April 24, 2000

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

The Administration understands that, although conferees have not yet been named, your staff are discussing ways to reconcile the House and Senate versions of H.R. 833, the Bankruptcy Reform Act. The attachment to this letter outlines the Administration's views on these two versions of the bill. As you and your staff develop an agreement on this bill, your consideration of these views would be appreciated.

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President, as described in the enclosure. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

The Administration notes that certain non-relevant amendments have been included in the Senate version of the bill. The President has made clear on a number of occasions that he strongly supports an increase in the minimum wage of $1 over the next two years. However, as the Administration has stated previously, if Congress sends him a bill delaying the increase, repealing overtime protections for certain workers, adding costly and unnecessary tax cuts that threaten fiscal discipline and direct benefits away from working families, thwarting ongoing efforts to enforce pension law, **and including an objectionable private school voucher provision**, he will veto it.

Thank you for your consideration of the Administration's views on these bills. We would be happy to discuss any of these concerns with you or your staff.

Sincerely,

Jacob J. Lew
Director

Enclosure

Identical letters sent to The Honorable Patrick J. Leahy,
The Honorable Henry J. Hyde, and The Honorable John Conyers, Jr.

ADMINISTRATION VIEWS ON
H.R. 833 -- THE BANKRUPTCY REFORM ACT

NON-RELEVANT AMENDMENTS

The Senate version of the bankruptcy bill includes non-relevant amendments on the subjects described below.

Minimum Wage and Tax Amendment

The President strongly supports an increase in the minimum wage of $1 over two years. Working families across this country deserve this increase, which would restore the real value of the minimum wage to what it was in 1982, helping more Americans share in our current economic prosperity. But the Senate bill would delay the increase. The Senate bill also includes a provision that would repeal overtime protections for certain workers, and a tax and pension package that would direct benefits away from working families and reduce Federal unemployment taxes without addressing needed system reforms. These tax and pension provisions are regressive, could lead to cuts in retirement and health benefits for moderate- and lower-income workers, would not significantly increase plan coverage or national savings, and would hamper efforts to enforce pension law. Moreover, we must establish a proper framework for paying down the debt, strengthening Social Security and Medicare, and funding key priorities before we consider major new tax cuts. If the Congress sends the President a bill delaying the minimum wage increase, creating regressive, costly, and unnecessary tax cuts that threaten fiscal discipline, repealing protections for certain workers, hampering the enforcement of pension law, directing benefits away from working families and potentially reducing their retirement and health benefits, he will veto it.

Drug Amendment

The Administration also opposes the provisions that would reduce the current disparity between crack and powder cocaine sentences solely by increasing powder cocaine penalties dramatically instead of addressing both crack and powder cocaine penalties. Decreasing the threshold amount of powder cocaine that an individual must possess to receive 5- and 10-year mandatory minimum sentences may be counterproductive because it could significantly redirect Federal law enforcement resources from the most serious offenders. In addition, this amendment would actually exacerbate the disproportionate impact of cocaine sentencing on minorities because, according to U.S. Sentencing Commission statistics, approximately 31% of defendants sentenced at the Federal level for powder cocaine offenses in 1998 were African American, 48% were Hispanic, and only 19% were white. Please note, however, that the Administration supports many of the provisions contained in the amendment to combat the spread and abuse of methamphetamine and hopes that the Congress will consider them outside of bankruptcy legislation.

Private School Vouchers Amendment

The drug amendment discussed above also contains an objectionable school voucher provision that is unrelated to the underlying bill. The Administration's opposition to private school vouchers is well known. Rather than improving and reforming public schools, private school vouchers drain scarce resources from public schools and are a distraction from the serious work of education reform. Instead, the President is committed to a comprehensive agenda to improve our schools by investing more in them and demanding more from them. The Administration also opposes the provision to require States to mandate the expulsion of students who bring a "felonious" quantity of drugs onto school property. A similar provision was defeated in a bipartisan House vote during consideration of the juvenile justice bill last year, and we oppose the inclusion of this type of measure in bankruptcy legislation. Finally, the Administration objects to the inclusion of any provisions affecting elementary and secondary education in the bankruptcy bill, because the Elementary and Secondary Education Act of 1965 (ESEA) is currently being reauthorized in the House and Senate. Congress should continue to address elementary and secondary education issues through the ESEA reauthorization process.

CONSUMER BANKRUPTCY PROVISIONS

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

Means Test

Principle: **Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances.** The goal of the means test is to identify those debtors who genuinely have the capacity to repay a portion of their debts under a Chapter 13 plan. Many debtors who now enter Chapter 13 fail to complete their plans. To ensure greater repayment and positive outcomes instead of higher failure rates and greater hardships, we should ensure that debtors' specific circumstances are considered in a meaningful way. Neither creditors nor debtors are helped by wasting scarce resources establishing and overseeing repayment plans that will quickly fail. The House bill fails to meet the President's principle (despite valuable efforts by Chairman Hyde to bring some balance to its provisions). Because it limits access to Chapter 7 through a tight, inflexible, and arbitrary means test, it would force into Chapter 13 repayment plans many debtors who are unlikely to succeed. Specifically, the House bill would:

-- allow exceptions to the means test only to those demonstrating "extraordinary circumstances" -- a nearly insurmountable burden of proof.

-- not allow for expenses related to the long-term care of family members, including the elderly and disabled. Such assistance may be essential to enable these family members to avoid institutionalization and maintain their quality of life, yet may not qualify the family member as a legal dependent of the debtor.

-- not allow for expenses that debtors may incur in protecting themselves against domestic violence. These expenses could include relocation expenses to move away from the violent spouse, transportation expenses to get to work from a new location or to work removed from the spouse's knowledge, legal costs to get and enforce a protective order, security costs, and income gaps associated with unavoidable absences from work.

-- rigidly use IRS guidelines that were designed for a different purpose -- collecting taxes -- where they are applied far more flexibly than the means test would allow. We urge the Conferees to adopt Chairman Hyde's proposal to authorize the creation of standards specific to bankruptcy, using the IRS guidelines as a starting point.

-- not incorporate payments for arrearages on secured debt for necessary property, which must be paid under a Chapter 13 plan. Thus, the means test could leave some debtors in bankruptcy "no-man's land": unable to file under Chapter 7, but unable to get a Chapter 13 plan confirmed because they cannot pay these arrearages.

-- subject many debtors to burdensome paperwork that is not needed for bankruptcy determinations, including the collection of back tax returns regardless of their relevance at a cost of millions per year.

The House bill does take into account required administrative expenses under a Chapter 13 plan in calculating whether the debtor has the capacity to repay. (This important provision, which is not in the Senate bill, should be retained in the final bill.) It also contains both essential safe harbors: (1) protecting below-median income debtors from 707(b) "abuse" motions by creditors that could be the basis for threats or coercion; and (2) protecting below-median income debtors from 707(b) means-test motions by bankruptcy trustees. It includes a proposal by Chairman Hyde to allow adjustments for reasonable food and clothing expenses to take into account regional differences in costs. Finally, it clarifies sensibly the definition of household goods that a debtor can claim as exempt property (and thus upon which the debtor can void a non-purchase money, non-possessory lien), by limiting household goods to those "normally" found in or around a residence. These provisions should be retained.

<u>The Senate bill</u> uses a more reasonable means test, which provides more-appropriate relief to debtors, although improvements could be made. The Senate bill would:

-- allow exceptions to the means test to debtors who can show "special circumstances."

-- use a more appropriate threshold for access to Chapter 7.

-- provide a means test that includes expenses for the long-term care of elderly and other family members, and for protection of victims of domestic abuse and their families.

Certain of the provisions of the Senate bill, however, are also problematic.

-- The Senate bill also uses IRS guidelines for the means test, but includes a Congressional finding that the Treasury Secretary can modify the guidelines for bankruptcy purposes. Because this interpretation of existing Treasury authority is subject to legal challenge, we prefer Chairman Hyde's approach described above.

-- The Senate bill's means test calculation includes arrearages on secured debt for necessary property; however, it does leave some debtors in bankruptcy "no-mans' land" because it does not include the important provision, included in the House bill by Chairman Hyde, incorporating the required administrative expenses of a Chapter 13 plan in calculating the means test.

-- The Senate bill avoids needless filing of back tax returns and streamlines the means test for debtors between 100% and 150% of median income. However, further reductions in the paperwork burden on low-income debtors could be achieved at no cost to the effectiveness of the means test.

-- The Senate bill's motions safe harbor would protect below-median income debtors from 707(b) motions by creditors that could be the basis for threats or coercion. It fails, however, to provide a "safe harbor" for low-income debtors from means test calculations and paperwork or a full safe harbor from means test motions by United States trustees. Including both safe harbors would improve both the efficiency and fairness of the means test. If low-income debtors are abusing the process for other reasons, they would still be subject to general 707(b) motions by the court, the United States Trustee or the Chapter 7 trustee.

-- The Senate bill's definition of household goods is so narrowly drawn that the debtor may be deprived of reasonable or even vital household items that would be exempt under the House bill's definition.

Finally, we note that both bills contain inconsistent references to median income standards (State, Regional, and National). Administration of the new law will be eased by use of consistent standards.

Homestead Exemption and Other Loopholes for the Wealthy

Principle: **It is fundamentally unfair to ask low- and moderate-income debtors to devote future income to repay the debts that they can, while leaving loopholes that allow the wealthy to shield income and assets from their creditors.** High or unlimited homestead exemptions allow people with expensive homes to avoid their responsibility to repay a significant portion of their debts. Similarly, some wealthy debtors can file under Chapter 11 where they can shield their future income from creditors.

The House bill provides a $250,000 cap on homestead exemptions, but allows the states to opt out of the cap. With the opt-out, the provision is effectively the same as having no cap at all. Moreover, the bill does nothing to close the Chapter 11 loophole for wealthy debtors.

The Senate bill provides a meaningful cap of $100,000 on homestead exemptions. It also closes the Chapter 11 loophole for wealthy debtors. These provisions should be retained.

Protection Against Coercive Reaffirmations and Practices

Principle: **There must be appropriate safeguards against coercive creditor practices that compel debtors to forgo their rights and that disadvantage more scrupulous creditors.** Debtors often reaffirm debt on unfavorable terms, sometimes when they demonstrably cannot afford the future payments. These new commitments put their future, as well as their payments to socially more important debts (e.g., child support, alimony, and taxes) at risk. These reaffirmations are frequently the result of insufficient or misleading information and sometimes the result of intimidation or outright coercion. Unfortunately, such practices have been all too frequent, and the new legislation may increase the risk of such coercion by giving creditors new opportunities to challenge debtors' actions. In light of these new opportunities for abuse, the Administration cannot countenance weakening existing protections; in fact, enhanced safeguards are essential.

The House bill gives debtors the right to a hearing on a reaffirmation of wholly unsecured, non-credit union debt, but allows represented debtors to waive the hearing, which effectively does little to change current law and might inadvertently bolster arguments that courts have no authority to review agreements filed by represented debtors. The bill expressly provides a private right of action for failure to comply with reaffirmation agreements or willful violations of a discharge, but it precludes use of class actions to bring such claims. This eliminates the most effective approach -- used in the Sears case among others -- to remedy widespread coercive practices. The private right of action should be retained, but the bar on class actions should be dropped.

The Senate bill does not ban class action remedies. Moreover, it requires disclosure of the terms of debt being reaffirmed and creates a new presumption of undue hardship if the debtor does not have the capacity to repay debts that he or she is reaffirming. These mechanisms will go a long way toward preventing debtors from reaffirming debts because of creditor threats or intimidation or because of simple confusion. The bill proposes a form of disclosure, although it is not as comprehensive as the one developed by the Administrative Office of the U.S. Courts now in use in a few districts; Congress could provide districts discretion to use the more extensive form. The new Subsection 524(j) in the Senate bill codifies existing practice by providing that creditors can accept payments before and after a reaffirmation agreement is filed with the court; however, if debtors exercise their right to rescind a reaffirmation agreement or the agreement is found to be invalid, subsections (j)(2) and (j)(3) may raise issues in litigation and should be clarified or struck. Specifically, Congress should clarify that nothing therein is intended to preempt any Federal or State law or eliminate remedies available under current Federal or State law, including disgorgement of funds collected under invalid agreements. Finally, the Senate bill includes a provision that would allow debtors to waive in advance bankruptcy protection for their retirement assets. We fear that those of limited means or sophistication could easily be compelled, perhaps even as a condition of receiving credit, to put these critical assets at risk. As the Department of Labor recently testified before the Senate Health, Education, Labor and Pensions Committee, this provision should be struck.

Improving Credit Card Practices

Principle: Both debtors and creditors must be required to be responsible. Bankruptcy reform should be balanced by including provisions that address credit-card practices that may lead to bankruptcies. Creditors should give consumers the information they need to manage their credit card debt successfully. Doing so would allow more consumers to make informed decisions and give many households better control of their finances, reducing the number of bankruptcies.

The House bill requires that consumers receive a generic description of the impact of making only minimum payments on the duration of the debt. However, it provides no way for a consumer to obtain more specific information about the impact of making the minimum payment in his or her own circumstance. The House bill requires conspicuous disclosures of "teaser" rates, but it does not require that the rates be labeled "introductory" or that the permanent interest rate be disclosed in close proximity to the teaser rate.

The Senate bill provides more-useful provisions though it could be further improved. It requires most lenders to provide an 800 number for consumers who want specific information about the impact of minimum payments in their situation. (The information provided could be more valuable, if it included the cost as well as the duration of debt when only the minimum payment is made.) It also requires that consumers be given clear and conspicuous notice of teaser rates by labeling them as introductory each time they appear in a solicitation, as well as disclosure of the permanent interest rate in close proximity to the teaser rate. Lastly, the bill includes new disclosures on high loan-to-value home equity loans so consumers are not misled about their tax implications.

Non-Dischargeable Debts and "Cram Downs"

Principle: The goal of repaying creditors must be balanced with the need to protect social priorities, such as payment of child support, alimony and taxes, and to preserve a meaningful opportunity for a fresh start. The Bankruptcy Code makes debts nondischargeable only where there is an overriding public purpose to protect those debts. To the extent that the bills make more credit-card debt nondischargeable and preserve secured claims regardless of the value of their collateral, these societal priorities will compete for scarce resources and the fresh start will become ephemeral.

The House bill gives secured creditors in bankruptcy unprecedented rights to collect amounts in excess of the value of their collateral. It precludes "cramming down" debt to the collateral value for any debt secured by personal property purchased within five years of the bankruptcy filing. Were these provisions to become law, societal priorities would suffer, unsecured creditors would be placed at a disadvantage, and secured creditors would have less incentive to evaluate properly lending risk. The House bill also makes nondischargeable all cash advances above $250 and all debts incurred to pay nondischargeable debts, both if within 90 days of bankruptcy. This rule endangers societal priorities and may trap debtors who are trying to feed their families or meet debt obligations before they realize that bankruptcy is inevitable.

The Senate bill is preferable because it protects under-secured debt other than for automobiles for only six months before filing; nonetheless, the ban for car loans should be far shorter than five years. Similarly, the Senate bill has a shorter window before bankruptcy in which cash advances (with a higher threshold) and debts incurred to pay nondischargeable debts become nondischargeable. An even better approach would be to limit the new nondischargeability provisions to above-median income debtors, as Senator Moynihan has proposed.

Barriers to Entry or Representation in the Bankruptcy System

Principle: Inappropriate barriers should not be created to entry into or effective representation in the bankruptcy system. Filing fees, fee-shifting provisions, and inflexible pre-filing hurdles can unfairly deny access to the bankruptcy system to people who do not have the ability to repay their debts.

The House bill would require mandatory credit counseling before a bankruptcy filing, but does not make clear that the requirement can be met by telephone or over the Internet, creating a barrier for those without convenient access to counseling. It also would require a debtor's attorney to pay a trustee's attorney's fees if the debtor is not "substantially justified" in filing for Chapter 7. Fear of such sanctions may deter attorneys from representing debtors with bona fide claims. However, the bill does allow courts to waive filing fees for debtors unable to pay, for the first time removing this important barrier to entry for indigent debtors.

The Senate bill ensures that mandatory credit counseling can be provided by telephone or over the Internet. It also applies an appropriate and more reasonable standard to the effort to deter abusive use of Chapter 7, allowing the trustee to recover reasonable costs from the debtor's attorney if filing under Chapter 7 was "frivolous." It also would allow courts to waive filing fees for debtors. However, the Senate bill does require a debtor's counsel to attest under oath to the accuracy of any adjustments to income and expenses that the debtor provides (also under oath). This requirement will chill even the most responsible and scrupulous of attorneys from representing financially distressed debtors.

Prevent Abuse of Bankruptcy To Facilitate Clinic Violence

Principle: The abuses of the bankruptcy system must be stemmed, including abuse by those who would use bankruptcy to avoid penalties for violence against family planning clinics. The Administration is deeply concerned by the incidents of violence, vandalism, and harassment committed against family-planning clinics, some of which have resulted in the deaths and maiming of innocent people. The Administration believes that these unlawful activities must not be tolerated, and that when they are committed, those found liable should be held accountable. In 1994, Congress made clear its disapproval for those who would use unlawful means to deny citizens access to legal clinic services by enacting the Freedom of Access to Clinic Entrances Act (FACE).

Unfortunately, there is evidence that those found liable have been making strategic use of bankruptcy to avoid the penalties for their actions established by Congress and the States. This abuse of the bankruptcy system to facilitate unlawful behavior must not be tolerated. Senator Schumer's amendment, passed by the Senate by a margin of 80 to 17, would make court-ordered and other fines and debts resulting from family-planning clinic violence nondischargeable. The Administration opposes the expansion of categories of nondischargeable debt unless there is an overriding public policy objective and no other way to achieve that objective. The Schumer amendment meets that test, providing a necessary tool to ensure that bankruptcy is not used strategically to avoid the legal consequences of clinic violence and intimidation. It should be included in the final legislation.

Privacy Of Personal Financial Records In Bankruptcy

Principle: The financial and personal privacy of those who seek protection in the bankruptcy system must be protected.

The electronic aggregation and availability of public and non-public bankruptcy information could serve at least two important purposes: (1) it could lower costs for participants in the bankruptcy system; and (2) it could improve our understanding of bankruptcy trends and the impact of policy changes. The Administration strongly supports these goals. At the same time, however, disseminating bankruptcy information electronically could threaten the security and privacy of debtors in bankruptcy by making sensitive information (including account numbers, social security numbers, balances, income sources, and payment histories) widely available to curious neighbors, employers, marketers, and predators looking for those most likely to be lured by scams.

Far too little attention has yet been given to complicated questions such as: who needs what information and under what circumstances? Does new technology change our perception of what information should be in the public domain? And what kinds of information in bankruptcy records could be used to prey upon debtors and their families?

These questions have been raised as private trustees explore the development of a national database of bankruptcy information to answer creditor inquiries about the status of payments under Chapter 13 plans. The database may contain material obtained independently by the private trustees in the administration of the case, as well as records from the public court file. Though such a database would provide creditors with one location to obtain information about their claims, important decisions must be made about privacy and the commercial use of this information. The private trustees appear interested in performing this function responsibly, and the Executive Office for U.S. Trustees is working with the private trustees to explore ways to safeguard the privacy of this information. However, legislative language in both the Senate and House bills designed to facilitate efforts by the private trustees without taking into account privacy considerations is, at best, premature.

The House bill would protect the private trustees from liability for dissemination of information unless a trustee has actual knowledge that the information is false. This provision provides no safeguards against misuse; and no compelling argument has been presented as to why the normal liability rules should not apply. We strongly recommend that this provision be removed from the final bill. In addition, the House bill also expresses the "sense of the Congress" that all public record data held by bankruptcy clerks shall be released in electronic form to the public, subject to privacy safeguards that the Judicial Conference may determined. The privacy issues regarding bankruptcy information should be fully explored before the Congress makes any determinations in this area.

The Senate bill contains language (in a section regarding collection of child support) that would require Chapter 13 trustees to provide non-public information about their cases to any not-for-profit entity that shall provide such information to parties in interest. The bill also contains "sense of the Congress" language about dissemination of bankruptcy information. The possible implications of these provisions, in particular the risk to personal privacy, have not been adequately explored, so these provisions should be dropped.

OTHER ISSUES

New Provisions

The Administration understands that consideration is being given to including, in the conference report, additional provisions that were not in either the House or Senate versions of the bankruptcy bill. The Administration opposes the inclusion of such provisions.

First, some are reportedly urging the Congress to include amendments that would undermine or overturn the ability of governmental units to enforce regulatory programs with regard to debtors who may hold interests in licenses, permits, franchises or entitlements issued by the Government. The Administration would strongly oppose inclusion of such amendments because of the important governmental, regulatory and financial interests at stake. The Administration would also oppose any effort to narrow or restrict the police and regulatory exception or the principles upon which it is based.

Second, the Administration understands that some are urging adoption of an amendment that would exclude collection of bad checks from the provisions of the Fair Debt Collection Practices Act (FDCPA). Courts have repeatedly found that check collection is covered by the FDCPA, which protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair collection methods. No compelling argument has been made explaining why these protections provided by the Congress are not as appropriate to collection of checks as they are to collection of other debts. In any event, before any such important consumer protections are weakened or eliminated, the case for the change should be subjected to sunlight and public scrutiny.

Certain Contract for Electric Power Voided

The Senate bill contains a provision that would void a power supply contract between Hydro Quebec and a consortium of Vermont utilities. While the intent of this provision appears to be to protect Vermont utilities that may be facing bankruptcy, the legislative abrogation of a contract between two commercial entities raises troubling policy issues, as more fully set out in a letter, dated March 3, 2000, to Senator Jeffords from Assistant Secretary for Fossil Energy Robert W. Gee. The Department of Justice has also raised concerns that the provision could give rise to a "taking" of private property for which just compensation would be required under the Fifth Amendment of the Constitution. It is also possible that a claim for money damages could be brought to international arbitration under NAFTA on the theory that NAFTA affords comparable protections to investments through the investment chapter's expropriation provision (Article 1110).

From: Melissa G. Green on 04/19/2000 12:35:09 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP@EOP

cc:

Subject: 8:00 on bankruptcy

---------------------- Forwarded by Melissa G. Green/OPD/EOP on 04/19/2000 12:34 PM ---------------------------

Sarah Rosen Wartell
04/18/2000 08:35:10 PM

Record Type: Record

To: David Tseng/OPD/EOP@EOP

cc: Melissa G. Green/OPD/EOP@EOP

Subject: 8:00 on bankruptcy

It is currently formulated so that the cover letter says: (1) here are views, please consider; (2) if you send POTUS bad minimum wage/tax package, he vetos; and (3) POTUS supports balanced bankruptcy reform to encourage responsibility and stem abuses. Should meet principles in attached. Disappointed in House bill; Senate generally better at meeting principals but serious concerns about some provisions.

No formal bankruptcy conference has been named and none will be. Instead, plan of leadership (with Daschle's concurrence and perhaps encouragement) is to attach the result of an unofficial conference to another conference report -- most likely crop insurance or digital signatures. (Note: At 8:30 meeting yesterday, discussion of our approach to **dig sig** and proposed Daley/Summers letter, based on sarah's memo. Per Beier -- everyone comfortable.) In Senate, key players are Leahy, Torrecelli, Grassley, Hatch, and Sessions. Leahy and Torrecelli will support a final bill that comes out close to the Senate bill. They claim they wouldn't support it if the conference weakens the credit card provisions (despite how weak they are). They expect that the homestead language will need to be compromised to get a final product. In the House, Hyde and Gekas are key -- Nadler included in some discussions. Hyde is definately trying to moderate the House bill. Unclear how far he is getting with the House. The Senate made a "proffer" to the House early last week. Generally, it holds with the Senate bill in most key areas, but makes a few minor compromises toward House.

In short, the Senate bill is poor, but we can find things in it we can use to explain why it is not so bad we had to veto (or we could let it become law without potus signature). The House bill is much worse. But there are provisions of the House bill that are better. It is hard to imagine that the product of the conference will be so different from the Senate bill that we will be able to rally 34 Senators (24 more than we had on final passage) to uphold the President's veto. Since only approximately 110 Democrats voted against the House bill (where there was a veto threat), hard to imagine that they would change their mind to support a veto on a bill that has been moderated by the Senate. (Nadler continues to insist that it could happen, if we only showed leadership.) The hard part is that it would be really hard to rally Senators against a conference report that doesn't have homestead and is worse than the Senate bill in a variety of technical ways; not entirely impossible, but hard. A complicating dynamic will be how the Senate feels about the bill to which the bankruptcy conference report is attached. If they try to roll the Democrats on digital signatures and a bad bankruptcy bill, maybe they would hold. If they have a good digital signatures bill, most won't want to piss off high tech, if they let digital signatures die because of a bankruptcy bill attached.

--------------------- Forwarded by Sarah Rosen Wartell/OPD/EOP on 04/18/2000 08:17 PM ---------------------------

Richard E. Green
04/18/2000 08:06:08 PM

Record Type: Record

To: Sarah Rosen Wartell/OPD/EOP@EOP
cc:
Subject: bankruptcy letter

Except that it doesn't help you unless I actually attach it.

bankruptcy letter.wp

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

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The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

Means Test

Principle: Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances. The goal of the means test is to identify those debtors who genuinely have the capacity to repay a portion of their debts under a Chapter 13 plan. Many debtors who now enter Chapter 13 fail to complete their plans. By forcing additional debtors into Chapter 13, we will only increase the failure rate unless we ensure that their specific circumstances are considered in a meaningful way. Neither creditors nor debtors are helped by wasting scarce resources establishing and overseeing repayment plans that will quickly fail. The House bill fails to meet the President's principle (despite valuable efforts by Chairman Hyde to bring some balance to its provisions). Because it limits access to Chapter 7 through a tight, inflexible, and arbitrary means test, it would deny access to Chapter 7's discharge to many debtors who are unlikely to succeed under a Chapter 13 repayment plan. Specifically, the House bill would:

- allow exceptions to the means test only to those demonstrating "extraordinary circumstances" -- a nearly insurmountable burden of proof.

- not allow for expenses related to the long-term care of family members, including the elderly and disabled. Such assistance may be essential to enable these family members to avoid institutionalization and maintain their quality of life, yet may not qualify the family member as a legal dependent of the debtor.

-- not allow for expenses that debtors may incur in protecting themselves against domestic violence. These expenses could include relocation expenses to move away from the violent spouse, transportation expenses to get to work from a new location or to work removed from the spouse's knowledge, legal costs to get and enforce a protective order, security costs, and income gaps associated with unavoidable absences from work.

-- rigidly use IRS guidelines that were designed for a different purpose -- collecting taxes -- and are applied far more flexibly than the means test would allow. We urge the Conferees to adopt Chairman Hyde's proposal to authorize the creation of standards specific to bankruptcy, using the IRS guidelines as a starting point.

-- not incorporate payments for arrearages on secured debt for necessary property, which must be paid under a Chapter 13 plan. Thus, the means test could leave some debtors in bankruptcy "no-man's land": unable to file under Chapter 7 and unable to get a Chapter 13 plan confirmed, because they cannot pay these arrearages.

-- subject many debtors to burdensome paperwork that is not needed for bankruptcy determinations, including the collection of back tax returns regardless of their relevance at a cost of millions per year.

The House bill does take into account required administrative expenses under a Chapter 13 plan in calculating whether the debtor has the capacity to repay. (This important provision, which is not in the Senate bill, should be retained in the final bill.) It also contains both essential safe harbors: (1) protecting below-median income debtors from 707(b) "abuse" motions by creditors that could be the basis for threats or coercion; and (2) protecting below-median income debtors from 707(b) means test motions by bankruptcy trustees. It includes a proposal by Chairman Hyde to allow adjustments for reasonable food and clothing expenses to take into account regional differences in costs. Finally, it clarifies sensibly the definition of household goods that a debtor can claim as exempt property (and thus upon which the debtor can void a non-purchase money, non-possessory lien), by limiting household goods to those "normally" found in or around a residence. These provisions should be retained.

The Senate bill uses a more reasonable means test, which provides more appropriate relief to debtors, although improvements could be made. The Senate bill would:

-- allow exceptions to the means test to debtors who can show "special circumstances."

-- use a more appropriate threshold for access to Chapter 7.

-- provide a means test that includes expenses for the long-term care of elderly and other family members and to protect victims of domestic abuse and their families.

Certain of the provisions of the Senate bill, however, are also problematic.

-- The Senate bill also uses IRS guidelines for the means test, but includes a Congressional finding that the Treasury Secretary can modify the guidelines for bankruptcy purposes. Because this interpretation of existing Treasury authority is subject to legal challenge, we prefer Chairman Hyde's approach described above.

-- The Senate bill's means test calculation includes arrearages on secured debt for necessary property; however, it does leave some debtors in bankruptcy "no-mans' land" because it does not include the important provision, included in the House bill by Chairman Hyde, incorporating the required administrative expenses of a Chapter 13 plan in calculating the means test.

-- The Senate bill avoids needless filing of back tax returns and streamlines the means test for debtors between 100% and 150% of median income. However, further reductions in the paperwork burden on low-income debtors could be achieved at no cost to the effectiveness of the means test.

-- The Senate bill's motions safe harbor would protect below-median income debtors from 707(b) motions by creditors that could be the basis for threats or coercion. It fails, however, to provide a "safe harbor" for low-income debtors from means test calculations and paperwork or a full safe harbor from means test motions by United States trustees. Including both safe harbors would improve both the efficiency and fairness of the means test. If low-income debtors are abusing the process for other reasons, they would still be subject to general 707(b) motions by the court, the United States Trustee or chapter 7 trustee.

-- The Senate bill's definition of household goods is so narrowly drawn that may be deprived of reasonable or even vital household items that would be exempt under the House bill's definition.

Finally, we note that both bills contain inconsistent references to median income standards (State, Regional, and National). Administration of the new law will be eased by use of consistent standards.

<u>Homestead Exemption and Other Loopholes for the Wealthy</u>

<u>Principle</u>: It is fundamentally unfair to ask low- and moderate-income debtors to devote future income to repay the debts that they can, while leaving loopholes that allow the wealthy to shield income and assets from their creditors. High or unlimited homestead exemptions allow people with expensive homes to avoid their responsibility to repay a significant portion of their debts. Similarly, some wealthy debtors can file under Chapter 11 where they can shield their future income from creditors.

<u>The House bill</u> provides a $250,000 cap on homestead exemptions, but allows the states to opt

out of the cap. With the opt-out, the provision is effectively the same as having no cap at all. Moreover, the bill does nothing to close the Chapter 11 loophole for wealthy debtors.

The Senate bill provides a meaningful cap of $100,000 on homestead exemptions. It also closes the Chapter 11 loophole for wealthy debtors. These provisions should be retained.

Protection Against Coercive Reaffirmations and Practices

Principle: There must be appropriate safeguards against coercive creditor practices that compel debtors to forgo their rights and that disadvantage more scrupulous creditors. Debtors often reaffirm debt on unfavorable terms, sometimes when they demonstrably cannot afford the future payments. These new commitments put their future, as well as their payments to socially more important debts (e.g., child support, alimony, and taxes) at risk. These reaffirmations are frequently the result of insufficient or misleading information and sometimes the result of intimidation or outright coercion. Unfortunately, such practices have been uncovered all too frequently and the new legislation may increase the risk of such coercion by giving creditors new opportunities to challenge debtors' actions. In light of these new opportunities for abuse, the Administration cannot countenance weakening existing protections; in fact, enhanced safeguards are essential.

The House bill gives debtors the right to a hearing on a reaffirmation of wholly unsecured, non-credit union debt, but allows represented debtors to waive the hearing, which effectively does little to change current law and might inadvertently bolster arguments that courts have no authority to review agreements filed by represented debtors. The bill expressly provides a private right of action for failure to comply with reaffirmation agreement or willful violations of a discharge, but it precludes use of class actions to bring such claims. This eliminates the most effective approach -- used in the Sears case among others -- to remedy widespread coercive practices. The private right of action should be retained, but the bar on class actions should be dropped.

The Senate bill does not ban class action remedies. Moreover, it requires disclosure of the terms of debt being reaffirmed and creates a new presumption of undue hardship if the debtor does not have the capacity to repay debts that he or she is reaffirming. These mechanisms will go a long way toward preventing debtors from reaffirming debts because of creditor threats or intimidation or because of simple confusion. The bill proposes a form of disclosure, although it is not as comprehensive as the one developed by the Administrative Office of the U.S. Courts now in use in a few districts; Congress could provide districts discretion to use the more extensive form. The new Subsection 524(j) in the Senate bill codifies existing practice by providing that creditors can accept payments before and after a reaffirmation agreement is filed with the court; however, if debtors exercise their right to rescind a reaffirmation agreement or the agreement is found to be invalid, subsections (j)(2) and (j)(3) may raise issues in litigation and should be clarified or struck. Specifically, to avoid lengthy litigation, Congress should confirm that nothing therein is intended to preempt any Federal or State law or eliminate remedies available under current Federal or State law, including disgorgement of funds collected under invalid agreements.

Finally, the Senate bill includes a provision that would allow debtors to waive in advance bankruptcy protection for their retirement assets. We fear that those of limited means or sophistication could easily be compelled, perhaps even as a condition of receiving credit, to put these critical assets at risk. As the Department of Labor recently testified before the Senate Health, Education, Labor and Pensions Committee, this provision should be struck.

Improving Credit Card Practices

Principle: Both debtors and creditors must be required to be responsible. Bankruptcy reform should be balanced by including provisions that address credit-card practices that may lead to bankruptcies. Creditors should give consumers the information they need to manage their credit card debt successfully. Doing so would allow more consumers to make informed decisions and give many households better control of their finances, reducing the number of bankruptcies.

The House bill requires that consumers receive a generic description of the impact of making only minimum payments on the duration of the debt. It provides, however, no way for a consumer to obtain more specific information about the impact of making the minimum payment in his or her own circumstance. The House bill requires conspicuous disclosures of teaser rates, but it does not require that the rates be labeled "introductory" or that the permanent interest rate be disclosed in close proximity to the teaser rate.

The Senate bill could be further improved, but it provides more useful provisions. It requires most lenders to provide an 800 number for consumers who want specific information about the impact of minimum payments in their situation. (The information provided could be more valuable, if it included the cost as well as the duration of debt when only the minimum payment is made.) It also requires that consumers be given clear and conspicuous notice of teaser rates by labeling them as introductory each time they appear in a solicitation, as well as disclosure of the permanent interest rate in close proximity to the teaser rate. Lastly, the bill includes new disclosures on high loan-to-value home equity loans so consumers are not misled about their tax implications.

Non-Dischargeable Debts and Cram Downs

Principle: The goal of repaying creditors must be balanced with the need to protect social priorities, such as payment of child support and alimony and taxes, and to preserve a meaningful opportunity for a fresh start. The Bankruptcy Code makes debts nondischargeable only where there is an overriding public purpose to protect those debts. To the extent that the bills make more credit-card debt nondischargeable and preserves secured claims regardless of the value of their collateral, these societal priorities will compete for scarce resources and the fresh start will become ephemeral.

The House bill gives secured creditors unprecedented rights in bankruptcy to collect amounts in excess of the value of their collateral. It precludes "cramming down" debt to the collateral value for any debt secured by personal property purchased within five years of the bankruptcy filing.

Were these provisions to become law, societal priorities would suffer, unsecured creditors would be placed at a disadvantage, and secured creditors would have less incentive to evaluate properly lending risk. The House bill also makes nondischargeable all cash advances above $250 and all debts incurred to pay nondischargeable debts, both if within 90 days of bankruptcy. This rule endangers societal priorities and may trap debtors who are trying to feed their families or meet debt obligations before they realize that bankruptcy is inevitable.

The Senate bill is preferable because it protects under-secured debt other than for automobiles for only six months before filing; nonetheless, the ban for car loans should be far shorter than five years. Similarly, the Senate bill has a shorter window before bankruptcy in which cash advances (with a higher threshold) and debts incurred to pay nondischargeable debts become nondischargeable. An even better approach would be to limit the new nondischargeability to provisions to above-median income debtors, as Senator Moynihan has proposed.

Barriers to Entry or Representation in the Bankruptcy System

Principle: Inappropriate barriers should not be created to entry or effective representation in the bankruptcy system. Filing fees, fee-shifting provisions, and inflexible pre-filing hurdles can unfairly deny access to the bankruptcy system to people who do not have the ability to repay their debts.

The House bill would require mandatory credit counseling before a bankruptcy filing, but does not make clear that the requirement can be met by telephone or over the Internet, creating a barrier for those without convenient access to counseling. It also would require a debtor's attorney to pay a trustee's attorney's fees if the debtor is not "substantially justified" in filing for Chapter 7. Fear of such sanctions may deter attorneys from representing debtors with bona fide claims. However, the bill does allow courts to waive filing fees for debtors unable to pay, for the first time removing this important barrier to entry for indigent debtors.

The Senate bill ensures that mandatory credit counseling can be provided by telephone or over the Internet. It also applies an appropriate and more reasonable standard to the effort to deter abusive use of Chapter 7, allowing the trustee to recover reasonable costs from the debtor's attorney if filing under Chapter 7 was "frivolous." It also would allow courts to waive filing fees for debtors. However, the Senate bill does require debtor's counsel to attest under oath to the accuracy of any adjustments to income and expenses that the debtor provides (also under oath). This requirement will chill even the most responsible and scrupulous of attorneys from representing financially distressed debtors.

Prevent Abuse of Bankruptcy To Facilitate Clinic Violence

Principle: The abuses of the bankruptcy system must be stemmed, including abuse by those who would use bankruptcy to avoid penalties for violence against family planning clinics. The Administration is deeply concerned by the incidents of violence, vandalism, and harassment committed against family-planning clinics, some of which have resulted in the deaths and maiming of innocent people. The Administration believes that these unlawful activities must not be tolerated, and that when they are committed, those found liable should be held accountable. In 1994, Congress made clear its intolerance for those who would use unlawful means to deny citizens access to legal clinic services by enacting the Freedom of Access to Clinic Entrances Act (FACE).

Unfortunately, there is evidence that those found liable have been making strategic use of bankruptcy to avoid the penalties for their actions established by Congress and the States. This abuse of the bankruptcy system to facilitate unlawful behavior must not be tolerated. Senator Schumer's amendment, passed by the Senate by a margin of 80 to 17, would make court-ordered and other fines and debts resulting from family-planning clinic violence nondischargeable. The Administration opposes the expansion of categories of nondischargeable debt unless there is an overriding public policy objective and no other way to achieve that objective. The Schumer amendment meets that test, providing a necessary tool to ensure that bankruptcy is not used strategically to avoid the legal consequences of clinic violence and intimidation. It should be included in the final legislation.

<u>Privacy Of Personal Financial Records In Bankruptcy</u>

<u>Principle</u>: The financial and personal privacy of those who seek protection in the bankruptcy system must continue to be protected.

The electronic aggregation and availability of public and non-public bankruptcy information could serve at least two important purposes: (1) it could lower costs for participants in the bankruptcy system; and (2) it could improve our understanding of bankruptcy trends and the impact of policy changes. The Administration strongly supports these goals. At the same time, however, disseminating bankruptcy information electronically could threaten the security and privacy of debtors in bankruptcy by making sensitive information (including account numbers, social security numbers, balances, income sources, payment histories) widely available to curious neighbors, employers, marketers, and predators looking for those most likely to be lured by scams.

Far too little attention has yet been given to complicated questions such as: who needs what information and under what circumstances? Does new technology change our perception of what information should be in the public domain? And what kinds of information in bankruptcy records could be used to prey upon debtors and their families?

These questions have been raised as private trustees explore the development of a national database of bankruptcy information to answer creditor inquiries about the status of payments under Chapter 13 plans. The database may contain material obtained independently by the private trustees in the administration of the case, as well as records from the public court file. While such a database would provide creditors with one location to obtain information about their claims, important decisions have to be made about privacy and the commercial use of this information. The private trustees appear interested in performing this function responsibly, and the Executive Office for U.S. Trustees is working with the private trustees to explore ways to safeguard the privacy of this information. However, legislative language in both the Senate and House bills designed to facilitate efforts by the private trustees without taking into account privacy considerations is, at best, premature.

The House bill would protect the private trustees from liability for dissemination of information unless a trustee has actual knowledge that the information is false. This provision provides no safeguards against misuse; and no compelling argument has been presented as to why the normal liability rules should not apply. We strongly recommend that this provision be removed from the final bill. In addition, the House bill also expresses the "sense of the Congress" that all public record data held by bankruptcy clerks shall be released in electronic form to the public, subject to privacy safeguards that the Judicial Conference may determined. The privacy issues regarding bankruptcy information should be fully explored before the Congress makes any determinations in this area.

The Senate bill contains language (in a section regarding collection of child support) that would require Chapter 13 trustees to provide non-public information about their cases to any not-for-profit entity that shall provide such information to parties in interest. The bill also contains "sense of the Congress" language about dissemination of bankruptcy information. The possible implications of these provisions, in particular the risk to personal privacy, have not been adequately explored, so these provisions should be dropped.

OTHER ISSUES

New Provisions

The Administration understands that consideration is being given to including, in the conference report, additional provisions that were not in either the House or Senate versions of the bankruptcy bill. The Administration opposes the inclusion of such provisions.

First, reportedly some are urging the Congress to include amendments that would undermine or overturn the ability of governmental units to enforce regulatory programs with regard to debtors who may hold interests in licenses, permits, franchises or entitlements issued by the Government. The Administration would strongly oppose inclusion of such amendments because of the important governmental, regulatory and financial interests at stake. The Administration would also oppose any effort to narrow or restrict the police and regulatory exception or the principles upon which it is based.

Second, the Administration understands that some are urging adoption of an amendment that would exclude collection of bad checks from the provisions of the Fair Debt Collection Practices Act (FDCPA). Courts have repeatedly found that check collection is covered by the FDCPA, which protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair collection methods. No compelling argument has been made explaining why these protections provided by the Congress are not as appropriate to collection of checks as they are to collection of other debts. In any event, before any such important consumer protections are weakened or eliminated, the case for the change should be subjected to sunlight and public scrutiny.

<u>Certain Contract for Electric Power Voided</u>

The Senate bill contains a provision that would void a power supply contract between Hydro Quebec and a consortium of Vermont utilities. While the intent of this provision appears to be to protect Vermont utilities that may be facing bankruptcy, the legislative abrogation of a contract between two commercial entities raises troubling policy issues, as more fully set out in a letter, dated March 3, 2000, to Senator Jeffords from Assistant Secretary for Fossil Energy Robert W. Gee. The Department of Justice has also raised concerns that the provision could give rise to a " taking" of private property for which just compensation would be required under the Fifth Amendment of the Constitution. It is also possible that a claim for money damages could be brought to international arbitration under NAFTA on the theory that NAFTA affords comparable protections to investments through the investment chapter's expropriation provision (Article 1110).

#1
Richard Lerner
Ken Canfield
Ellen Galinsky OR CEO, tbd
*youth/parent: Debbie, Dylan and Drew Silcox [in video, single parent family, mom works two jobs, they are very worried about time together -- we will check them out tomorrow at filming]
chair: LaChance

#2
Katherine Montgomery
Bill Damon
Zoe Baird
Katherine Heintz-Knowles
*youth/parent: TBD
chair: William Kennard

#3
*Ken Gladish
Katherine Newman or CEO, tbd
Bill Strickland or Shirley Brice Heath
*youth/parent: LaToya Gardner [active in Y's Nashville Youth Council and P-TAP program, which uses drama to talk about teen issues]
chair: Eric Holder or Alexis Herman [or should we ask Barry McCaffrey?]

#4
Peter Benson
Debra Delgado
Sandy Dong
Kate Sylvester
*youth: Youthbuild youth and/or immigrant youth
chair: Alexis Herman or Eric Holder

#5
Andrew Shue [invited, not confirmed]
Gary Walker [confirmed]
Kathleen Lee [confirmed]
Bob Putnam [confirmed]
youth: Community Impact youth tbd [working on this]
chair: Harris Wofford [confirmed]

#6
Michael Resnick
Sarah Brown

Carole Morris
Bernie Arons
Larry Steinberg
*youth/parent: Brandi Chapple [BET Teen Summit host; active with Campaign for the Prevention of Teen Pregnancy]
chair: Donna Shalala

#7
Education tbd
Gear Up Program Director
*youth: National Honor Society?
chair: Dick Riley