indictment stands if it alleges facts which will bring it under 18 U.S.C. §153. Pruett v. United States, 3 F.2d 353 (9th Cir. 1925).

This statute is not to be read as concerning itself only with property which property belongs to the estate of the bankrupt, but includes all property which comes into the possession of the court officer by reason of his/her position as such. Meather v. United States, 36 F.2d 156 (9th Cir. 1929).

9-41.220 Section 154: Adverse Interest And Conduct

> Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under Title 11; or

> Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so--
>
> Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant. As amended Nov. 6, 1978, Pub. L. 95-598, Title III, §314(a)(2), (e)(1),(2), 92 Stat. 2676, 2677.

It should be noted that this is only a misdemeanor statute in which the penalty is not more than $500 and the forfeiture of the office. There are simpler procedures for removing trustees, marshals, or other officers (11 U.S.C. §324), but this statute could be useful if a judge refused to remove such (a)person(s).

9-41.230 18 U.S.C. §155: Fee Agreement

The final criminal provision applies to all participants in a bankruptcy proceeding. While Title 11 prohibits fee arrangement, (11 U.S.C. §102(c) and (d), 18 U.S.C. §155 provides the criminal sanctions as follows:

> Whoever being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them or attorney for any such party in interest, in any receivership, or case under Title 11 in any United States court or under its supervision, knowingly or fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate;
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

The obvious purpose of this section is the prohibition against the exacting of unreasonable fees for service performed by all those involved in a case under Title 11. In effect it is a safeguard to protect against allowing named participants in a bankruptcy proceeding from dividing up a debtor's estate. However, this section is not intended to prevent a debtor from agreeing to compensate his/her attorney, in any amount agreed upon so long as the compensation was to be paid after the bankruptcy proceedings had been closed. In re Trans-State Oil Co., 24 F. Supp. 454 (Tex. 1938), rev'd on other grounds, 99 F. 658 (5th Cir. 1938).

9-41.300 IMMUNITY PROVISION

Title 11 Section 343 provides,

> The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of the title. Creditors, any indenture trustee, or any trustee or examiner of the case may examine the debtor.

The purpose of the examination is to enable creditors and the trustee to determine if assets have been improperly disposed of or concealed.

Efforts to thwart examinations through the exercise of the privilege against self-incrimination have been met with the enactment of the immunity section (11 U.S.C. §344) which provides,

> Immunity for persons required to submit to examination, to testify or to provide information in a case under this title may be granted under part V of Title 18.

This section carries part V, (section 6001 et seq. of Title 18, Crime and Criminal Procedure), over into bankruptcy cases. Thus, for a witness to be ordered to testify before a bankruptcy court, in spite of a claim of privilege, the U.S. Attorney for the district in which the court sits would have to request the immunity order from that district court. The rule would apply to both debtors, creditors, and any other witnesses in a bankruptcy case. If the immunity were granted, the witness would be required to testify. If not, the witness could claim the privilege against self-incrimination.

Immunity provision of this section prohibits not only evidentiary use of compelled testimony, but its use as an investigatory lead, and bars the use of any evidence obtained by focusing investigation on witness as a result of compelled disclosure. In re Grand Jury Proceedings, 497 F. Supp. 979 (E.D. Pa. 1980).

Under 18 U.S.C. §3057 bankruptcy judges, receivers and trustees are required to report criminal violations to U.S. Attorneys. The following safeguards have been recommended by the Bankruptcy Division, Administrative Office of the United States Courts, in order to protect against inadvertent use of the bankrupt's testimony in developing a criminal case against the bankrupt.

In criminal referrals based upon evidence or leads not directly or indirectly obtained from the testimony of the bankrupt, the existing referral procedures will be followed.

In any case in which the debtor testifies and a criminal investigation is underway or is anticipated, the bankruptcy judge will order that no one shall have access to the transcript of the debtor's testimony without first identifying himself/herself and signing an appropriate record reflecting that he/she has requested and been granted access to the transcript. Adoption of this procedure will assist the government in showing in any subsequent criminal proceeding that the prosecution did not have the benefit of a review of that portion of the debtor record.

In addition, in any case under Title 11 in which the debtor testifies, and a criminal investigation is underway or is anticipated, the bankruptcy judge will appropriately advise trustees, creditors, attorneys, and other persons who heard the debtor's testimony that, in the event they are interviewed concerning criminal aspects of the case, no disclosure should be made concerning the content of the immunized testimony of the debtor.

In any instance in which the only evidence of criminality is developed is the debtor's testimony, the referee will refer the case to the U.S. Attorney for possible criminal investigation without making reference to any information based directly or indirectly upon the debtor's testimony. The U.S. Attorney will request the Federal Bureau of Investigation to conduct a limited investigation, possibly including a review of available books and records and the bankrupt's schedules, to determine whether there is independent evidence upon which a criminal investigation may be predicated.

However, since in Kastigar v. United States, 406 U.S. 441 (1972) the court stated:

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

The Criminal Division recognizes that the argument may be raised that the immunity bars a referral based solely upon the immunized testimony, but it is believed that in cases of significant import, at least, the Department has a responsibility to investigate regardless of this factor.

When the debtor is a corporation, bankruptcy judges will consider the feasibility of clearly designating an individual not suspected of criminal conduct as the person to represent the debtor, thus possibly avoiding a grant of immunity to a prospective criminal defendant. However, if a corporate officer voluntarily testified without being clearly designated to speak for the corporation, it has been held that the immunity provisions are applicable under these circumstances. United States v. Coyne, 587 F.2d 111 (2d Cir. 1978).

Where the bankrupt or officer of a bankrupt corporation designated to represent the corporation is the defendant in a bankruptcy prosecution and has testified at the first meeting of creditors, the burden of proof is on the government to show that its evidence is independent of such testimony; however, such proof is by preponderance of the evidence rather than beyond a reasonable doubt, United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974); (Bloch v. Consino, 535 F.2d 1165 (9th Cir.), cert. denied, 429 U.S. 86 (1976). It has also been held that the books and records of the debtor and the bankruptcy documents are not subject to the immunit provisions of Title 11. United States v. Seiffert, supra; United States v. Falcone, 544 F.2d 607 (2d Cir. 1979), cert. denied, 430 U.S. 916 (1977).

9-41.400 PLANNED BANKRUPTCY

One aspect of bankruptcy fraud to which particular consideration should be given is the planned bankruptcy or "scam" operation. While the scheme has many variations basically it involves the purchase of merchandise from many creditors, the disposal of the goods for cash, the concealment of the proceeds, and then either claiming bankruptcy or having the creditors force the bankruptcy.

In some instances the perpetrators of this scheme purposely purchase relatively small quantities of merchandise from a large number of suppliers. Since no one creditor suffers a great loss, no complaint may be made unless one or more of the creditors organizes the others to pursue the matter. Since frequently the books and records disappear with the perpetrator, one of the major tasks of the investigation is to find all of the victims.

All of the schemes employed cannot be set forth, a few entail the following:

A. Setting up a new company, with a bank account, a legitimate or apparently legitimate balance sheet, paying initial invoices in full on modest orders, increasing orders and paying less and finally placing large orders which are not paid for, with the merchandise being sold at cost or shipped to other locations, and with the operations of the scheme disappearing with the proceeds or the merchandise.

B. Setting up a company with a name similar to one with an established credit rating with "new" branches, placing large orders and absconding with goods or proceeds.

C. Acquiring control or purchasing a company with a good credit rating and employing the scheme before suppliers become aware of a change in ownership.

In addition to the use of the statute designed to combat bankruptcy frauds as to the concealment and transfer of assets, in these matters consideration should be given to the use of the mail and wire fraud statutes, 18 U.S.C. §1341 and §1343, and the interstate transportation of property obtained by fraud statute. 18 U.S.C. §2314. See United States v. Castellana, 349 F.2d 264 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966); United States v. Jacobs, 395 F.2d 469 (8th Cir. 1968); United States v. Wolcoff, 379 F.2d 521 (7th Cir. 1967); United States v. Dioguardi, 428 F.2d 1033 (2d Cir.). cert. denied, 400 U.S. 825 (1970); United States v. Goodman, 285 F.2d 378 (5th Cir. 1960) and United States v. Harris, 388 F.2d 373 (7th Cir. 1967).

9-41.500 REPORT OF VIOLATIONS

Title 18, United States Code, Section 3057(a) requires the judge, receiver or trustee having reasonable grounds for believing that any violation of laws of the United States relating to insolvent debtors,

receiverships or reorganization plans have been committed, to report all the facts and circumstances to the appropriate U.S. Attorney. This report has been made mandatory in order that the United States Attorney be apprised of possible violations which ordinarily would not come to his attention. Upon receipt of this report, the U.S. Attorney determines whether an FBI investigation should be commenced; and upon completion of this investigation decides whether criminal action is warranted. The judge's report of possible violations is not a condition precedent to the initiation of an FBI investigation.

Investigations are often begun as the result of information furnished by creditors or other interested parties, rather than by report pursuant to 18 U.S.C. §3057(a), and it is thus immaterial, when prosecuting an offender under any of the criminal provisions, whether the procedure set forth in 18 U.S.C. §3057(a) has or has not been followed. Dean v. United States, 51 F.2d 481 (9th Cir. 1931); 2 COLLIER ON BANKRUPTCY (14th ed.), 1236. This section does not confer any procedural rights upon a defendant. United States v. Filiberti, 353 F. Supp. 252 (D. Conn. 1973).

The U.S. Attorney, in declining prosecution, should furnish the Department with a cogent and reasonably detailed explanation of his reasons for declination, together with specific reference to the facts of the case. The mere conclusion that the facts of the case do not warrant criminal prosecution or that the facts do not indicate that an offense has been committed is not sufficient. This requirement is applicable regardless of the method by which the investigation was initiated and as well to those cases in which a report is received pursuant to 18 U.S.C. §3057(a) and the United States determines that no investigation is necessary. However, where the report is received under 18 U.S.C. §3057(a) the judge should be advised of action taken or declination, although reasons for declination need not be indicated.

It is to be noted that the personal opinion of the judge or trustee as to whether a criminal offense has occurred or as to whether criminal proceedings should or should not be commenced is in no way binding on the U.S. Attorney or determinative of the issues involved. Similarly, the decision of an officer of the Bankruptcy Court not to refer a matter to the U.S. Attorney should be determinative in any prosecutive analysis.

TORTS BRANCH REPRESENTATION MONOGRAPH I:

REPRESENTATION PRACTICE AND PROCEDURE

JOHN J. FARLEY, III
Director, Torts Branch
Civil Division

Prepared by:

JOHN LODGE EULER
Assistant Director
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Telephone: FTS 724-8246

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I. INTRODUCTION

Tort suits seeking money damages against federal employees in their individual or personal capacities is a phenomenon of serious and growing concern. As of this writing, there are approximately 2,500 lawsuits of this nature involving approximately 10,000 federal employees. Prompt and effective legal representation in the appropriate cases is critical to successful defense on both a tactical and strategic level. This monograph will address the criteria, process and problems involved with Department of Justice representation.

A. THE CONTEXT

This monograph addresses tort suits. In a limited sense, it also addresses criminal matters filed against federal employees in state courts, but the thrust of the Department of Justice representational effort is in tort suits.

The elements of a tort case are:

1. A duty running from the defendant to the plaintiff;
2. A breach of that duty by the defendant;
3. Proximate causation of an injury;
4. Resulting in damages.

If a lawsuit seeks money damages personally against a federal employee, it is likely a tort suit with which the Torts Branch is concerned and to which the procedures and concerns outlined below apply. The Torts Branch processes approximately 75% of all suits against individual federal employee defendants. If in doubt, forward the matter to the Torts Branch. If it belongs elsewhere, it will be promptly transferred.

B. INDIVIDUAL CAPACITY VERSUS OFFICIAL CAPACITY

Personal representation of government employees is necessary only when they are sued in an individual capacity. This capacity is to be distinguished from official capacity. When a government employee is sued in an official capacity, the real defendant is the United States. Should the court award relief, it would be awarded against the resources of the United States. A public official can quickly be rid of an official capacity lawsuit simply by changing jobs and leaving the office which is the real target of the suit. The Department of Justice will represent federal officials (who in turn are representatives of the real defendant, the United States) sued in their official capacity for declaratory, injunctive or other forms of relief. No formal request for representation is necessary. United States Attorney's Manual, Title 4, ¶ 4-13.000.

When an employee is sued in his or her individual capacity, however, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from his or her personal assets as opposed to the assets of the United States. The official cannot shed the suit by shedding the job, even though it may have arisen out of performance of official duties. The defendant is just as much a personal defendant as if sued in tort by a neighbor for a personal trespass or as though sued by a motorist for negligence when not on government business. Thus, the context of the normal personal request for Department of Justice representation is a tort suit arising out of that federal employment, but filed against the employee in his or her individual capacity.

The initial inquiry upon receipt of a new tort suit against named individuals then must be to determine whether they are sued in their individual or official capacities. This is not always easy. Among the indicia to be reviewed are the caption of the complaint, the body of the complaint and, particularly, the ad damnum clause. The clearest hallmark of an individual capacity suit is that the ad damnum, or prayer for relief, seeks money damages personally from the named individual. If that is the case, the suit is against the employee in his or her individual capacity. When in doubt, it is safer to treat the case as one against the official in his or her individual capacity.

C. TORT SUITS AGAINST THE UNITED STATES

The United States can also be sued in tort, but only in a limited way. In 1946, Congress passed the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (FTCA). The FTCA is a limited waiver of sovereign immunity which does not extend to all causes of action which might exist under the common law or to any cause of action based upon an alleged violation of the Constitution. Moreover, if a plaintiff attempts to sue the United States, but does not strictly comply with the procedural requirements of the FTCA, such as filing an administrative claim within two years (28 U.S.C. §§ 2401, 2675), there is no subject matter jurisdiction.

Individual federal employees do not enjoy sovereign immunity. Accordingly, neither the procedural requirements of the FTCA nor limitations on the types of actions for which the United States can be sued are applicable. When an employee is named as a co-defendant with the United States, there must be a distinct jurisdictional basis alleged in the complaint, and the analysis of applicable defenses and tactics on behalf of the employee is usually entirely distinct from an analysis of defenses available to the United States. */

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*/ An exception to this rule exists when a federal employee is sued for conduct which has been declared by statute to be exclusively remedial against the United States. See 28 U.S.C. § 2679 (federal drivers); 10 U.S.C. § 1089; 22 U.S.C. § 817; 38 U.S.C. § 4116; and 42 U.S.C. § 233 (medical personnel of most federal agencies). In that particular type of case, the United States is substituted as the defendant for the employee. See part VI, L, infra. However, it must be stressed that this is the exception, not the norm.

II. AUTHORITY FOR DOJ REPRESENTATION

A. STATUTORY AUTHORITY

The authority for Department of Justice Representation is found in 28 U.S.C. §§ 516-519; it is the responsibility of the Attorney General to "attend to the interests of the United States" in any court in the land (28 U.S.C. § 517) and "to supervise all litigation to which the United States, an agency, or officer thereof is a party, . . ." (28 U.S.C. § 519). Among the "interests" of the United States is the representation of its employees who are sued for acting within the scope of their employment. Booth v. Fletcher, 101 F.2d 676 (D.C. Cir.), cert. denied, 307 U.S. 628 (1938); Barr v. Matteo, 360 U.S. 564, 591 (1959). This representation is provided more to protect the interest of the United States in defending the federal conduct or program than the individual interest of the employee. Happily, the private and publi interests usually coincide. There is no obligation to any particular employee to provide representation. Ryan v. United States, 227 Ct. Cl. 711 (1981).

B. PRESENT AND FORMER EMPLOYEES OF THE UNITED STATES

Pursuant to its statutory authority and responsibility, it has bee the practice and the policy of the Department of Justice to represent present and former employees who are personally sued for money damages in their individual capacities based upon actions taken in pursuit of their official duties.

Guidelines were published in 1977 and revised in 1982. They appear at 28 C.F.R. §§ 50.15 and 50.16. Such representation is not necessarily limited to tort cases, but may extend to congressional and deposition testimony as well. See Part V, infra.

C. OTHERS

In addition to federal employees, whose representation is covered by the guidelines, there may be sufficient interest of the United States in a particular matter to warrant representation by the Department of Justice of persons who are not federal employees. Under the general authority of 28 U.S.C. §§ 517, et seq., the Attorney General has, on occasion, represented such persons as key informants and cooperating citizens when their efforts have been or continue to be vital to a law enforcement effort. A request for such representation requires a strong expression of interest from the concerned United States Attorney and sponsoring agency. Since such representation is not the norm, it is given careful scrutiny.

III. CRITERIA

Representation of Federal officials sued in their official capacities is virtually automatic. By contrast, Department of Justice representation is never available in a federal criminal proceeding or investigation or in an agency disciplinary proceeding. 28 C.F.R. § 50.15(a)(4) and (b). Nor

is it available in a civil case if the employee is the subject of a federal criminal investigation for the same act or acts. 28 C.F.R. § 50.15(a)(4)-(6).

The criteria for personal representation of an employee personally sued for damages or the subject of state criminal proceedings or the subject of a congressional or judicial subpoena are:

1. Scope of employment. The employee's actions must reasonably appear to have been performed within the scope of his or her federal employment.

2. Interest of the United States. It must also appear that it is in the interest of the United States to provide the requested representation.

28 C.F.R. § 50.15(a).

Scope of employment is determined by reference to generally understood concepts of tort law. The issue is: was the employee about the master's (federal government's) business at the time of the occurrence? Because of time constraints in the early stage of the case, extensive fact finding cannot be undertaken by the Department and any doubt is usually resolved in the employee's favor.

The second criterion of "interest of the United States" is harder to define. As a practical matter, there is usually an interest in the United States in defending the conduct of the program in which the employee was engaged. There is also an additional interest in employee morale generally. Interest of the United States has been found to be lacking in cases that:

1) were of a de minimis nature (minor traffic ticket); 2) involve a swearing contest between two co-equal employees arising out of an altercation; 3) where the subject employees apparently did not tell the truth or otherwise covered up wrongdoing in the course of an official investigation following the incident; 4) where another federal agency has found the conduct to have been wrongful, and, at least, the subject of formal punishment (e.g., court martial); and 5) where the Department has been asked to undertake representation at so late a stage in the proceedings as to be handicapped in effectively doing so.

A representation decision is not irreversible. It is based upon matters as they "reasonably appeared" at the time. New information may lead to reconsideration and, possibly, withdrawal or initiation of representation that was originally denied.

IV. PROCEDURE

A. REQUESTS FOR REPRESENTATION

Every individual defendant or subject of a subpoena who believes that he or she needs and qualifies for Department of Justice representation must request it in writing. Before Department attorneys can establish an attorney-client relationship, they must know that the individual defendant desires that relationship to exist. Every defendant has the right to

hire private counsel at his or her own expense and the Department has no right to intrude (except perhaps in an amicus capacity) unless requested. The written request should be submitted to the individual's employing agency (usually the Office of the General Counsel, Chief Counsel, Solicitor, etc.) along with a copy of the summons and complaint or other legal papers. Unless representation is clearly unwarranted (e.g., in a federal criminal case), the agency should then forward the request with all available factual information to the Department with a recommendation as to whether representation should be provided based upon the criteria of "scope" and "interest". Sound practice dictates that a courtesy copy of the papers should also be provided to the United States Attorney in the district where the suit is filed.

Most requests for representation are within the province of the Civil Division of the Department of Justice and should be sent there by the employing agency. The matter will then be assigned to the appropriate branch of the Division (usually the Torts Branch). In the Torts Branch, the Assistant Director in charge of representation may approve routine requests. Cases that are difficult or involve requests that should be denied (except for denials in de minimis cases which can be handled at the Branch level) are forwarded to the Assistant Attorney General through the "Civil Division Representation

Committee". This Committee, which meets informally when necessary and is open to presentations, makes a recommendation to the Assistant Attorney General, who then renders a decision.

Other litigating divisions of the Department may authorize representation in cases within their sphere of activity. The Criminal, Tax, Civil Rights, and Lands Divisions have all had occasion to do so. However, most individual representation cases are handled by the Civil Division and should be forwarded there when doubt exists.

B. CONDITIONAL AUTHORIZATION BY TELEPHONE

Since each case is given careful individual consideration, the written authorization obviously takes time. Frequently, for one reason or another, the matter must be determined quickly. In such a case, telephone approval may be secured from the Assistant Director in charge of representation in the Torts Branch. 28 C.F.R. § 50.15(a)(1). This approval is conditional and must be supplemented by the aforesaid written materials. In addition, United States Attorneys have automatic authority to seek 60 days in which to respond to a complaint. United States Attorney's Manual, Section 4-13.361.

C. CABINET OFFICERS AND AGENCY HEADS

There is a partial exception to one aspect of the process described above. Cabinet Officers and Agency Heads need not personally request representation if:

1. The plaintiff does not allege his or her personal involvement in the alleged tortious conduct;

2. It is clear from the representations of the agency that the official was not personally involved.

In such a case we will attempt to treat the suit as one against the Cabinet Officer or Agency Head in his or her official capacity. Moreover, government officials cannot be held vicariously liable for the actions of their subordinates. Lander v. Morton, 518 F.2d 1084 (D.C. Cir. 1975). If, however, a plaintiff either subsequently alleges personal involvement or it is a fact that the officer was personally involved, a personal, written request must be forwarded.

D. CIVIL DIVISION REPRESENTATION LETTER AGREEMENT

Upon formal approval of representation, the litigating attorney should, in every case, forward a Representation Letter Agreement to the client with a copy for signature and return. The letter should set forth the limitations of Justice Department representation so that the client fully understands and enters the attorney-client relationship on a basis of informed consent. A copy of the letter utilized by the Civil Division is included as an appendix to this monograph.

V. DEPOSITION AND OTHER TESTIMONIAL REPRESENTATION

Federal officials may be subpoenaed to give testimony at a deposition, judicial proceeding or before Congress concerning matters involving their official duties. However, unless Department of Justice representation has been specifically authorized or the witness is testifying in an offical capacity, a Department of Justice attorney present at the testimony does not represent the witness and no attorney-client relationship exists between the witness and the attorney.

A. OFFICIAL CAPACITY WITNESSES.

If the witness is testifying in an official capacity, such as pursuant to a designation by the employing agency under Rule 30(b)(6), Fed. R. Civ. P., then he or she is serving as spokesperson for the United States. Since the Department of Justice attorney represents the interests of the United States, the attorney represents the witness in his or her official capacity.

B. INDIVIDUAL CAPACITY WITNESS.

1. Representation Already Authorized.

If testimony is sought in connection with a proceeding for which Department of Justice representation has been requested and authorized pursuant to 28 C.F.R. § 50.15, individual representation will be provided and an attorney-client relationship exists between the Department of Justice attorney and the witness. The most common example would be when the Department represents a federal employee/defendant who is being deposed by the plaintiff.

2. Representation Not Authorized.

A federal offical subpoenaed to give testimony in an individual capacity may request personal representation by the Department of Justice pursuant to 28 C.F.R. § 50.15. In addition to determining whether the "scope" and "interest of the United States" criteria are satisfied, inquiry must also be made as to whether there is a demonstrable need for personal representation, i.e., whether representation is warranted to protect the witness from adverse legal consequences. For example, representation might be provided if "John Doe" defendants were named in the complaint and the witness was involved in the conduct giving rise to the suit and is likely to be named as a defendant. On the other hand, representation cannot and will not be provided to protect a witness from the possibility of federal criminal investigation or prosecution. In most instances, a federal employee providing testimony does not need personal representation and Department of Justice representation will not be authorized for a federal employee/witness.

While the Department of Justice may not represent a federal employee/witness, and there is no attorney-client relationship established prior to or during the testimony, there is nevertheless a mutuality of interests which offers a measure of comfort and protection to a witness. In many cases, when a federal employee is called upon to serve as a witness, his or her official conduct is at issue and the Department of Justice

attorney is, in effect, defending, or seeking to explain, the actions of the witness on behalf of the employer of the witness, the United States. Consultation with a present or former federal employee prior to a deposition or testimony, regardless of whether personal representation by the Department has been requested or authorized, is entirely appropriate, as is assisting the expeditious processing of a request for personal representation should the federal employee/witness have a valid basis for believing that personal representation is necessary and warranted. The Department attorney should ensure that the witness is placed at ease, fully understands the nature, scope and potential consequences of the proceedings and testimony, and is briefed generally on what to expect and the appropriate manner in which to respond. During a deposition, it may be appropriate to attempt to make the witness comfortable and to prevent unwarranted harassment or intimidation by counsel. After all, the witness is a present or former employee of the United States, which is the main client of the Department attorney.

It must also be remembered, however, that situations may arise where the Department attorney may have to cross-examine the federal employee/witness, even vigorously, in order to fully protect the interest of his or her client(s). For this reason, care must be taken to ensure that the witness has no basis for an impression that a Department of Justice attorney is providing personal representation to the witness or that

an attorney-client relationship exists such that communications between the attorney and the witness are protected from disclosure or use by the attorney. Similarly, Department attorneys must take no action which would impinge upon the rights or prerogatives of present or former employees who are called upon to testify as witnesses. For example, in the absence of specific consent by the witness, Department attorneys should not agree to accept subpoenas or other process on behalf of the witness and care must be taken in arranging for schedules, interviews, etc.

VI. ISSUES, PROBLEMS AND LIMITATIONS

A. TIME TO ANSWER OR OTHERWISE RESPOND TO A COMPLAINT AND TO APPEAL

Rule 12(a) of the Federal Rules of Civil Procedure provides that "[t]he United States or an officer or agency thereof shall serve an answer to the complaint . . . within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted." There has been some confusion as to whether a defendant in a Bivens case gets 60 days by virtue of his status as a federal officer or 20 days because a Bivens action is, by definition, against him or her personally or individually. The Department of Justice position is that all federal employees who are sued for money damages are entitled under Rule 12 to 60 days within which to answer. United States Attorneys are authorized without further

communication from the Department to provide federal employees with representation for the limited purpose of assuring that they receive 60 days. See U.S. Attorneys Manual, Section 4-13.361.

However, the Supreme Court recently denied certiorari in the case of Robinson v. Chapman, ____ U.S. ____, S.Ct. No. 83-5293, and thereby left intact an unpublished holding of the 11th Circuit Court of Appeals that a federal employee, Bivens defendant, was not an officer of the United States for purposes of Rule 4(a)(1), Federal Rules of Appellate Procedure. Therefore, the 30 day time period to appeal was applied rather than the 60 day appeal period for a suit against the United States or an agency or officer thereof. The effect of this ruling is to place a cloud, at least within the 11th Circuit, upon the Department's position and practice of seeking 60 days in which to respond to a complaint in the district courts under Rule 12 of the Civil Rules. This is so because the language describing an "officer" of the United States in both rules is identical. Some courts, particularly in the 11th Circuit, may take the view that a Bivens defendant has only 20 days to respond to a complaint.

The Ninth Circuit Court of Appeals, in a published opinion, found that 60 days was proper in an appeal context. Wallace v. Chappell I, 637 F.2d 1345 (9th Cir. 1981). Recently the Fifth Circuit also adopted that Rule. Williams v. Collins,

____ F.2d ____, No. 82-4434 (April 2, 1984). A Federal District Court has also specifically held that the longer period applies to answer complaints. Joam Co. v. Stiller, N.D. Ca., No. C-82-4392 Rhs (December 14, 1982); 83-1 U.S.T.C. 9195.

Until the issue is finally settled, prudence dictates that care be taken to protect individuals who are served with a summons which appears to require an answer or responsive pleading in less than 60 days. In addition, individual Bivens defendants should be advised that it is the position of the United States that the 60-day time period is appropriate. In the event that the defendant is successful in the trial court and a plaintiff files an appeal more than 30 days but less than 60 days after judgment, the United States will not take the position that such appeal is untimely. To the contrary, the United States will be asserting in both the District and Appellate Courts that 60 days is the proper time limit.

B. REMOVAL

28 U.S.C. § 1442 provides, inter alia, that a civil action or criminal prosecution commenced in a state court against any officer of the United States, or any agency thereof, or person acting under him, for any act under color of such office, may be removed to the United States District Court for the district and division embracing the place where it is pending.

In a case brought against a federal employee in state court, removal to federal court should be undertaken in almost every instance. There may be tactical reasons why removal is not in the interest of an employee-client in an isolated case, but it is generally to the strong advantage of the employee to have the matter heard in federal court. If an individual client elects to disregard advice to remove and chooses to stay in state court, the appropriate departmental officer should be immediately informed. 28 U.S.C. § 1446 requires that a case must be removed within 30 days after the receipt by the defendant through service "or otherwise" of a copy of the initial pleading. Thus, Department of Justice authority for representation, including removal, should be quickly sought. A removal bond is required pursuant to 28 U.S.C. § 1446(d), and the premium for such a bond is payable from the United States Attorney's litigation expense account. United States Attorney's Manual, Title 4, ¶ 4-13.360; Civil Division Practice Manual, ¶ 1.3(c).

C. SERVICE OF PROCESS

It is not in the scope of this monograph to exhaustively treat service of process requirements and their impact on defenses under Rule 12 of the Federal Rules of Civil Procedure. See, Torts Branch Representation Monograph II. However, Department of Justice attorneys defending Bivens cases must be alert to such defenses as an initial concern when first reviewing a complaint. The validity of such process as has been received

by the defendant is often dispositive of the entire case. Note that Rule 4 of the Federal Rules of Civil Procedure was recently revised to authorize service of process by first class mail against individuals and corporations. See new Rule 4(c)(2)(C).

In summary, the new rule provides for the summons and complaint to be accompanied by two copies of a "notice and acknowledgment" form, one of which is to be returned to the plaintiff in a postage paid envelope also provided by plaintiff. Assistant Attorney General J. Paul McGrath issued guidance on February 19, 1983, to all U.S. Attorneys and General Counsels advising that no federal employee should acknowledge receipt of such service of process by first class mail before consulting with competent counsel, either at the agency or Department of Justice level. Department attorneys were also given broadened authority to render advice on the validity of service of process prior to receiving specific representation authority.

D. ATTORNEY-CLIENT PRIVILEGE

Department of Justice attorneys who undertake representation of individual clients personally sued for money damages have a full attorney-client relationship with those individuals. 28 C.F.R. § 50.15(a)(3). This also extends to agency attorneys of Department components such as the FBI. The attorney-client relationship commences at such point as the individual requests representation and applies to communications made for the purpose of securing such representation. No material contained

in the request nor confidences exchanged during the process may be used against the individual defendant in agency disciplinary or other proceedings. Such information may, however, be part and parcel of the data determining whether representation is to be authorized or maintained. Once a case has reached disposition in the courts, attorney-client material must continue to be protected and a separate file containing such material should usually be retained after the case is closed and the official file forwarded to a record center.

E. CONFLICTS

1. Among Defendants.

Eighty percent of the damages suits against individual federal employees involve multiple defendants. In some of those cases individual defendants will have different versions of the underlying facts and will accuse each other of wrongdoing. Usually, these conflicts do not ripen until threshold legal motions to dismiss or for summary judgment have been filed and lost. In addition, it is frequently very much in the tactical interest of the defendants to assume a joint defensive front and not be divided and weakened by cross accusations. However, in the event that a conflict persists beyond threshold motions, the Assistant Attorney General may decide that the Department of Justice will pay private counsel to represent the defendants, grouping them into the largest compatible groups possible to minimize the number of private counsel

needed. See 28 C.F.R. § 50.16 and Civil Division Directive 2120 (Revised). The Civil Division Directive prescribes a maximum fee of $75 an hour and sets forth the details as to how a private counsel contract is to be established and maintained. If the United States is not a party to a lawsuit wherein private counsel are retained because of a conflict among defendants, the United States Attorney will withdraw completely from the case so as not to create an unfavorable inference against any of the defendants. If the United States remains a party, a different AUSA may be assigned in deference to the attorney-client relationship which existed between the original AUSA and the defendants.

2. With a Position or Interest of the United States.

On occasion, a position or argument might be available to a defendant, the assertion of which would not be in the interest of the United States. Department of Justice attorneys primarily represent the interest of the United States. Where there is a tension between the interest of the individual client and the interest of the United States, the Department attorney cannot advance the interest of the individual client. The attorney must advise the individual defendant of the available argument or position but that the Department cannot assert it. The defendant's option then is to specifically agree to continue with Department of Justice representation and expressly waive the right to have the argument made or the position asserted.

Alternatively, the defendant can terminate that representation and hire private counsel at his or her own expense. In some cases where these interests do not coincide but are not in direct contradiction, the Department may fund private counsel. Accordingly, a request for such funding will be entertained. However, it must be recalled that a basic tenet of Department sponsored representation is "interest" of the United States. If that interest is defeated by a certain argument, it is probably not in the interest of the United States to either represent or fund private counsel.

Department attorneys handling such a case may be legitimately troubled by the ethical aspects. Canon Five of the Rules of Professional Conduct generally prohibits the serving of two masters. However, inherent in the policy decision to provide representation to individually sued employees was the prospect of diverging interests in the course of litigation. Every case carries with it a bundle of public and private interests. The Attorney General must, perforce, determine and then assert the primary interest of the United States when these interests do in fact diverge. The only antiseptic solution would be to cease representing individuals altogether. This would be neither fair to employees nor wise for the United States. The Attorney General is unlike a private attorney in this role. He must look to all of the public interests involved,

including defense of the individual employee. In this connection, Attorney General Benjamin R. Civiletti, in correspondence to the ABA Commission on Evaluation of Professional Standards on May 23, 1980, stated, "In such circumstances I believe it is the responsibility of the Attorney General to determine the appropriate course of conduct for federal attorneys."

F. COUNTERCLAIMS AND OTHER AFFIRMATIVE ACTIONS

As a general rule, Department of Justice representation only extends to defensive representation of individual employees. Neither counterclaims nor other affirmative actions are authorized. However, in compelling cases, United States Attorneys, clients, and their agencies may write to the Department seeking an exception to the general rule.

Other possible aggressive actions that may be considered against a hectoring plaintiff include the following:

1. Sanctions under Rule 11, Fed. R. Civ. P., C.F. Tapp and Sons v. Arnett, et al., ____ F.Supp. ____, Civ. No. 83-1656HB (D. N.M., Feb. 7, 1984);
2. Attorney's fees for the United States based upon principles of bad faith. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); 42 U.S.C. § 1988; Moon v. Smith, 523 F. Supp. 1332 (E.D. Va. 1981);

3. Injunctive action against frivolous suits.

See, In re Anthony R. Martin-Trigona v. Lavien, et al., 573 F. Supp. 1245 (D. Conn. 1983).

These remedies are being increasingly utilized by United States Attorneys throughout the country. Nonetheless, care should be taken to seek the advice of the Department before initiating their pursuit.

G. PAYMENT OF JUDGMENTS AND SETTLEMENTS

With few exceptions, there is no provision for the United States to pay a judgment or settle a case by paying money in a case solely involving individual federal defendants. (A specific statutory exception can be found at 26 U.S.C. § 7423 concerning Internal Revenue activities.) Accordingly, responsibility for payment of any judgment or settlement rests with the individual defendants. If the United States, however, is also properly sued under the Federal Tort Claims Act and there is a judgment on the merits, no judgment can be entered against the individual defendants. 28 U.S.C. § 2676. Similarly, the United States can settle if it is a viable defendant under the FTCA. Short of that, the only recognized vehicle for relief from a final judgment awarded against an individual federal employee is to seek a private relief bill in the Congress for payment.

H. CRIMINAL MATTERS

As previously mentioned, there is no Department of Justice representation available in federal criminal matters or investigations. Representation may be available in state criminal proceedings if the tests of scope of employment and interest of the United States are satisfied. However, in every such case, close consideration is given to both criteria.

In cases where a federal employee is the subject of a federal criminal proceeding or investigation, Department of Justice representation cannot be provided in a related civil suit. 28 C.F.R. § 50.15 (a)(4)-6). If, however, an unrelated civil suit happens to be filed against the employee, representation could be provided. Moreover, if an indictment or information has not yet been issued against the federal employee, a request for private counsel will be entertained in a related civil case. If it were approved, funding would have to be withdrawn upon indictment or issuance of an information.

In Bivens cases, it is important for United States Attorneys and other Department of Justice attorneys to be alert to the possibility of the existence of a related federal criminal matter. Contact with the prosecuting unit must be promptly initiated when there is reason to believe that there may be a federal criminal proceeding to determine if the civil defendant is also a subject or whether he or she has been cleared.

I. REPRESENTATION OF JUDGES AND LEGISLATORS

Representation of employees of co-equal branches of the government, including judges and legislators, is inherently sensitive and should be approached with care in every case. In particular, careful coordination of requests for representation is required. The legislative branch, for example, often chooses to defend its own cases. Beyond these observations, the general concepts concerning representation also apply to these officials.

As a general rule, the Department may represent a member of the judiciary when the only relief sought is money damages. The Department, however, will not represent a judge in a collateral proceeding, such as a mandamus action, which is in the nature of an appeal to overturn a decision of the judicial officer rendered in favor of one party or another. Such a proceeding normally would see the decision of the court defended by the real party in interest, i.e., the party that benefited from the ruling. Unless that party happened to be the United States, there would be no federal interest. See, United States Attorney's Manual, ¶¶ 1-10.100, et seq.

A related issue has to do with the propriety of a United States Attorney or an Assistant continuing to appear before a judge, having undertaken representation of the judicial officer in another case. See 28 U.S.C. §§ 455 and 144. The position

of the Department is that no unfairness or appearance of unfairness is created in the normal case due to the fact that representation of judicial officers rarely involves the disclosure of attorney-client type confidences. Virtually every case finds disposition through the doctrine of judicial immunity. Thus, there would be no basis for disqualification or any requirement to notify opposing counsel in other unrelated cases of the representation. See letter of Attorney General Richard G. Kleindienst to Roland F. Kirtz, January 31, 1973, reprinted at United States Attorneys Manual, ¶ 1-10.111. If, however, competent representation will require attorney/client discussions and a defense beyond the assertion of judicial immunity, consideration should be given to representation by Department attorneys or an Assistant United States Attorney from a neighboring district.

J. TRAFFIC CASES AND OTHER DE MINIMIS MATTERS

Traffic cases and other small matters may be the subject of representation requests. Unless the employing agency reasonably concludes that representation is "clearly unwarranted" (28 C.F.R. § 50.15(a)(1)), the request should be forwarded to the Department. Whether representation is then afforded turns on an analysis of the interest of the United States. Heavy weight is given to the position of the United States Attorney as to whether it would impact unduly on available staff and resources.

The other primary factors are whether the incident involved personal or property injury that may result in a tort claim against the United States or its individual employee and whether the supremacy clause of the Constitution or similar federal concepts may be implicated. Representation in such cases may be considered and denied at the Torts Branch level.

K. SUITS CONCERNING DEPARTMENT OF JUSTICE REPRESENTATION

The Attorney General is not required to provide representation. Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 566 F.2d 289, 292 n. 7 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); Booth v. Fletcher, 101 F.2d 676, 681-682 (D.C. Cir.), cert. denied, 307 U.S. 628 (1938); Ryan v. United States, 227 Ct. Cl. 711 (1981).

Similarly, plaintiffs have failed in attempts to disqualify Department attorneys on the grounds of conflict of interest. Aetna Casualty and Security Co. v. United States, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821 (1978); Halperin v. Kissinger, et al., 542 F. Supp. 829 (D. D.C. 1982).

Recently, however, the U.S. Court of Appeals for the District of Columbia held that a decision by the Attorney General not to reimburse a federal employee for private counsel expenses was subject to APA judicial review for the reasonableness of the decision. Falkowski v. EEOC, et al., No. 82-1446 (January 12, 1984). The issue of whether to file a petition for certiorari is now under review.

L. DRIVERS' ACT AND SIMILAR EXCLUSIVE REMEDY STATUTES

There are statutes that provide an exclusive remedy against the United States for certain kinds of tortious conduct and thereby effectively immunize federal employees engaged in the covered activities. The primary beneficiaries of such legislation are drivers of motor vehicles acting within the scope of federal employment (28 U.S.C. § 2679) and medical personnel of various federal agencies (10 U.S.C. § 1089, Armed Forces; 22 U.S.C. § 817, State Department; 38 U.S.C. § 4116, Veteran's Administration; and 42 U.S.C. § 233, Public Health Service). In such cases, the United States Attorney has authority to affirmatively determine that the employee was acting in the scope of employment and to then certify that finding to the court, substituting the United States as the defendant and, where appropriate, removing the case from state to federal court. See 28 C.F.R. §§ 15.1-15.3. The scope of this monograph does not include discussion of such statutes. Suffice it to say that Department attorneys should be alert for the possibility that such a statute may be applicable and the individual defendant thus immunized by statute from suit and personal liability.

VII. ELEMENTS OF EFFECTIVE REPRESENTATION

The observation was made at the outset of this monograph that there have been approximately ten thousand individual capacity, tort lawsuits filed against federal employees since 1971. Of those, only seventeen have resulted in verdicts

entered against individual federal employees and only five have ultimately resulted in the payment of money from the defendants to plaintiffs. The reasons for this laudable win-loss record are varied. Primary among them is the fact that the Department of Justice, its trial attorneys and Assistant United States Attorneys place great emphasis on these cases, which generally and specifically go to the heart of the ability of the Government and its employees to function. Key elements have been:

First, timeliness. Agency and Department attorneys have been alert to the need for expeditious, even immediate, processing of representation requests and prompt action in court. These cases simply cannot afford to sit. With individual liability the issue, there is too much at stake.

Second, alertness to issues and defenses unique to the individual. The Department attorney representing an individual defendant must pay close attention to the defenses set forth in Rule 12 and Rule 8 of the Federal Rules of Civil Procedure. In addition, an individual defendant has available certain immunity defenses, such as qualified immunity in constitutional tort cases and absolute immunity in common law tort cases, which must be asserted in every case. See, Torts Branch Representation Monograph III.

Third, close coordination. The involved offices have usually stayed in close touch with the cases, assuring that all defenses are raised and that all facts and arguments are properly marshalled.

Fourth, personal attention. Testimony in the Congress has revealed that Bivens cases involve twenty to fifty percent more attorney time because of the need to attend to the legitimate fears and concerns of individual clients. It cannot be over-emphasized that this must be done in every case, and the client must know that his interests are, in fact, being looked to.

Finally, since the cases can so rarely be settled, the only true assurance is a vigorous defense. Usually "no quarter" is asked or given in the defense of Bivens cases. Aggressive motions practice is followed by aggressive discovery and aggressive trial litigation. All federal attorneys need to be sensitive to the frame of mind of being, "agile, mobile and hostile," in Bivens cases in order that individual defendants prevail and the people of the United States continue to enjoy the benefit of effective government.

APPENDIX I

In the event of an adverse money judgment entered solely against you in this case, you will be personally responsible for the payment of this judgment; there is no right to indemnification from the United States. However, if the United States is properly made a defendant by the plaintiff and there is a judgment entered jointly against you and the United States, the United States would pay the judgment. By statute, the United States cannot be held liable for punitive damages (damages awarded to punish the defendant). Therefore, you would be personally responsible in the unlikely event punitive damages are assessed.

We look forward to a close and productive working relationship with you on this case should you elect to be represented by Department of Justice attorneys. If so, please sign the attached copy of this letter and return it for our files. Our office is committed to vigorously defending this action and we share your confident hope in a favorable result.

ACKNOWLEDGEMENT
AND ACCEPTANCE: _____

DATE: _____

Re: Case of _____ v. _____

APPENDIX I

SAMPLE REPRESENTATION LETTER AGREEMENT

Re:

Dear:

This is in response to your request for representation by the Department of Justice in this case. It reasonably appears that you were acting within the scope of your federal employment with respect to the events giving rise to this lawsuit and that extending such representation would be in the interest of the United States. Therefore, I am pleased to advise you that representation in this case by attorneys employed by the Department of Justice is available to you without cost.

You are, of course, free to retain private counsel at your own expense to represent your interests in this case now and at any time in the future. You are not required to accept representation by Department of Justice attorneys and it is the purpose of this letter to provide you with information about the nature of Department of Justice representation so that you can make an informed choice. A copy of the applicable regulations is attached for your information and review.

Department of Justice representation may differ in certain respects from that provided by a private attorney hired by you with your own funds because the Department attorney must continue to represent the interests of the United States. This is not to say that the attorney(s) assigned to your defense will not engage in a full, confidential and traditional attorney-client relationship with you. The attached regulations and legal ethics require attorneys assigned to this case to keep your confidences. But you must also be made aware of the fact that the responsibility of Department attorneys to represent the interests of the United States may, at times and under certain circumstances, limit actions which might otherwise be taken on your behalf. For these reasons, you should be aware of the following points concerning the representation by Justice Department lawyers which we are offering you:

1. Attorneys employed by the Department will not assert on your behalf any claim you may have against the United States in this case; nor will they assert any claim you might have against other federal employees;

2. As a general policy, Department attorneys can only undertake to defend you. They will not assert an affirmative claim on your behalf against the plaintiff or anyone else. If you strongly believe that such a claim should be asserted, your normal recourse would be for you to hire a private attorney at your personal expense to press that claim. In the rare instance when an affirmative claim would also further the defense of the federal employee and the interests of the United States, the Department would consider pressing the claim;

3. If there is a legal argument which may be made in your defense, but which conflicts with a legal position taken by the United States in this or another case, Department of Justice attorneys will not make the argument. You will be advised of this fact and afforded the opportunity to retain private counsel at your expense if you choose to pursue the argument. It must be noted that, within these constraints, Department attorneys will fully represent you an will assert all legal positions appropriate to your defense which are not precluded by their responsibility to attend to the interests of the United States;

4. If the United States, any agency or any officer in his official capacity is also sued, Department attorneys are required to assert all appropriate defenses on their behalf even if it is to your detriment in defending the case;

5. If the judgment of the court is in your favor and the losing plaintiff appeals, representation would continue throughout the appellate stages of this case. In the event of an adverse judgment, the Solicitor General would determine whether an appeal would be in the interest of the United States. If so, Department attorneys would continue to represent you. If the Solicitor General, pursuant to the statutory obligations inherent in his office, determines that an appeal would not be in the interests of the United States, we would make every effort to facilitate an appeal by an attorney retained by you at your own expense if you desire.

While in some narrowly limited circumstances the Department of Justice may elect to provide private counsel at federal expense, the chronic uncertainty of budgetary limitations and the required determinations as to the interests of the United States may preclude such representation at any given time. In any event, the circumstances of this case at the present time permit direct representation by Department of Justice attorneys.

In the event of an adverse money judgment entered solely against you in this case, you will be personally responsible for the payment of this judgment; there is no right to indemnification from the United States. However, if the United States is properly made a defendant by the plaintiff and there is a judgment entered jointly against you and the United States, the United States would pay the judgment. By statute, the United States cannot be held liable for punitive damages (damages awarded to punish the defendant). Therefore, you would be personally responsible in the unlikely event punitive damages are assessed.

We look forward to a close and productive working relationship with you on this case should you elect to be represented by Department of Justice attorneys. If so, please sign the attached copy of this letter and return it for our files. Our office is committed to vigorously defending this action and we share your confident hope in a favorable result.

ACKNOWLEDGEMENT AND ACCEPTANCE: _____

DATE: _____

Re: Case of _____ v. _____