February 15, 2007

06 - BK - 055

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: FR Doc. 06-8381, Notice of Proposed Amendments and Open Hearings

Dear Mr. McCabe:

This comment letter is submitted on behalf of the undersigned industry representatives to provide comment on the Proposed Amendments to Bankruptcy Rules and Official Forms ("Proposed Amendments") implementing the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" ("Act"). We appreciate the opportunity to provide our comments to the Judicial Conference Committee on Rules of Practice and Procedure ("Committee").

Executive Summary

Our comments touch on a wide variety of issues. Although many of our comments address discrete topics in a brief manner, a summary of some of the more lengthy topics is as follows:

- We commend the Advisory Committee on Rules of Bankruptcy ("Advisory Committee") on its diligence and good faith efforts.

- We believe revisions are necessary to some of the forms to implement the needs-based testing more accurately. These revisions generally pertain to state unemployment compensation, requiring needs-based calculations of all debtors, implementing the housing and transportation standards, applicability of spousal income, administrative expenses, and additional claims.

- The Committee should provide for uniformity with respect to the acceptance of the statutory language for reaffirmation disclosures.

- The Committee should delete the requirement to make motions under § 707(b) (1) and (3) "with particularity".

- The forms requiring attorney signatures should include the preprinted representations found in § 707(b) (4) (C) and (D) in immediate proximity to the signatures.

- The Committee should amend Rule 1020 to allow a creditor to object to the debtor's characterization of itself within 60 days after an amendment to the debtor's statement.

In General

The Act contains extensive revisions to the Bankruptcy Code ("Code") and reflects the clear Congressional intent to substantially reform key aspects of the bankruptcy system. The bankruptcy reform process did not end, however, with passage of the Act. In order for the intent of Congress to be fully realized, significant and comprehensive changes to the Bankruptcy Rules and Official Forms are required. We commend the Advisory Committee for its diligent work in developing Interim Rules on an expedited basis, and in promulgating these Proposed Amendments for Committee consideration. We believe the Advisory Committee made a good faith effort to adopt a framework which accurately implements the Act and has generally achieved that objective. Although the Committee is now considering Proposed Amendments which generally reflect the Act and underlying Congressional intent, we respectfully submit that the Proposed Amendments should be revised in some respects to better reflect some of the statutory provisions and Congressional intent more accurately. We offer the following comments toward that end.

Consumer Bankruptcy Rules and Forms

Implementing Needs-Based Reforms: Forms 22A and 22C

As the Committee knows, one of the key reforms included in the Act was the adoption of a "needs-based test" with respect to filing for bankruptcy under Chapter 7. In effect, Congress determined that Chapter 7 should be available only to debtors who do not have the ability to repay a significant portion of their nonpriority, unsecured debts. The Act provides for a specific needs-based calculation to determine whether a debtor should be permitted to obtain relief under Chapter 7 or whether the debtor should obtain relief under Chapter 13. In order to implement fully the revisions to the Code made by the Act, it is critically important that the appropriate bankruptcy forms reflect the statutory requirements accurately.

The Advisory Committee has developed Forms 22A and 22C to assist in calculating the debtor's current monthly income ("CMI") and to determine whether the presumption of abuse applies under Section 707(b)(2) of the Code. We applaud the Advisory Committee for adopting forms that are clear and relatively easy to use. The necessary statutory calculations, while specific, are not complicated and the relevant forms should, and do, reflect this reality. We note, however, that Congress discussed at length the need to establish a needs-based formula that could be applied in a uniform manner for all debtors, regardless of venue. The situations in which debtors and judges would be permitted to deviate from this formula were debated extensively, resulting in the "special circumstances" exception. Outside of this narrow exception, the clear Congressional intent was to provide for a standardized national approach to the needs-based test in accord with the Constitution's requirement of uniform bankruptcy laws. We strongly urge the Committee to ensure that the Bankruptcy Rules, and Forms 22A and 22C in particular, carry out this mandate. In particular, we believe that it is vital that the rules carry out the clear Congressional intent that applicable IRS expense standards be utilized for non-debt expenses, but that an individual debtor's calculations for purposes of the needs test include that debtor's actual monthly debt payment obligations. We note that two United States Senators, Senators Grassley and Sessions, raised specific concerns with Form 22A and Form 22C during the hearing on December 6, 2006, "Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act" ("Congressional Hearing"). We discuss the concerns raised by Senators Grassley and Sessions below.

One area of concern that has arisen in this context is the attempt to amend Form 22A in a manner that has the potential to eviscerate the needs-based reforms enacted by Congress. Specifically, during a public meeting held in August 2005 several members of the Advisory Committee proposed to revise Form 22A to allow the debtor to deduct *any* other expenses the debtor deemed necessary as part of the needs-based formula in Chapter 7. In essence, the proposed revision would have vitiated the clear Congressional mandate to establish a uniform needs-based formula by allowing the debtor and his or her attorney to list any deductions they wished, in addition to those specified in the statute. The net result would have been retention of the *status quo ante* prior to October 17, 2005. Again, we believe it is clear that Congress intended for such additional claimed expenses or adjustments to income to be subject to judicial evaluation as part of its consideration of a debtor's claim of "special circumstances". The Advisory Committee is to be commended for rejecting this proposal and we strongly urge the Committee to resist any similar efforts it may be encouraged to consider by other parties participating in this rulemaking process.

Forms 22A and 22C: Unemployment Compensation

Line 9 of Form 22A and line 8 of Form 22C ("Line 9/8") allows the debtor to assert that state unemployment income is excluded from CMI. This will result in some debtors excluding such income from CMI, while other debtors include it. We believe that Line 9/8 injects ambiguity into the calculation of CMI where none exists. The statute excludes from CMI "benefits *received* under the Social Security Act." (Emphasis added.) In an effort to implement this statutory exclusion, the Advisory Committee provided on Line 9/8 that a debtor may claim that unemployment compensation is a benefit that is received under the Social Security Act. The Committee Note to Forms 22A, 22B, and 22C ("Form 22 Note") states that because *states* receive funding for state unemployment programs under the Social Security Act, "there may be a dispute about whether unemployment compensation is a 'benefit received under the Social Security Act.'" Furthermore, according to the Form 22 Note, the forms "take no position on the merits of this argument but give debtors the option of reporting unemployment compensation separately from the CMI calculation."

As we discuss above, we believe Forms 22A and 22C should provide for a standard formula with respect to the needs-based calculations. By allowing some debtors to claim an exemption to CMI, Forms 22A and 22C deviate from the clear Congressional intent to provide for a uniform needs-based calculation. Furthermore, we do not believe that any contention that unemployment could be excluded from CMI can be supported by the statute. The statute refers to a debtor excluding benefits *received* under the Social Security Act. Although the state may arguably receive funding under the Social Security Act to operate unemployment compensation programs, the debtor does not receive any quantifiable benefits in such a context. In fact, the benefits actually *received* by the debtor are provided under applicable state law. The Social Security Act itself provides no benefits to individuals with respect to unemployment compensation, and it is therefore seems inarguable that unemployment benefits cannot be received under it. We urge the Committee to delete the suggestion in Line 9/8 that state unemployment compensation may be excluded from CMI.

Form 22A: Failure to Require Information from Debtors Below State Median

Section 707(b)(2)(C) of the Code states that "[a]s part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current

monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated." Therefore, by the plain language of the statute, each debtor is required to file a statement of CMI and the needs-based calculations described in the statute. However, Form 22A does not require the debtor to provide the needs-based calculations if the debtor's income is below the state median income. In fact, Form 22A specifically instructs the debtor *not* to provide such information.

We request that the Committee revise Form 22A to require all debtors to provide the needs-based calculations. We note that, although the statute provides that a motion may not be brought under Section 707(b)(2) if the debtor has an income below the state median, the statute contains no exemption from the requirement that the needs-based calculation be completed and filed by the debtor. Moreover, Congress considered providing such an exemption but ultimately chose not to do so. For example, the Senate Judiciary Committee specifically discussed such an exemption shortly before enactment of the Act. *The exemption was rejected.* Form 22A should not create an exemption that Congress considered and rejected as it is clearly inconsistent with Congressional intent.

We also note that the required information is necessary to ensure the proper and efficient administration of the needs-based test. In this regard, whether a debtor's CMI is below the applicable state median is a question of fact and the debtor's asserted CMI is subject to review, inquiry, and challenge by the court, trustee, and others participating in the case. As a result, the debtor's CMI and entitlement to an exemption from a motion under § 707 for abuse are not established by the debtor's mere declaration of CMI on the form. Instead, those issues are only established after the debtor asserts a certain level of CMI and the debtor's assertion survives the review process and goes unchallenged. If the debtor's assertion is challenged and a CMI level above the applicable median is established the remainder of the needs-based information is required to proceed with the case. Under the Committee's approach, however, the administration of the case would be put on hold while the debtor is required to supplement the filing with the required information. This would impose additional burdens on trustees and clerks to track the status of the incomplete files and impose delays on the progress of the case. The forms, however, assume that the mere assertion by the debtor grants the debtor an exemption from the rest of the needs-based filing requirements. As noted above, Congress provided no such exemption and neither should the Committee.

We also note that the exemption created by the forms results in the exclusion of information that is likely to be relevant to a trustee or other party in interest in determining whether to conduct further inquiries regarding the debtor's CMI. For example, if the debtor declares CMI well below the applicable median and the level of needs-based deductions is such that the debtor would not be subject to the presumption unless the debtor's actual CMI was doubled or tripled, the trustee may decide that further inquiry would be inefficient absent some other indication that the debtor has understated CMI. On the other hand, if the debtor declares CMI slightly below the applicable median but the debtor's deductions are low enough that the debtor is close to triggering the presumption, the trustee may determine that some basic amount of further inquiry may be warranted.

We also note that Congress was clearly disappointed with the accuracy and granularity of the statistics available with respect to bankruptcy. The Act includes an entire title (Title VI) designed to remedy this shortcoming. Given the obvious Congressional interest in compiling and reviewing

comprehensive national bankruptcy data, we believe it would be unusual to assume that Congress was not interested in statistics relating to needs-based calculations for debtors below the applicable state median income. To the contrary, Congress in Section 602 of the Act specifically requested reports "in the public interest" providing "adequate information to evaluate the efficiency and practicality of the Federal bankruptcy system." Certainly complete statistics with respect to one of the centerpieces of the Act, *i.e.*, the applicability of needs-based limitations on Chapter 7, would be necessary to meet the Congressional mandate. The burden on individual debtors to provide the calculation will be low, as they already must furnish the data upon which the calculations will be based to counsel, and software has become available to perform the fairly simple calculation required by statute. Imposing this nominal burden will be more than justified by the large gain in bankruptcy system information that will result, and is also required for the Act's implementation to be consistent with clear Congressional intent.

Forms 22A and 22C: Local Standards for Housing and Utilities

The Code allows a debtor to deduct the allowances provided in the "applicable" Internal Revenue Service's ("IRS") local standards for housing and utilities. However, the Code also specifies that the debtor's expenses are not to include any payment for debts, which would include mortgage payments. A plain reading of the statute renders the IRS standards for mortgage payments (as opposed to utilities) inapplicable to the needs-based calculations—under the needs-based test, the debtor deducts actual debt payments for mortgage payments rather than the mortgage amount specified by the IRS. However, line 20B of Form 22A and Line 25B of Form 22C ("Line 20B/25B") permit the debtor to, in essence, deduct the greater of the debtor's mortgage payment or the IRS-specified amount. This clearly contravenes the plain language of the Code. Therefore, Line 20B/25B should be amended to apply only to those debtors who have rental—not mortgage—expenses.

We also strongly believe that line 21 of Form 22A and line 26 of 22C ("Line 21/26") should be deleted. Line 21/26 permits the debtor to contend that "the process set out [regarding housing and utility standards] does not accurately compute the allowance to which [the debtor is] entitled" under the IRS standards. On one hand, there is no statutory justification for Line 21/26 in the Code. The Code provides that: (i) the debtor is entitled to the *applicable* IRS standards; (ii) secured debts must be excluded from the IRS standards; and (iii) that debtors have the opportunity to claim additional heating expenses in limited circumstances. The Advisory Committee has done a commendable job working with the IRS to modify the standards so that they could be used for purposes of the needs-based test, splitting the mortgage/rent expense from the utilities expense on the forms, and providing a line item for additional heating expenses elsewhere. The Form 22 Note provides no explanation as to why Form 22A and Form 22C could be attacked for not providing accurate computations with respect to the housing and utilities standards. We do not understand how a debtor or an attorney could claim that the forms do not accurately compute the IRS standards. To the extent there is any doubt about the accuracy of the forms in this regard, the Committee should confer with the IRS to resolve it. It should not be left to each debtor, attorney, and judge to second guess the IRS and the Committee.

In the alternative, it may be that Line 21/26 is intended to provide debtors the opportunity to claim additional deductions as a result of "special circumstances" as provided in the Code. If this is the case, it is inappropriate to allow the deduction to be taken "above the line," so to speak. The

debtor should provide the information for the needs-based test as specified in the statute. Only after the calculations are complete should the debtor be able to request additional adjustments on account of the special circumstances. Indeed, this may be what the Committee has provided at the end of Form 22A and Form 22C, which we discuss below.

Regardless, this is another circumstance in which the Committee should revise Form 22A and Form 22C to provide for a single needs-based calculation applicable to all debtors. As currently drafted, Forms 22A and 22C are an open invitation for enterprising debtors to manipulate the needs-based calculations in order to avoid a presumption of abuse. We strongly oppose such a result.

Forms 22A and 22C: Local Standards for Transportation

Lines 23 and 24 of Form 22A and lines 28 and 29 of Form 22C ("Lines 23/28") allow a debtor to deduct a "net ownership/lease expense" for vehicle ownership. We do not believe that Lines 23/28 accurately reflect the Code's needs-based test, and therefore should be deleted. According to the Code, a debtor may deduct the "*applicable* monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses" issued by the IRS. (Emphasis added.) Furthermore, the Code states that "the monthly expenses of the debtor shall not include any payments for debts." Therefore, a debtor may claim "applicable" amounts using the IRS figures, not including secured debt payments. As we explain below, we believe this obviates a need for a specific deduction relating to local standards for transportation ownership.

As the Committee may be aware, the IRS local standards provide for a deduction for vehicle "ownership." However, it is critical to understand what the IRS means when it refers to "ownership" costs. According to the IRS, "[t]he transportation standards consist of nationwide figures for monthly loan or lease payments referred to as ownership costs." There is a separate category for "additional amounts for monthly operating costs."[1] Therefore, the IRS "ownership" costs are those costs relating to loan or lease payments. The Form 22 Note, however, appears to misinterpret this standard by stating that "[t]he ownership/lease component...*may* involve a debt payment." (Emphasis added.) Not only may the IRS standard for ownership/lease include a debt payment, according to the information provided by the IRS, it consists *entirely* of the debt payment. In light of the fact that the "applicable" IRS standard is one intended to provide a deduction only for secured debts or lease payments, the Code appears to prohibit a debtor deducting the amount provided under the IRS standard as part of the needs-based calculation. Instead, Congress provided that the debtor may deduct the debt payment, averaged over 60 months, on the automobile, regardless of the IRS standards in this area. Allowing the debtor to deduct the greater of the IRS standard or the debt payment, which is the net effect of Lines 23/28, is inconsistent with the requirements of the Code. Indeed, Senators Grassley and Sessions referenced this specific provision at the Congressional Hearing as an example of an instance in which the forms implementing the means test provisions of the Act did not coincide with the statutory provisions or their intent. We believe that the concerns recently discussed by two of the primary authors of the Act are noteworthy and should be a catalyst for revisions to Form 22A and Form 22C.

[1] http://www.irs.gov/individuals/article/0,,id=96543,00.html

We also note that Form 22A and Form 22C appear to imply that a debtor may deduct "ownership/lease" expenses regardless of whether the debtor is making payments on a car. If the Committee retains Lines 23/28, we strongly urge the Committee to clarify that the deduction for vehicle ownership applies only if the debtor is making "monthly loan or lease payments," which is what was intended when the IRS developed the standard. Other costs associated with ownership, such as maintenance and operation, are deducted as part of the "vehicle operation" standard elsewhere on the forms.

Forms 22A and 22C: Chapter 13 Administrative Expenses

Line 45 of Form 22A and line 50 of Form 22C ("Line 45/50") allow debtors to deduct Chapter 13 administrative expenses if the debtor is eligible to file a case under Chapter 13. We request that the Committee make clear as part of Line 45/50 that such expenses may at no time exceed 10% of projected plan payments, as provided in the Code. For example, section (b) of Line 45/50 should include language such as the following: "If such multiplier is greater than 0.10, use 0.10."

Forms 22A and 22C: Additional Expense Claims

Part VII of Form 22A and Part VI of Form 22C ("Part VII/VI"), entitled "Additional Expense Claims", allows the debtor to list and describe any monthly expenses that are not otherwise included on the form "that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I)" of the Code. The expenses provided by the debtor do not appear to be a factor in any of the needs-based calculations. However, according to the Committee Note, "the listing provides a basis for debtors to assert that these expenses should be deducted from CMI under § 707(b)(2)(A)(ii)(I), and that the results of the forms' calculation, therefore, should be modified."

The purpose for Part VII/VI of the forms is unclear. As stated on the forms, it appears as though Part VII/VI gives the debtor an opportunity to contend that additional deductions are necessary "under § 707(b)(2)(A)(ii)(I)." However, the section referenced in Part VII/VI makes no mention of an opportunity for the debtor to make any such contention. In fact, as stated above, Congress specifically provided that a debtor may deviate from the needs-based formula only under "special circumstances" as described in section 707(b)(2)(B). Therefore, it would appear that there is no statutory basis for Part VII/VI, and it should be deleted. Any such additional expense claims should play no part in the initial needs testing calculation and should only be asserted for purposes of judicial evaluation in the later "special circumstances" procedure.

If the Committee intends for Part VII/VI to provide a forum for the debtor to allege special circumstances pursuant to section 707(b)(2)(B), Part VII/VI should reference that section of the Code. Furthermore, the form should also reference the statutory purpose for that section, such as by stating "describe any monthly expenses or adjustments to income, not otherwise stated in this form, that result from special circumstances to the extent that such special circumstances justify additional expenses or adjustments to income for which there is no reasonable alternative." The form should also provide the debtor with the information provided in section 707(b)(2)(B)(ii) so that the debtor is aware of the types of expenses that would be appropriate for listing on the forms and should require that the debtor certify that the "special circumstances" have been met.

Form 22C: Marital Adjustment

Line 13 of Form 22C ("Line 13") gives the debtor the opportunity to contend that spousal income not be included in the income calculations under § 1325(b)(4) of the Code. The Code states specifically that the applicable commitment period is "not less than 5 years, if the current monthly income of the debtor *and the debtor's spouse combined*" is equal to or greater than the applicable state median income level. (Emphasis added.) We believe the statute is quite clear in stating that the spouse's income must be included when calculating the applicable commitment period. There is no reasonable basis to allow a debtor to contend otherwise. Therefore Line 13 (and 14) should be deleted.

Including the spousal income for purposes of determining the applicable commitment period in Chapter 13 is also consistent with the inclusion of spousal income for purposes of the needs-based test under Chapter 7. The entire needs-based calculation for Chapter 7 is based on a 60-month repayment plan (*i.e.,* 5 years). Therefore, if a debtor is converted from Chapter 7 to a Chapter 13 on account of the needs-based formula, it only makes sense that the subsequent Chapter 13 plan be based on a 60-month repayment period. However, Form 22C has the potential to disrupt this symmetry by allowing the debtor to use two separate CMI calculations, meaning that the debtor may not be eligible for a Chapter 7, but may be able to attempt to confirm a Chapter 13 plan with payments lasting less than 60 months.

In addition to having no legitimate support in the Code, Line 13 should be deleted for the reasons described above with respect to ensuring consistency and uniformity of application of the Code to debtors. Congress intended for a standard calculation to be performed in order to determine the duration of a Chapter 13 plan. Allowing debtors and their attorneys to decide which portions of the formula will apply undermines this key concept.

Credit Counseling: Form 1, Exhibit D

We applaud the Committee for proposing to require potential debtors to review the credit counseling requirements under the new law and check a box that appropriately describes their status with respect to the requirement. As has been discussed at a prior meeting of the Advisory Committee, this requirement will help prevent debtors from filing a petition without knowledge of the credit counseling requirements. We also believe that the 15-day "grace period" for purposes of obtaining the certificate—not for receiving the counseling—is also appropriate. There may be reasonable circumstances in which the credit counseling agency does not provide the certificate to the individual in time to be included with the petition, *i.e.,* the consumer receives counseling by telephone the day prior to filing. A 15-day period to provide the certificate is reasonable in such circumstances. For these reasons, we urge the Advisory Committee to retain the new Exhibit D to Form 1. We ask, however, that the last sentence for box 2 on Exhibit D clarify that: (i) the certificate must truthfully evidence that the individual received the credit counseling within the 180 days *before the filing of the case*; and (ii) the individual's case may be dismissed if the debtor does not file a copy of the certificate within 15 days. The first clarification will ensure that the individual does not incorrectly believe, as a result of the language in Exhibit D, that he or she can obtain counseling after filing the petition. The second clarification will help the individual understand the consequences of not providing the certificate within the stated time period.

Reaffirmations

Congress made significant changes to the reaffirmation process under the Code. Among these changes is a statutorily prescribed text that must be used in connection with reaffirmation agreements. The Code clearly states that such text is the text to be used for reaffirmations. However, it is our understanding that some judges have been devising their own variations to the statutory reaffirmation agreement language. This is not permitted under the statute and we urge the Committee to adopt a rule or take other appropriate action making it clear that the statutory language is the *only* language that a judge may require as part of a reaffirmation agreement and that judges may not impose their own requirements.

Motions to Dismiss or Convert under Section 707(b)

The Code, as revised by the Act, allows for various parties to move to dismiss a Chapter 7 proceeding (or convert to Chapter 11 or 13 if the debtor consents) if the court finds that granting relief under Chapter 7 would be an abuse of Chapter 7. The revisions to the Code eliminated the notion that the abuse must be "substantial" and permit parties other than the court or the U.S. trustee ("UST") to bring the motion in certain circumstances. The Code also states explicitly that the court must consider whether the debtor filed the petition in bad faith or the totality of the circumstances of the debtor's financial situation when determining whether the granting of relief would be an abuse of Chapter 7. The Act also permits creditors to bring motions under 707(b). The Act did *not* make changes to the nature of the required motion or the procedure under which it should be brought.

Prior to the Act, Rule 1017(e) provided the framework under which motions brought under § 707(b) of the Code would be handled. It specified who may bring a motion and the process for doing so. In particular, it stated that if the UST filed the motion, the UST "shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing." The Proposed Amendments make revisions to Rule 1017(e) in an effort to implement these changes to the Code. For example, the revisions allow new parties to file motions under § 707(b) of the Code and for appropriate conforming changes to be made. However, the Committee proposes to add an additional provision to Rule 1017(e)(1). Specifically, the Proposed Amendments provide that "a motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse."

We urge the Committee to delete the requirement that a motion state circumstances with particularity because such a requirement is unnecessary and implies some deficiency with the requirements of pre-existing Rule 1017(e)(1). The Proposed Amendments already provide that "[t]he party filing the motion shall set forth in the motion all matters to be considered at the hearing." This is consistent with the existing Rule 1017(e)(1) which required the UST to provide all matters to be considered at the hearing. We are unaware of any deficiency in this requirement, nor are we aware that the Committee identified any. The requirement to "set forth in the motion all matters to be considered at the hearing" ensures that motions contain sufficient information to proceed with the case. As a result, there is no need to require motions to "state with particularity" issues arising under § 707(b)(1) and (3). The Committee Note states that the requirement stems from the unspecific nature of § 707(b) (1) and (3). However, the Act did not alter the unspecific nature of "abuse" under Chapter 7—it was general in nature prior to the Act—yet the UST was not

required to plead a motion with particularity. There is no evidence that Rule 1017(e) needs such a requirement in order to implement the intent of Congress in making these revisions to the Code.

Because of the existing requirement to "set forth in the motion all matters to be considered at the hearing," it is not clear to us that the new requirement in Rule 1017(e)(1) will provide any more specificity in § 707(b)(1) motions than is already required. However, some could try to use the new requirement as a procedural obstacle for legitimate motions under § 707(b)(1). Legitimate motions could be denied due to technical interpretations of what "particularity" means. There may also be circumstances in which a party has sufficient information to allege abuse credibly and convincingly, but may not have information of sufficient granularity to meet various judges' definition of "particularity." We also note that adding additional requirements for § 707(b)(1) motions would appear to contravene the clear Congressional intent to allow *more* motions to be considered on the merits under § 707(b)(1), not less.

Expiration of, or Unavailability of, Automatic Stay

The Act reforms the Code to establish an automatic expiration of, or deny the availability of, the automatic stay in certain circumstances. For example, § 362(c) (3) (A) of the Code provides for the automatic expiration of the stay in certain circumstances while § 362(c) (4) denies its availability in certain circumstances. Although these statutory provisions do not need implementing rules to make them effective, we believe it would be useful for the Committee to require the court to issue an order with respect to the expiration or denial of an automatic stay in the specified circumstances. Such an order would put the debtor on notice with respect to the status of the automatic stay ensuring that debtors understand that no stay is in effect. The order would also ensure that all creditors have access to equal information regarding the status of the case.

Attorney Accountability

Concerned about the accuracy of information filed as part of bankruptcy petitions and schedules, Congress added, among other things, § 707(b)(4)(C) and (D) to the Code. These provisions state that the signature of an attorney on a petition, pleading, or written motion constitutes various representations by the attorney. We urge the Committee to make the appropriate amendments to the Proposed Amendments such that the relevant representations listed in § 707(b)(4) (C) and (D) are included in immediate proximity to the attorney's signature on a petition, pleading, or written motion. For example, Form 1 provides a section for the attorney to sign the petition and provide his or her contact information. We urge the Committee to include a disclosure in that section of Form 1 that states: "Your signature constitutes a certification that you have performed a reasonable investigation into the circumstances that give rise to this petition and that you have determined that the petition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse of Chapter 7. Your signature also constitutes certification that you have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect."

Although these disclosures are not required in order to give effect to § 707(b)(4)(C) and (D), we believe they are appropriate. These disclosures will reinforce an attorney's knowledge of the statutory obligations and will promote compliance with them. The disclosures would also help to prevent inadvertent violations of the law.

Debtor Providing Appropriate Information

Payment Advice

The Committee proposes to revise Rule 4002(b)(2)(A) to require, among other things, that the debtor provide the trustee with a copy of the most recent payment advice received by the debtor unless the document "does not exist or is not in the possession of the debtor." We applaud the Committee for requiring the debtor to bring the most recent payment advice to the § 341 meeting for use by the trustee. We believe that such information can provide the trustee with useful information in terms of the debtor's current financial condition relative to the debtor's financial condition at the time he or she filed for relief.

We request that the Committee make two improvements to this requirement. First, the Committee should clarify that the debtor must provide the most recent payment advice unless the debtor has no reasonable ability to obtain it. We do not believe the appropriate question is whether the debtor "possesses" the document. There may be many reasons, legitimate or not, that the debtor does not actually "possess" the document. However, it may be quite simple for the debtor to obtain another copy, such as through use of his or her employer's Intranet resources or by calling the employer's human resources department. (Such an approach would be similar to that proposed for Rule 4002(b)(3), discussed below.) Second, we also request that such information be provided to parties in interest in a more streamlined manner, rather than requiring that each make a separate motion under Rule 2004. This information is similar to information that such parties may receive as part of the petition, and would be of use to them in the same way as it is to the trustee.

Tax Returns

Rule 4002(b)(3) in the Proposed Amendments requires the debtor to provide the trustee with a copy of the debtor's federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the return, or provide a written statement that the documentation does not exist. The debtor must provide this information at least seven days before the first date set for the § 341 meeting. We applaud the Committee for including this provision in the Proposed Amendments and we urge that it be retained. The Advisory Committee debated this issue at a public meeting where some members of the Advisory Committee urged that the requirement pertain only to tax returns in the debtor's possession. However, the Advisory Committee ultimately concluded, correctly, that the debtor could obtain a transcript of the return from the IRS without much difficulty.

In addition to providing a tax return to the trustee, § 521(e)(2) of the Code requires a debtor to provide the tax return "to any creditor that timely requests" it. The debtor must provide the creditor with the tax return "at the same time the debtor complies" with the requirement to provide the document to the trustee. The Proposed Amendments would implement this provision in Rule 4002(b)(6) by requiring the creditor to request the tax return fifteen days before the first date set for the § 341 meeting, essentially requiring eight days' notice since the debtor may provide the tax return as late as seven days before the first date set for the meeting of creditors. We do not believe it is necessary to provide a debtor with eight days' notice to provide creditors with a document that the debtor must already provide to the trustee. We believe a more reasonable requirement would be three days' notice, giving the debtor sufficient time to make copies and provide them to creditors.

We also urge the Committee to revise the requirement in Rule 4002(b) (4) to allow the creditor to request the tax return within ten days of the first meeting of creditors.

Protection of Purchase Money Security Interests

The Act included reforms with respect to the treatment of purchase money security interests ("PMSIs") in bankruptcy proceedings. In particular, Section 1325(a) of the Code now protects PMSIs relating to automobiles and other property from the so-called "cramdown" or "lien stripping" process. Specifically, a PMSI is protected from cramdown so long as the PMSI was incurred within the 910-day period preceding the date of the filing of the bankruptcy petition. PMSIs relating to other things of value are protected from cramdown so long as the PMSI was incurred within one year of the filing. It is our understanding that there may be some confusion among the courts with respect to the application of this provision. We urge the Committee to consider appropriate measures to ensure a uniform application of this reform according to its plain language and the clear Congressional intent.

Commercial Bankruptcy Rules and Forms

Small Business Chapter 11 Reorganizations

Rule 1020 is an entirely new rule. It reflects the changes in definition of a small business debtor and provides procedures for informing parties in interest and the US Trustee that the debtor is a small business debtor. Because the definition of a small business debtor turns on multiple factors, such as the total amount of debt and the presence or absence of an active creditors' committee, and because no such committee is likely to exist at the commencement of the case, the rule addresses potential definitional disputes through the provision of opportunities to raise timely objections and obtain relief. It provides procedures for raising disputes with the court regarding the proper characterization of the debtor, and imposes a time limit for raising such disputes. Objections to the debtor's designation must be raised within 30 days after the conclusion of the meeting of creditors under Section 341, or within 30 days after any amendment to the designation whichever is later. While the 30 day time limit seems reasonable after the initial meeting of creditors, we believe that a longer period should be allowed for the raising of objections after any amendment is made by the debtor to its statement. There may be a significant time lag between such amendment and a creditor becoming aware of it, and the consequences for creditors vary markedly between a regular and small business Chapter 11. Therefore, we believe that the Proposed Amendment should be modified to allow a creditor to object to the debtor's characterization of itself within 60 days after an amendment to the statement.

The rule also relates to the presence and activity of a committee of unsecured creditors, as this factor is related to the new definition of "small business debtor". Where the US Trustee has appointed such a committee, the case shall be treated as a small business case only if the committee has not been sufficiently active and representative to provide effective oversight of the debtor. A party in interest or the US Trustee may request a determination of the debtor's status only within a "reasonable time" after the committee's failure to be sufficiently active and representative, while the debtor may file a request for such determination at any time. Given that there may be substantive disputes regarding the point in time at which the committee ceased to be sufficiently active and representative, we would urge that the rule be amended to clarify that a reasonable time is to be a

period of not less than 90 days and that such period may be extended by the court where the facts and circumstances warrant it.

Lease or Sale of Personally Identifiable Information

Rule 2002 has been amended to provide that a trustee leasing or selling personally identifiable information include a notice in the lease or sale transaction as to whether the action is consistent with any policy prohibiting such transfer. We have no comment on this change other than to note that it relates to the appointment of a consumer privacy ombudsman under revised Rule 6004.

Waiver of Creditors' Meeting in Certain Reorganization Cases

Rule 2003 has been amended to authorize the court, on request of a party of interest and after notice and hearing, to order that a meeting of creditors not be convened if the debtor has solicited acceptances of a plan prior to commencement of the case. We commend the Advisory Committee for accommodating new Code Section 341(e) which provides for such waiver under these circumstances.

Election of Trustee

Amendments to Rule 2007.1 reflect changes in the manner in the election and appointment of trustees in Chapter 11 cases that somewhat reduce the role of the US Trustee and also require the elected trustee to file an affidavit setting forth information regarding his connections with creditors and other parties in interest consistent with amendments to Section 1104(b)(2) of the Code. We support the required disclosures by the newly elected trustee as a means of assisting parties in interest to determine whether such trustee is truly disinterested.

Small Business Reporting Requirement

Amendments to Rule 2015 implement new Section 308 of the Code, which requires a small business debtor to file periodic financial and operating reports. We appreciate and endorse the clarification provided by the Committee Note that compliance with these reporting obligations does not relieve the trustee or debtor of any other obligations to provide information or documents to the United States trustee.

Filing of Plan and Disclosure Statement in a Chapter 11 Reorganization

An amendment to Rule 3016 recognizes that the plan proponent in a small business case need not file a disclosure statement if the plan itself includes adequate information and the court finds that a separate disclosure statement is unnecessary. We believe that this amendment makes adequate recognition of new Code Section 1125(f)(1).

Court Consideration of Disclosure Statement in a Small Business Case

Rule 3017.1 implements the court's ability in a small business case to conditionally approve a plan intended to provide adequate information, after which such plan is treated as a disclosure statement, and is related to Rule 3016 above. The Rule provides that:

> On or before conditional approval of the disclosure statement, the court shall:
> (1) fix a time within which the holders of claims and interests may accept or reject the plan;
> (2) fix a time for filing objections to the disclosure statement;
> (3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and
> (4) fix a date for the hearing on confirmation.

We urge the Committee to revise the rule to provide that the time fixed by the court for each of these four deadlines shall be a reasonable time that fully protects the substantive and procedural rights of all holders of claims and interests. Given the expedited nature of a small business Chapter 11 case, particularly where the disclosure statement and plan have been consolidated, such clarification would be desirable to fully protect the rights of creditors and other parties in interest.

Consumer Privacy Ombudsman

Rule 6004 has been amended to implement new requirements for a consumer privacy ombudsman in certain circumstances when the debtor proposes to sell personally identifiable information, including requirements for the motion for and appointment of the ombudsman. The rule provides that any motion for authority to sell or lease such information include a request for an order from the US Trustee to appoint a consumer privacy ombudsman. The US Trustee's report on such appointment must be accompanied by a verified statement of the appointee setting forth his connections with any party in interest, any related professionals, and anyone connected with the Office of US Trustee. We believe that the Rule properly implements new Code Sections 332 and 363(b)(1)(B).

Extensions of Time for a Small Business Debtor

Rule 9006 recognizes that extensions of time for a small business debtor to file schedules and a statement of financial affairs cannot exceed the time limits set forth in Code Section 1116(3). We commend the Advisory Committee for recognizing that the time limits for small business reorganizations are to be strictly enforced.

Model Small Business Disclosure Form

We recognize that a small business debtor remains free to file a proposed plan in any format so long as it conforms substantially to any Official Forms or other court-approved standard forms (per Rule 3016(d)) and with the general requirements of Code Section 1123, subject to creditor objections. We nonetheless applaud and endorse the Advisory Committee's development of model

template form (Official Forms 25A, B, and C) for small business filings and believe that having such a model available will be particularly useful to them. We also believe that the disclosure of creditor claims in the model form – which divides such claims by priority, and notes for each any impairment as well as proposed treatment in reorganization – will be a key and extremely useful disclosure item for creditors. A uniform model national small business disclosure form would be far preferable to a collection of disparate local forms and we urge the Committee to make such a model form available to small business debtors as soon as is practicable.

Reports on Entities in Which a Chapter 11 Debtor Holds a Substantial or Controlling Interest

We support the adoption of new Rule 2015.3, which implements Section 419 0f the Act by requiring Chapter 11 debtors (or trustees) to file periodic financial reports on the value and profitability of entities in which they hold a substantial or controlling interest. We specifically endorse the development of a single required Official Form 26 for this purpose; the establishment of a 20 percent interest bright line test for establishing a presumption of such control relationship; and the requirement that the initial report be filed no less than five days prior to the initial meeting of creditors and no less than every six months thereafter.

Conclusion

The Act made many significant changes to the Code. These changes require extensive revisions to the Bankruptcy Rules and to the Official Forms. We believe the Interim Rules, now under review as Proposed Amendments, reflect the Advisory Committee's diligent and good faith efforts to implement the changes in a manner that is faithful to the Code and the Congressional intent. We appreciate the opportunity to provide comments on the Interim Rules and hope they assist the Committee as it moves forward in the process. If you would like more information or have questions, please do not hesitate to contact Mike McEneney (202-736-8368), Karl Kaufmann (202-736-8133) or Philip Corwin (202-347-6875) who assisted in the preparation of this letter.

Sincerely,

American Bankers Association
America's Community Bankers
The Financial Services Roundtable
American Financial Services Association
Consumer Bankers Association
Independent Community Bankers of America