



Department of Justice

STATEMENT

OF

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DIRECTOR

EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

U.S. DEPARTMENT OF JUSTICE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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UNITED STATES TRUSTEE PROGRAM: OVERSIGHT HEARING

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Statement of
Clifford J. White III
Director
Executive Office for United States Trustees
United States Trustee Program: Oversight Hearing
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
United States House of Representatives

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Madam Chairman, Ranking Member Cannon, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss the activities of the United States Trustee Program (USTP or Program). We are the component of the United States Department of Justice whose mission it is to promote the integrity and efficiency of the bankruptcy system.^{1/} Our duties, which are set out primarily in titles 11 and 28 of the United States Code, range from consumer bankruptcy cases to large corporate reorganizations.

Over the past two years, our focus necessarily has been on implementing the substantial new responsibilities given to the Program by the Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). We are now responsible, for example, for conducting a more transparent and objective test to determine a consumer debtor's eligibility for chapter 7 relief, scrutinizing applications by credit counselors and debtor educators to ensure that only qualified providers are approved to offer these services to debtors, supervising audits of chapters 7 and 13 cases, and enforcing new provisions to hold corporate managers more accountable after their companies file for bankruptcy relief. These have been daunting tasks, but objective evidence suggests that we are meeting the challenges. We understand that our work to effectuate the BAPCPA is far from over, and every day we strive to refine our efforts and to improve upon our performance for the benefit of all stakeholders in the bankruptcy system.

In carrying out the BAPCPA and other statutory mandates, the Program is guided by a simple principle: to faithfully carry out the law as written by Congress, and to do so with prudence, discretion, and sound legal judgment. We balance many factors in every case and, while we vigorously enforce the law, we recognize that not every technical violation merits an enforcement action. Further, we work to combat both fraud and abuse committed by debtors, as

^{1/} The USTP has jurisdiction in all judicial districts except those in Alabama and North Carolina. In addition to specific statutory duties and responsibilities, United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307.

well as violations committed against debtors who are vulnerable to exploitation because of their financial situation.

One of the major challenges we have faced has been the litigation of numerous cases on issues of first impression. It is our duty to help clarify the many new and complex provisions of the BAPCPA by bringing issues before the bankruptcy and appellate courts to promote the coherent, uniform, and prompt development of case law.

The Program's success in fulfilling the broad responsibilities assigned to it in the BAPCPA is a result of the extraordinary efforts of staff in the Executive Office and in our field offices. Prior to the effective date of the BAPCPA, teams of employees from around the country were assembled to develop policies and procedures to ensure the effective and efficient implementation of the new law. These teams also conducted comprehensive training for all employees in the Program, as well as for the private trustees and members of the bar. As we retooled our internal operations, we engaged in an enormous outreach effort with other constituencies in the bankruptcy system. We have regularly consulted with government agencies, the consumer bar, consumer advocates, creditor organizations, the courts, and others to gain a broader perspective on our new duties. Both internal analyses and external outreach are a continuing part of our strategy to enhance our ability to make the BAPCPA work for all stakeholders in the bankruptcy system.

The following highlights some of the most significant activities of the Program over the past year.

Civil Enforcement, Means Testing, and Consumer Protection

Civil Enforcement

One of the core functions of the USTP is to combat bankruptcy fraud and abuse. This is reflected both in our statutory mandate and in our track record over the past 20 years. In launching a Civil Enforcement Initiative in 2002, the Program adopted a balanced approach to address wrongdoing both by debtors and by those who exploit debtors. The Program combats fraud and abuse by debtors by seeking denial of discharge for the concealment of assets and other violations, by seeking case dismissal if a debtor has an ability to repay debts, and by taking other enforcement actions. We protect consumer debtors from wrongdoing by attorneys, bankruptcy petition preparers, creditors, and others by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In the first three quarters of Fiscal Year (FY) 2007, the Program took more than 55,000 civil enforcement and related actions, including actions not requiring court resolution, with a monetary impact of more than \$651 million in debts not discharged, fines, penalties, and other relief. Since we began tracking our results in 2003, we have taken more than 270,000 actions with a monetary impact in excess of \$3.2 billion.

Means Testing

A major new aspect of our civil enforcement efforts is the implementation of the means test that was established under the bankruptcy reform law. The new section 707(b) and other provisions replaced the former subjective “substantial abuse” standard with more transparent and objective criteria to determine whether a case is “presumed abusive” and potentially subject to dismissal. Under the means test, all individual debtors who have above median income are subject to a statutorily prescribed formula to determine disposable income. The formula is partially based on allowable expense standards issued by the Internal Revenue Service for its use in tax collection. The primary purpose of the means test is to help determine eligibility for chapter 7 bankruptcy relief.

The Judicial Conference of the United States promulgated the official means test forms that debtors are required to complete. It is important to note that the means test calculation of disposable income applies only to debtors with income above their state median level. For more than 90 percent of chapter 7 debtors and nearly three-quarters of chapter 13 debtors, the means test is abbreviated to an income calculation without consideration of expenses.

The BAPCPA requires the United States Trustee to file a statement with the court within 10 days after the section 341 meeting of creditors indicating if the case is “presumed abusive” under the statutory formula. Within 30 days thereafter in “presumed abusive” cases, the United States Trustee is required to file either a motion to dismiss or a statement explaining why filing such a motion would not be appropriate. We have endeavored to implement these mandates in a manner that allows us to identify cases of abuse and also to exercise our discretion to ensure that dismissal is sought only in appropriate cases.

Between October 1, 2006, and June 30, 2007, approximately nine percent of chapter 7 debtors had income above their state median. Of those cases filed by above median income debtors, approximately 10 percent were “presumed abusive.” However, after consideration of special circumstances, such as a job loss, reduction in income, or medical condition, we exercised our statutory discretion to decline to file motions in about 30 percent of the “presumed abusive” cases that did not voluntarily convert or dismiss.

Despite the high rate of declinations, we are filing motions to dismiss at nearly three times the rate prior to enactment of the BAPCPA. Notably, the United States Trustee has prevailed in nearly 97 percent of the cases that were either adjudicated by the bankruptcy court or voluntarily dismissed or converted under the “presumed abuse” standard contained in 11 U.S.C. § 707(b)(2). For example, in a recent case in the Northern District of Texas, an investigation by the United States Trustee’s office revealed that a married couple had under-reported their income by more than \$5,000 per month and had over-reported their mortgage expense. When the means test was adjusted to align with the facts, it reflected that the debtors had over \$1,000 per month in disposable income, as opposed to the minus \$18 they had initially claimed. In response to the United States Trustee’s motion to dismiss, the debtors converted their case to chapter 13 and will repay nearly \$62,000 to unsecured creditors.

It is important to note that even if a case is determined not to be “presumed abusive” under the means test calculation, the reform law does not preclude the USTP from taking action when it finds it to be abusive under a “totality of the circumstances” or bad faith analysis. The following examples illustrate this point.

- Despite annual income exceeding \$125,000, a debtor in the Western District of Washington attempted to discharge \$642,181 in unsecured debt in order to retain what he described as his \$810,000 “dream home” with a \$7,200 monthly mortgage payment. Although the case was not “presumed abusive” under the means test because his large monthly payments to secured creditors reduced his current monthly income, the United States Trustee successfully argued for dismissal under the totality of the circumstances of the debtor’s financial situation.
- The United States Trustee obtained case dismissal for bad faith against debtors in the District of Massachusetts who earned nearly \$10,000 per month; owned real estate valued at almost \$1 million; and owned or leased a Jaguar, a Mercedes Benz, and a vintage 1965 Mustang. They incurred significant debt on numerous credit cards to purchase luxury goods and withdrew large cash advances against the cards within one year before filing bankruptcy. The dismissal prevented the chapter 7 discharge of \$300,775 in unsecured debt.

Congress mandated that the Director of the Executive Office report on the impact of the use of the IRS standards in the means test calculation. The Program contracted with the RAND Corporation to collect data and to perform related research. Based on that research, in July of this year, the Program issued its report to the Congress. The most significant finding was that the IRS standards generally allow chapter 13 debtors to deduct expenses in an amount above their actual expenses, with the greatest advantage realized by above median chapter 13 debtors with lower income. The IRS standards allow above median debtors, on average, \$490 in expenses above the amount that debtors report they actually spend. As income rises, the differential becomes smaller. This means that the IRS standards have a progressive impact on above median debtors, such that those with lower income are treated more favorably than those with higher income. Further research using a larger sample size is necessary to determine any long-term trends. Unfortunately, the inability to extract data electronically from court forms necessitates the use of manual data entry, which makes further research cumbersome and expensive.

Consumer Protection

An important component of the Program’s civil enforcement efforts has been to protect consumer debtors. These enforcement efforts often involve actions against debtors’ counsel, non-attorney bankruptcy petition preparers (BPPs), or other third parties. In the first nine months of FY 2007, the Program took 394 formal actions against debtors’ counsel and 184 actions against petition preparers.

Among the most egregious schemes are those perpetrated upon consumers facing foreclosure on their homes. In a recent case in the Western District of Pennsylvania, the

bankruptcy court entered a default judgment against a BPP following an adversary proceeding filed by the Office of the United States Trustee. The out-of-state BPP contacted several Pittsburgh area residents faced with foreclosure by mailing a postcard which guaranteed the BPP could help them keep their homes. In exchange for fees ranging from \$250 to \$2,100, the BPP provided the homeowners with skeletal chapter 13 petitions to file to stay foreclosure. The debtors' bankruptcy cases were ultimately dismissed. The court fined the BPP \$72,000, ordered the disgorgement of fees in the amount of \$8,200, and permanently enjoined it from acting as a BPP and offering legal advice or otherwise engaging in the unauthorized practice of law in the district.

Regrettably, debtors sometimes are also exploited by their bankruptcy lawyers. In a recent case in the District of Rhode Island, the bankruptcy court approved an order in which a debtor's attorney consented to a 36-month suspension from the practice of bankruptcy law and agreed to disgorge \$2,726 in fees to three former clients. The order resulted from an investigation by the United States Trustee's Providence office into numerous complaints that the attorney engaged in professional malfeasance when handling consumer bankruptcy cases.

The Program also has a duty to redress violations by creditors, particularly when the abuse is systemic or multi-jurisdictional. In many cases, creditor abuse is best addressed by the private case trustees we appoint who object to claims, or by debtors' lawyers who dispute loan agreement terms. But sometimes, the integrity of the system as a whole is at stake, and it is important for the Program to take direct enforcement action.

In one ongoing case in the Southern District of Texas involving the conduct of a large national mortgage servicer and its counsel, the Program has invested substantial resources. USTP attorneys deposed more than 20 witnesses, reviewed nearly 10,000 pages of documents, and completed five full days of trial. In another case, the bankruptcy court sanctioned the law firm of that same national mortgage servicer for making inaccurate representations to the court. In his opinion, the bankruptcy judge noted that creditor's counsel "complained bitterly about the participation of the U.S. Trustee in this matter." The court concluded, however, that the United States Trustee's participation "assured presentation of a complete factual and legal case" and "provided an invaluable benefit to the case and to the process by his professional participation."

The Program also has been active in enforcing 11 U.S.C. § 363(o), which is a less publicized consumer protection measure added under the BAPCPA. Section 363(o) prohibits bankrupt lenders from selling loan portfolios or other interests "free and clear" of the rights of their customers to assert claims or defenses provided under the Truth in Lending Act or other consumer protection laws. The United States Trustee's role to enforce section 363(o) is paramount because consumer borrowers may not receive notice of the intended sale of their loans. Even if they receive notice, they may not have the financial means to object to the sale or request the sale provisions contain section 363(o) safeguards to preserve their rights. To date, United States Trustees have filed pleadings to enforce section 363(o) in at least a dozen cases in which bankruptcy sales by lenders did not provide the required and appropriate consumer protection.

The BAPCPA created 11 U.S.C. §§ 526-528 to protect consumer debtors by regulating the conduct of debt relief agencies (DRA), as defined in the Bankruptcy Code, that provide bankruptcy-related services. Approximately 20 cases have raised statutory challenges to the DRA provisions, including challenges to the application of the provisions to attorneys, to the requirement that a DRA provide certain written disclosures to consumer debtors, to the constitutionality of the prohibition on advising debtors to incur additional debt in contemplation of filing bankruptcy, and to the constitutionality of the required disclosure in advertisements touting bankruptcy assistance.

The Program has worked closely with the Department's Civil Division, which has taken the lead in defending the DRA provisions in cases brought in United States bankruptcy and district courts. The majority of these cases have been resolved, with several cases being dismissed. Appeals are pending in the Second, Fifth, Eighth, and Ninth Circuits, all of which involve constitutional challenges. In addition, arguments on similar issues have been fully briefed in two district court cases.

Criminal Enforcement

Criminal enforcement is another key component of the Program's efforts to uphold the integrity of the bankruptcy system. We recently issued our first annual report to the Congress on criminal referrals by the Program. We reported that in FY 2006, the Program made 925 bankruptcy and bankruptcy-related criminal referrals. We are on track to exceed that number for FY 2007.

Under the leadership of our Criminal Enforcement Unit (CrEU), consisting primarily of career federal prosecutors, we have enhanced the Program's work in this critical area. The CrEU has conducted extensive training for federal prosecutors and law enforcement personnel, USTP staff, private trustees, and others; published internal resource documents and a training video for use by Program personnel involved in the criminal referral process; and established a bankruptcy fraud Internet "hotline" that became operational at the beginning of FY 2007. In addition, approximately 25 of the Program's attorneys have been cross-designated as Special Assistant United States Attorneys to assist in the prosecution of bankruptcy fraud.

The following examples demonstrate the wide array of bankruptcy fraud prosecutions that address both debtor fraud and criminal violations by those who exploit debtors:

- On April 13, 2007, in the District of Minnesota, husband and wife debtors were convicted on eight counts and nine counts, respectively, including false declaration in bankruptcy, concealment of assets, and money laundering. In their bankruptcy case, the couple did not disclose their interests in an Individual Retirement Account (IRA) and substantially understated the value of their house. When the chapter 7 trustee discovered the IRA, valued at approximately \$208,000, the debtors liquidated the asset, cashed the check, and concealed the cash from the trustee. After the trustee learned of the true value of the debtors' interest in their house, the house burned down and the couple received a check for the insurance proceeds from

the loss. The debtors cashed the check, which was property of their bankruptcy estate, and carried \$244,535 in currency from the bank. The insurance proceeds have not been recovered by the trustee. The United States Trustee's Minneapolis office referred the case and assisted in the investigation, and a member of CrEU assisted in the preparation of the indictment.

- A "foreclosure rescue" operator was sentenced on August 8, 2007, in the District of Arizona to 33 months in prison, fined \$5,000, and ordered to pay \$86,409 in restitution, based on his guilty plea to two counts of false declaration in bankruptcy. The operator sought out individuals who were losing their homes to foreclosure and prevailed upon them to transfer their homes to him to avoid having a foreclosure on their credit reports. To stay foreclosure, he filed bankruptcy petitions in the homeowners' names without their knowledge. While the cases were pending, he collected rental income on the properties. The United States Trustee's Phoenix office referred the matter, conducted the investigation, and provided assistance to the United States Attorney's office.

Credit Counseling and Debtor Education

One of the key elements of the bankruptcy reform law is financial education. Individual debtors must now receive credit counseling prior to filing and education on personal financial management prior to discharge. These new requirements are designed to ensure that debtors know what their options are before entering bankruptcy and have the tools to avoid future financial catastrophe when they exit bankruptcy.

The primary responsibility of the United States Trustees is to approve providers who meet statutory qualifications to offer credit counseling and debtor education services to debtors. In light of the troubled history of the credit counseling industry, our priority was to design an application screening and approval process that would protect debtors from unscrupulous providers. We developed our approval and monitoring criteria with assistance from the Internal Revenue Service and the Federal Trade Commission.

There are currently 161 approved credit counseling agencies and 297 approved debtor education providers. Approximately 41 percent of all initial credit counseling applications and 28 percent of initial debtor education applications were either rejected or withdrawn. In recent months, the Program launched a schedule of on-site Quality Service Reviews. This mechanism for post-approval monitoring will permit the Program to interview provider staff, review records on-site, and observe counseling sessions. These reviews will strengthen the Program's efforts to ensure that debtors receive quality services from approved providers.

Approximately 46 percent of debtors receive credit counseling via the Internet (which also may have a telephone component), 43 percent by telephone, and 11 percent in person. From October 1, 2006, to June 30, 2007, credit counseling agencies issued 801,024 counseling certificates. Interestingly, during the first nine months of FY 2007, approximately 14 percent fewer bankruptcy cases were filed than credit counseling certificates were issued. We will need

time series data to determine if this difference is probative of the question of whether credit counseling is assisting debtors in identifying alternatives to bankruptcy.

Another ongoing concern of the Program is the provision of credit counseling and debtor education for limited English proficient debtors. The Program has approved two national providers that offer interpreter services without charge to their clients in more than 150 languages. In addition, other approved national and local providers offer telephonic or in-person counseling in a total of 30 languages. Approved providers are required to report to the Program on their language capabilities, and the USTP Web site provides information on the language capability of all providers on a district-by-district basis.

The USTP also monitors compliance with the Congressional mandate that approved providers offer services without regard to a debtor's ability to pay. Available information suggests that fees charged for services appear to be reasonable and that providers are waiving or reducing fees in appropriate cases. Fees charged by credit counseling agencies and debtor education providers generally are about \$50. Fees are waived by credit counseling agencies in 15 percent of all cases, and are offered at a reduced rate in about another 14 percent of the cases. Similarly, debtor education providers are waiving fees in 14 percent of cases and reducing fees in approximately 21 percent of cases. This means that about one out of every three debtors is receiving the required counseling and education services at no cost or at a reduced cost.

In a report issued in April 2007, the Government Accountability Office (GAO) credited the Program with developing a comprehensive, timely, and effective process for the approval of eligible credit counselors and debtor educators. GAO found few issues with the competence, integrity, and performance of providers approved by the USTP. Additionally, GAO found that debtors receive services within a reasonable time frame and at a reasonable fee that is waived for inability to pay. GAO did make two recommendations for further action which the Program endorses.

- The USTP should “develop a mechanism that would allow the Program or other parties to track outcomes of pre-filing credit counseling, including the number of individuals issued counseling certificates who then file for bankruptcy.” In addition to refining efforts already made in comparing certificates with bankruptcy filings, we also will pursue recommendations made in a recent report prepared for the Program by the RAND Corporation. Among other things, RAND recommended that we develop outcome measures based upon results from the Quality Service Reviews of approved providers that we began to conduct this year. The scope and timeliness of our research may be determined, in part, by our level of appropriations in FY 2008.
- The Program should “issue formal guidance on what constitutes ‘ability to pay’ . . . [and] examine the reasons behind the significant variation among providers in waiving fees.” We are preparing formal fee waiver guidance in a rulemaking which we hope to issue for public comment in the near future. We also will collect and analyze data from providers so that we can enhance our ability to compare the

number of fee waivers granted by providers and the criteria they used in making their decisions.

Section 105 of the BAPCPA requires the Program to develop and evaluate the effectiveness of a financial management training curriculum and materials. After consulting with a wide range of individuals who are experts in the field of debtor education, including chapter 13 trustees, a curriculum was developed and pilot tested. The study is nearing completion and a report will be submitted to Congress by the end of this calendar year.

Debtor Audits

The BAPCPA mandated a new regimen of debtor audits for consumer cases filed on or after October 20, 2006. Audits must be conducted in at least one out of every 250 consumer cases filed in a judicial district, and in cases where income or expenses deviate from a statistical norm. Each audit will verify the accuracy of the financial information provided in a debtor's schedules and statement of financial affairs. The audits are designed to assist the Program in identifying cases of fraud, abuse, and error; to enhance deterrence; and to provide baseline data to gauge the magnitude of fraud, abuse, and errors in the bankruptcy system.

In FY 2007, the USTP contracted with six accounting firms to perform the audits. By statute, debtors are required to cooperate with the auditors, and a debtor's discharge may be revoked for failing to adequately explain either a lack of cooperation with the auditor or a material misstatement reported by the auditor. Before an audit firm reports a material misstatement, it is required to offer the debtor an opportunity to provide a written explanation. The Program also is required to report annually to Congress on the results of the audits.

As of August 31, 2007, 3,344 cases had been selected for audit and 2,575 audits had been concluded. There are three potential outcomes for a debtor audit: (1) no material misstatements reported, (2) at least one material misstatement reported, or (3) issuance of a report of no audit. About 27 percent of the audits concluded thus far have identified at least one material misstatement, and an additional 10 percent were closed without audit completion generally because the debtor did not respond to the audit notification letter, the debtor did not provide a sufficient response to the audit firm's request for information, or the case was dismissed before a sufficient response was received.

When a debtor audit identifies a material misstatement, the Program reviews the case to determine if enforcement action is appropriate. In a recent case in the Eastern District of California, an audit revealed that a debtor had under-reported several bank and financial accounts, and had failed to disclose pre-petition transfers to insiders and creditors. Based on these facts, the United States Trustee's Sacramento office filed a complaint against the debtor, who agreed to forego the discharge of \$4.2 million in unsecured debt rather than proceed to trial.

Chapter 11 Issues

The Program carries out significant responsibilities in business reorganization cases. These responsibilities include such matters as the appointment of official committees of creditors and equity security holders, objections to the retention and compensation of professionals, the review of disclosure statements, and the appointment of trustees and examiners where warranted. The BAPCPA reformed chapter 11 practice in many important respects, including the imposition of new deadlines for reorganization in small business cases; the USTP appointment of privacy and patient care ombudsmen to protect the rights of customers, patients, and other third parties affected by chapter 11 cases; and the addition of other requirements to enhance management accountability. Because business reorganization cases often raise highly complex questions of law and require sophisticated financial analysis, such cases can be time intensive for United States Trustee staff.

In the first nine months of FY 2007, the Program filed 1,717 motions to convert or dismiss chapter 11 cases. The grounds for such motions often involved debtors' failure to file financial reports or debtors' dissipation of estate assets without a reasonable likelihood of rehabilitation. In addition, the Program filed objections to professional fees in 460 cases and obtained nearly \$17 million in fee reductions. An additional \$11 million in reductions in 578 cases were obtained through out-of-court resolution. It is not possible to calculate other reductions voluntarily taken by professionals on account of USTP scrutiny of compensation applications.

One recent case illustrates the USTP's role in the review of professional compensation. In the case of Northwest Airlines in the Southern District of New York, debtor's counsel was paid \$35.5 million and requested an additional bonus of \$3.5 million due to "exceptional results achieved, the quality of work performed and the efficiency with which the services were rendered" in the case. The Program, along with the flight attendants' union and a former member of the Ad Hoc Committee of Certain Claims Holders, objected to the success fee. The United States Trustee argued that debtor's counsel was well compensated at market rates and provided no specific evidence of exceptional results that were not adequately compensated by such rates. The court ruled that the requirements for a fee enhancement were not met and denied the success fee.

The Program also reviews applications for the retention of professionals to ensure compliance with section 327 conflict of interest prohibitions. During FY 2007, three courts of appeals upheld objections by the USTP to the proposed retention of professionals who had interests adverse to the estate, were not disinterested, or failed to disclose connections that created potential and actual conflicts of interest.

Another recent case demonstrates the important role of the United States Trustee when management does not properly exercise its fiduciary obligations to the estate and comply with the law. The United States Trustee's Brooklyn office sought dismissal of a chapter 11 case due to the debtor's failure to provide proof of insurance, cooperate with the United States Trustee, meet disclosure and financial reporting obligations, and otherwise demonstrate an ability to reorganize. On the date the debtor filed its bankruptcy petition, it owned an apartment building that had more

than 1,400 uncorrected housing code violations and was about to be sold through a HUD regulatory foreclosure. The United States Trustee's motion to dismiss the case was supported by HUD, the City of New York, and an informal committee of tenants. The Bankruptcy Court for the Eastern District of New York dismissed the case on September 6, 2007, with a six-month bar to refiling a bankruptcy petition. The bar to refiling will allow HUD to proceed with the foreclosure and transfer the property to a responsible owner who will cure the housing code violations.

As noted, the BAPCPA added numerous provisions designed to enhance management accountability and to provide greater protections to creditors, shareholders, and the public. For example, Congress added section 1104(e) to the Bankruptcy Code, which requires the United States Trustee to seek to oust management if there are "reasonable grounds to suspect" that current management participated in fraud, dishonesty, or other criminal acts in the debtor's management or public financial reporting. In addition, corporate debtors are under stricter time deadlines to confirm a plan of reorganization. Under new 11 U.S.C. § 503(c), companies are also restricted in their ability to pay bonuses to senior executives through Key Employee Retention Plans (KERPs). Since enactment of section 503(c) through the beginning of August 2007, United States Trustees have filed approximately 40 objections to executive bonus plans and have been successful in almost 70 percent of these cases. This number does not include additional instances where the United States Trustee persuaded the debtor to modify its compensation scheme to avoid an objection. Moreover, 11 U.S.C. § 1112(b) was amended to lessen the court's discretion to refuse to order conversion of a case to chapter 7 if the debtor is not expeditiously reorganizing in accordance with the commands of chapter 11.

Two cases illustrate our actions to carry out the new chapter 11 provisions:

- In the New Century TRS Holdings, Inc., subprime mortgage lending case, the United States Trustee invoked section 1104(e) and filed a motion for the appointment of a trustee. As grounds, the motion cited New Century's admitted inability to stand behind its SEC financial filings and substantial issues about its internal financial controls. While the court acknowledged that the United States Trustee had raised serious concerns, the court granted alternative relief by ordering the United States Trustee to appoint an examiner to investigate the circumstances surrounding New Century's inaccurate public financial filings. When New Century later acknowledged that it could not stand behind its filings for a prior year, the court, at the United States Trustee's request, expanded the investigation to encompass that year as well.
- In the case of Malden Mills, the debtor, having failed to rehabilitate its business in a previous chapter 11 case, filed a new petition and immediately sought court approval of substantial bonuses for top management and others. The bonuses were payable upon the consummation by the debtor of a pre-negotiated sale of assets. Unsecured creditors were to receive nothing in the case, and most employees lost their jobs. The United States Trustee objected to the excessive bonuses, and the debtor withdrew the bonus proposal.

Private Trustee Oversight

One of the core functions of the United States Trustee is to appoint and supervise the private trustees who administer consumer bankruptcy estates and distribute dividends to creditors. The Program also trains trustees, evaluates their overall performance, reviews their financial accounting, and ensures their prompt administration of estate assets.

In the first nine months of FY 2007, approximately 530,000 consumer and other non-business reorganization cases were filed under chapters 7, 12, and 13 of the Bankruptcy Code in the 88 judicial districts covered by the Program. The United States Trustee oversees the activities of the approximately 1,400 private trustees appointed by them to handle the day-to-day activities in these cases. With distributions by these trustees of about \$7.9 billion last fiscal year, the Program's effectiveness in this area is critical. The Program has continued to strengthen its partnership with the private trustee organizations to address areas of mutual concern and enhance the operation of the bankruptcy system.

In implementing bankruptcy reform, the Program worked closely with the trustees and provided extensive training, with a particular focus on their new responsibilities with regard to serving as employee benefit plan administrators and the handling of debtor tax returns. We also have initiated the rulemaking process to issue uniform trustee final reports, which will enhance consumer bankruptcy case administration by improving access to case data and allowing for greater analysis of the bankruptcy system.

Information Technology Efforts

To the maximum extent possible, the USTP has leveraged its resources by utilizing information technology. In addition to enhancing existing automated systems that help manage caseloads and measure Program activity (e.g., the Automated Case Management System, Significant Accomplishments Reporting System, Criminal Enforcement Tracking System, and Professional Timekeeping System), the USTP has developed a number of new systems. These include a Means Test Review Management System, a Credit Counseling/Debtor Education Tracking System, a Credit Counseling/Debtor Education Certificate Issuance System, and a Debtor Audit Management System.

Notwithstanding the addition of these systems, the Program's ability to achieve efficiencies and maximize data collection has been hampered by an inability to electronically extract data from bankruptcy petitions and schedules. As suggested in Congressional Appropriations Committee Reports, we have been working with the Administrative Office of the U.S. Courts (AOUSC) for more than two years to have a data-enabled form standard made mandatory, subject to appropriate privacy and access concerns. "Data tags" in a data-enabled form permit the computer system to automatically extract and aggregate financial and other information from bankruptcy filings. Such forms would make the USTP's implementation of the new bankruptcy law vastly more time and cost efficient in several key areas such as calculating the means test to determine eligibility for chapter 7 relief and identifying cases for audit under statutory case selection standards. They would also save case trustees significant time and expense in the filing

of final reports in hundreds of thousands of no-asset consumer cases where considerable new information is required under the BAPCPA. In addition, data tags could aid the courts in performing administrative functions and would assist policymakers and researchers in analyzing the effectiveness of the bankruptcy system (by, for example, providing better data on the relationship between medical expenses and bankruptcy filings). Discussions with the courts on this critical issue are continuing.

Fiscal Year 2008 Appropriations Request

The USTP is entirely self-funded through user fees paid by bankruptcy debtors. All revenues are deposited into the United States Trustee System Fund. The Program may expend funds as appropriated by Congress. In FY 2007, approximately 50 percent of the funding was derived from quarterly fees in chapter 11 reorganization cases. The balance of the funds was derived from filing fees paid in chapters 7, 11, 12, and 13, as well as interest earnings and miscellaneous revenues.

For FY 2007, Congress appropriated \$223.1 million for the USTP. This amount provided funding for operations, including the Executive Office and 21 regions consisting of 95 field offices. The Program employs approximately 1,300 attorneys, financial analysts, and support staff. The USTP covers more than 300 sites where bankruptcy judges conduct proceedings and more than 450 administrative hearing sites (*i.e.*, section 341 meeting rooms).

For FY 2008, the President requested appropriations of \$231.9 million for the USTP. This amount would provide a current services budget. The Senate Appropriations Committee approved the President's budget. The House of Representatives passed legislation that would satisfy the President's request, subject to collections. The Program and the Department have re-estimated the level of receipts that are expected to be collected in 2008. The Attorney General has addressed the issue of the USTP funding in his appeal to the Appropriations Subcommittee, pointing out that the U.S. Trustee System Fund has a sufficient surplus to fully fund the FY 2008 request.

Conclusion

The United States Trustee Program has assembled a substantial record of accomplishment since enactment of the BAPCPA. Compliance with the comprehensive changes to the Bankruptcy Code has presented significant challenges to the United States Trustees, the courts, debtors, creditors, attorneys, and others. The bankruptcy system is in a period of transition. The USTP will continue its efforts to work cooperatively with all components of the system to satisfy our obligations to implement the law with fairness, efficiency, and effectiveness for the benefit of all stakeholders.