Major Consumer Bankruptcy Effects of the 2005 Reform Legislation

On April 20, 2005, President Bush signed into law S. 256. Titled the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," this is most substantial revision of bankruptcy law since the 1978 Bankruptcy Code. The new law will be generally effective as to cases filed on or after October 17, 2005. The following summary discusses changes in consumer bankruptcy law affected by the law. This summary addresses the areas of major impact; it is not a complete list of the bill's consumer provisions.

Changes affecting consumer cases under multiple chapters of the Code

1. Extended time between discharges

- **S. 256 § 312**

Section 727(a)(8) is amended to subject a Chapter 7 debtor to denial of discharge if the debtor received a Chapter 7 or 11 discharge in a case filed within 8 years of the filing of the pending case. Section 1328 is amended to include a new subsection (f) providing that a Chapter 13 debtor will be denied discharge if the debtor received a discharge (1) "in a case filed under Chapter 7, 11, or 12 . . . during the 4-year period preceding the date of the order for relief" in the pending case, or (2) "in a case filed under Chapter 13 . . . during the 2-year period preceding the date of such order."[1] The resulting discharge system can be displayed in a table:

[1] The quoted language is ambiguous. It denies discharge in a Chapter 13 case if some triggering event occurred during the two- or four-year period before the case was filed, but it does not clearly identify that event. The triggering event could be ~~either the *filing* of~~ a prior bankruptcy case that resulted in a discharge or the *receipt of a discharge* in the prior case. Since the first verb before the phrase "during the ... period" is "filed," the grammatically correct interpretation is that discharge is denied if the prior case was "*filed* [under the relevant chapter] during the [2- or 4-year] period preceding the

Discharge waiting period	Current case: Chapter 7	Chapter 11	Chapter 13
Prior case: Chapter 7	8 years from prior case filing	None	4 years from prior case filing (or prior case discharge)
Chapter 11	8 years from prior case filing	None	4 years from prior case filing (or prior case discharge)
Chapter 13	Current law (6 years from prior case filing; none with defined payout)	None	2 years from prior case filing (or prior case discharge)

2. Production of tax returns and other documents; dismissal on nonproduction

- **S. 256 § 315(b)**

Section 521 has been amended to impose a number of new production requirements on debtors. First, a new subparagraph (a)(1)(B) provides that unless the court orders otherwise individual debtors must file, together with their schedules:

- a certificate of an attorney or petition preparer indicating that the debtor was given an informational notice required by amended § 342(b), or, in the case of a pro se debtor, a certificate of the debtor that the debtor has received and read the notice;

- "copies of all payment advices or other evidence of payment received within 60 days before the filing of the petition, by the debtor from any employer of the debtor";

- "a statement of the amount of monthly net income, itemized to show how the amount is calculated"; and

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date of the order for relief." However, it is possible to read the provision as applying "if the debtor *received a discharge* [in a case filed under the relevant chapter] during the ... period." Policy arguments and legislative history might be advanced in support of the latter interpretation.

- “a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.”

“Monthly net income” is not a term defined in the Code as amended by S. 256. The use of this term in § 521(a)(1)(B) could have at least three different meanings: (1) it could mean simply the debtor’s take home pay (that is, gross income less payroll deductions); (2) it could mean the amount remaining after allowed deductions under the means test (discussed below in connection with changes to Chapter 7); or (3) it could mean the difference between the debtor’s income reported on Schedule I and the expenses reported on Schedule J. Since this last “monthly net income” would be relevant to the feasibility of a Chapter 11 or Chapter 13 plan, as well as to the ability of the debtor to perform under a reaffirmation agreement, this may be the most reasonable interpretation.

Second, new subparagraph (e)(2)(A) requires that each debtor, at least seven days prior to the 341 meeting, provide both to the trustee and to any creditor making a timely request a copy of the federal income tax return or transcript of the return (at the debtor’s option) for the period for which the return was most recently due and for which the debtor filed a return. This requirement may apply only to individual debtors in Chapter 7 and 13 cases, since § 521(e)(1) (requiring the court to give copies of certain filings to creditors) is limited in this way. A failure by the debtor to produce the return or transcript requires dismissal of the case (presumably on motion of the trustee or requesting creditor) unless the debtor demonstrates that the failure to produce the return or transcript was beyond the debtor’s control.

Third, new paragraphs (f)(1)-(3) provide that each individual debtor in a case under Chapter 7, 11, or 13, must also, on request of a party in interest or the court, file with the court, at the same time filed with the IRS, copies of any federal income tax return (or at the debtor’s option, a transcript of the return) for a tax year ending while the case is pending and for a tax year that ended during the three years before the case was filed, as well as copies (or transcripts) of any amendments filed to these returns. New paragraph (g)(2) provides that the filed returns or transcripts are to be available to any party in interest, with the debtor’s privacy protected by regulations to be adopted by the Director of the Administrative Office.

- **S. 256 § 316**

A new § 521(i) provides that if an individual debtor in a voluntary Chapter 7 or a Chapter 13 case fails to file all of the information required under § 521(a)(1) (including the new § 521(a)(1)(B) discussed above) within 45 days after filing the petition, the case must be dismissed on the 46th day, and that any party in interest may request a court order to that effect, which must be entered within five days of the request. The automatic dismissal may be delayed for up to 45 additional days on motion of the debtor made within the original 45-day period, and on motion of the trustee, filed prior to automatic dismissal, showing that the debtor attempted in good faith to file the debtor's payment advices and that the best interests of creditors would be served by administering the case. (It is unclear whether this exception would apply only when the debtor has satisfied the other filing requirements of § 521(a)(1).)

3. Audits

- **S. 256 § 603**

Section 603 of S. 256 sets out an uncodified duty, imposed on the Attorney General (in districts served by United States trustees) and on the Judicial Conference of the United States (in districts served by bankruptcy administrators) to conduct audits (1) of all information provided by the debtors in at least 0.4% of individual Chapter 7 and 13 cases, randomly selected, and (2) of any schedules of income and expenses "which reflect greater than average variances from the statistical norm of the district in which the schedules were filed if those variances occur by reason of higher income or higher expenses than the statistical norm of the district in which the schedules were filed." The audits are to "determine the accuracy, veracity, and completeness of petitions, schedules, and other information" that the debtor is required to provide under §§ 521 and 1322 of the Code. The audits are to be conducted by certified or licensed public accountants in accordance with generally accepted auditing standards, or under regulations adopted by the Attorney General (and the Judicial Conference in areas served by bankruptcy administrators). Provision is made for aggregate reports of the results of the audit and for criminal referrals in the event of material misstatements. A new § 727(d)(4) creates as a ground for revocation of discharge the failure by the debtor to cooperate with the auditor or to "explain satisfactorily a material misstatement in an audit." The latter phrase presumably refers to misstatements in filings of a debtor reflected in the

audit, rather than misstatements in the audit itself; however, it is not clear what would constitute a “satisfactory” explanation of such a misstatement. There is no deadline for motions to revoke discharge based on § 727(d)(4).

The Attorney General and the Judicial Conference are given two years from enactment of S. 256 to develop bankruptcy auditing standards. However, the auditing provisions themselves become effective 18 months after enactment, thus requiring earlier development of bankruptcy auditing standards to avoid the need to conduct the required audits under generally accepted auditing standards.

4. Credit counseling and debtor education

- **S. 256 § 106(a)**

Under new § 109(h), individuals are ineligible for relief under any chapter of the Code unless, within 180 days of their bankruptcy filing, they received "an individual or group briefing" from a nonprofit budget and credit counseling agency approved by the United States trustee or bankruptcy administrator under standards set forth in a new § 111 and published by the clerk of court. Among these standards is a requirement that the agency provide its services without regard to the debtor's ability to pay any fee. The required briefing, which may take place by telephone or on the Internet, must "outline" the opportunities for credit counseling and "assist . . . in performing a related budget analysis." Exceptions are made (1) for districts in which adequate counseling services are determined by the U.S. trustee or bankruptcy administrator not to be available (a determination that must be reviewed annually); (2) for debtors who submit to the court a certification describing exigent circumstances requiring immediate bankruptcy filing and stating that the debtor had sought the required briefing at least five days prior to the bankruptcy filing without being able to obtain it (in which case the debtor is required to complete the counseling within 30 days after the bankruptcy filing); and (3) for debtors who are incapacitated, disabled, or on active military duty in a combat zone (with limiting definitions for incapacity and disability). The debtor is required to file a certificate from the credit counseling agency describing the services provided, and file any debt repayment plan developed with the agency. By making individuals who have not received the defined briefing ineligible to be debtors, this change may have the effect of immunizing most individuals from involuntary bankruptcy cases. However, because the required briefing is to be received prior to the "filing of the petition by [the] individual [debtor]," it may be argued that the eligibility requirement applies only in voluntarily filed cases.

- **S. 256 § 105**

The Executive Director of the Office for United States Trustees is required to develop a financial management training curriculum and materials to educate individual debtors "on how to better manage their finances." The curriculum is to be tested in six judicial districts over an 18-month period, beginning no later than 270 days after enactment of S. 256. The Director is required to evaluate the effectiveness of the curricu-

lum and materials, as well as other consumer education programs, and report to Congress no later than three months after the end of the test period as to the effectiveness and cost of the programs.

- **S. 256 § 106(b) and (c)**

Even while the U.S. Trustees' test program is being evaluated, debtors in both Chapter 7 and 13 will be required to complete "an instructional course concerning personal financial management" in order to assure their discharge, as long as the United States trustee or bankruptcy administrator determines that there are adequate approved educational programs available and the debtor is not disabled or incapacitated (as defined in § 109(h)), or on active military duty in a combat zone. Unless one of these exceptions of the requirement applied, failure to compete the instructional course would be a ground for denial of the Chapter 7 discharge under a new § 727(a)(11), and of the Chapter 13 d discharge under new § 1328(g). Telephone and Internet courses would be permissible "if effective." As with credit counseling agencies, (1) the clerk of court must maintain a list of educational courses approved for each district by its United States trustee or bankruptcy administrator, under standards set out in new § 111, and (2) among the standards for approval is a requirement that the course be provided without regard to the debtor's ability to pay any fee charged for the course.

5. Automatic stay

- **S. 256 § 302; serial filings**

A new § 362(c)(3) provides that if a Chapter 7, 11, or 13 case is filed within one year of the dismissal of an earlier case (other than a Chapter 11 or 13 case filed after a § 707(b) dismissal), the automatic stay in the second case terminates 30 days after the filing, unless a party in interest demonstrates that the second case was filed in good faith with respect to the creditor sought to be stayed. And if a second repeat filing takes place within the one-year period, the automatic stay will not go into effect (and the court is required promptly to enter an order confirming the inapplicability of the stay on request of a party in interest). However, a party in interest may obtain imposition of the stay by demonstrating that the third filing is in good faith with respect to the creditor sought to be stayed. For both second and third filings within one year, circumstances are described which generate a presumption that the new filing was not made in good faith, and such a presumption

would be required to be rebutted by clear and convincing evidence. Under a new § 362(i), this presumption would not arise in "any subsequent case" if a debtor's case is dismissed "due to the creation of a debt repayment plan."

- **S. 256 § 303; in rem relief; ineligible debtors**

"In rem" relief from the automatic stay is authorized by a new § 362(d)(4). In cases involving either (A) transfers of real property collateral without the consent of the secured creditor or court approval or (B) multiple bankruptcy filings involving the same real property, the court may issue an order of relief from the automatic stay, which order, properly recorded, is binding on all owners of the property for two years from the date of entry. A party in interest may file a request for imposition of the stay within 30 days of a subsequent case filing, and the court may impose the stay only if the party demonstrates that the case was filed in good faith as to the creditors sought to be stayed. Where in rem relief is effective, new § 362(b)(20) creates an exception to the automatic stay for lien enforcement activity in later cases.

A new § 362(b)(21) excepts from the stay any act to enforce a lien or security interest in real property if the debtor was ineligible under § 109(g) or filed the case in violation of an order "prohibiting the debtor from being a debtor" in another case under Title 11.

- **S. 256 § 311; exception for leased residential real estate**

Two new exceptions from the automatic stay are established for landlords seeking to evict tenants. The first, § 362(b)(22), allows the continuance of any eviction proceeding in which the landlord obtained a judgment of possession prior to the filing of the bankruptcy petition. The second, § 362(b)(23), deals with evictions based on "endangerment" of the rented property or "illegal use of controlled substances" on the property. Paragraph (b)(23) excepts the eviction proceeding from the stay if (a) it was commenced before the filing of the bankruptcy case, or (b) if the endangerment or illegal use occurred within the 30 days before the bankruptcy filing. In either situation, the landlord would be required to file with the court and serve on the debtor a certificate setting out the facts giving rise to the exception.

New provisions in § 362(l)-(m) allow a debtor to contest the applicability of both of these new exceptions by filing timely certifications under penalty of perjury. As to the (b)(22) lease exception, the debtor would be able under § 362(l) both to keep the stay in effect for an initial 30 days after the bankruptcy filing—by certifying that applicable nonbankruptcy law allowed the lease to remain in effect upon the debtor's cure of the default that was the basis of the eviction order—and to keep the stay in effect after 30 days by filing a further certification that the cure amount had been paid within the initial 30 days. As to (b)(23), a new § 362(m) provides that if the debtor files a certificate denying the assertions in the landlord's certificate, the court is required to conduct a hearing within 10 days "to determine if the situation giving rise to the lessor's certification . . . existed or has been remedied."

- **S. 256 § 315(a); notice to creditors**

Section 342(c) is amended to remove the provision that a failure by the debtor to supply notice to creditors in the prescribed form does not invalidate the notice. Instead, a new § 342(g) provides that no monetary penalty may be imposed on a creditor for violating the automatic stay or for failing to turn over property, unless notice is given in a form effective under amended § 342. As amended by new provisions in (c)(2), (e), and (f), § 342 now provides that notice to a creditor will not be effective unless it is served at an address filed by the creditor with the court or at an address stated in two communications from the creditor to the debtor within 90 days of the filing of the bankruptcy case (or between 90 and 180 days if the creditor was prohibited from communicating with the debtor during the more recent 90-day period). To be effective, the notice must also include the account number used by the creditor in the two relevant communications. An otherwise ineffective notice will only subject the creditor to liability if the notice was "brought to the attention of the creditor," which is defined as receipt by a person designated by the creditor to receive bankruptcy notices.

6. Limiting definition of household goods for purposes of lien avoidance

- **S. 256 § 313**

A new § 522(f)(4) limits the "household goods," as to which a nonpossessory, nonpurchase-money security interest can be

avoided under § 521(f)(1)(B). The new definition limits electronic equipment to one radio, one television, one VCR, and one personal computer with related equipment; it excludes (among other things) works of art not created by the debtor (or a relative), jewelry worth more than $500 (except wedding rings), and motor vehicles.

7. Dischargeability

- **S. 256 § 310; credit card debts**

The presumption of nondischargeability for fraud in the use of a credit card, set out in § 523(a)(2)(C), is expanded. The amount that the debtor must charge for "luxury goods" to invoke the presumption is reduced from $1225 to $500; the amount that the debtor must withdraw in cash advances in order to invoke the presumption is reduced from $1225 to $750. The period of time prior to the bankruptcy filing in which these charges must be made in order for the presumption to apply is increased from 60 to 90 days for luxury goods, and from 60 to 70 days for cash advances.

- **S. 256 § 220; student loans**

Section 523(a)(8) is amended to make student loans nondischargeable, in the absence of undue hardship, regardless of the nature of the lender, thus covering loans from non-governmental and profit-making organizations.

8. Two-year residency requirement for state or local exemption law

- **S. 256 § 307**

A new § 522(b)(3) specifies the state or local law governing the debtors' exemption as the law of the place where the debtor's domicile was located for 730 days before filing, and if the debtor did not maintain a domicile in a single state for that period, the governing exemption law is that of the place of the debtor's domicile for the majority of the 180-day period preceding the 730 days before filing (that is, between 2 and 2-1/2 years before the filing). If this new residency requirement would somehow render the debtor ineligible for any exemption, then the debtor is allowed to choose the federal exemptions.

9. Limits on homestead exemptions

Contrary to the general effective date of S. 256, each of the following amendments, limiting the right to claim large homestead exemptions, applies in all cases filed on or after the enactment of S. 256.

- **S. 256 § 308; reduction of homestead value for fraudulent additions**

A new § 522(o) reduces the value of a debtor's homestead, for purposes of a state homestead exemption, to the extent of any addition to the value of the homestead on account of a disposition of nonexempt property made by the debtor—made with intent to hinder, delay, or defraud creditors—during the 10 years prior to the bankruptcy filing.

- **S. 256 § 322; limitation on new homestead additions; homestead cap**

Under a new § 522(p), any value in excess of $125,000—without regard to the debtor's intent—that is added to a homestead during the 1215-days (about 3 years, 4 months) preceding the bankruptcy filing may not be included in a state homestead exemption unless it was transferred from another homestead in the same state or the homestead is the principal residence of a family farmer.

Under a new § 522(q), an absolute $125,000 homestead cap applies if either (a) the court determines that the debtor has been convicted of a felony demonstrating that the filing of the case was an abuse of the provision of the Bankruptcy Code, or (b) the debtor owes a debt arising from a violation of federal or state securities laws, fiduciary fraud, racketeering, or crimes or intentional torts that caused serious bodily injury or death "in the preceding 5 years." However, this limitation is inapplicable if the homestead property is "reasonably necessary for the support of the debtor and any dependent of the debtor."

- **S. 256 § 330; delay of discharge to determine homestead limits**

The discharge provisions of Chapters 7, 11, and 13 are all amended to delay the grant of a discharge for a debtor who is subject to a proceeding that might give rise to a limitation of the homestead exemption under new § 522(q) (1), discussed above. In Chapter 7, a new ground for not granting discharge is set out in § 727(a)(12), based on a finding by the court that such a § 522(q) proceeding is pending. In Chapter 11, a new § 1141(d)(5)(C) appears to require, as a condition for discharge, that the court find no reason to believe that such a proceeding is pending (the provision is ambiguous because it is a long sentence fragment). In Chapter 13, new § 1328(h) clearly provides that the court may not grant a discharge unless the court finds "no reasonable cause to believe" that there is pending a proceeding of the kind that would result in the limitation of an exemption under § 522(q). All of these new provisions specify that the hearing they allow or require is to be conducted "not more than 10 days before the date of the entry of the order granting discharge." The intent of these provisions apparently is to allow a discharge order to be entered only if the court is able to find that no § 522(q) proceeding is pending, with the impact of delaying discharge until the conclusion of any such proceeding. The heading of § 330 of S. 256—"Delay of Discharge during Pendency of Certain Proceedings"— confirms this understanding.

10. Avoidance of transfers to asset protection trusts

- **S. 256 § 1402**

A new § 348(e) allows a trustee to avoid any transfer by the debtor to a self-settled trust or similar device made within 10 years of filing the petition, with "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted." This provision would allow recovery of funds transferred by the debtor to an asset protection trust, but apparently only if the trustee could establish that the transfer was made in connection with avoiding a particular claim, rather than simply as a general asset protection device.

11. Exclusions from estate property

- **S. 256 § 225; educational retirement accounts; state tuition programs**

A new paragraph (b)(5) is added to § 541, providing that funds placed in an educational retirement account at least 365 days prior to a bankruptcy filing, within the limits established by the Internal Revenue Code, and for the benefit of a child or grandchild of the debtor, are excluded from the debtor's estate, with a $5000 limit on funds contributed between one and two years before the filing. A new paragraph (b)(6) similarly excludes similar contributions to qualified State tuition programs, as defined in the Internal Revenue Code,

- **S. 256 § 323; contributions to employee plans**

Another new exclusion from estate property, § 541(b)(7), applies to employee contributions to ERISA-qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans.

12. Bankruptcy appeals

- **S. 256 § 1233**

Section 158 of the Judiciary Code (Title 28, U.S.C.) is amended to provide the circuit courts of appeal with discretion to accept bankruptcy appeals without an intermediate appellate decision. The circuit court may accept a direct appeal if the bankruptcy court, the district court, the Bankruptcy Appellate Panel, or the parties to the appeal acting jointly certify that direct appeal is necessary to resolve a matter of first impression, conflicting decisions, or public importance, or a matter that would materially advance the progress of the case.

13. Effective date

- **S. 256 § 1501**

The changes made by S. 256 are generally effective only with respect to cases filed after its effective date, October 17, 2005 (180 days after the date of enactment, April 20). However, as noted above, the limitations on homestead exemptions set out in §§ 308 322, and 330 are effective upon enactment, while the auditing requirements of § 603 are not effective until 18 months after enactment.

Changes affecting consumer cases under Chapter 7

1. New § 707(b)—means testing; S. 256 § 102(a)-(d)

Section 707(b) of the Bankruptcy Code is amended to provide for dismissal of Chapter 7 cases or (with the debtor's consent) conversion to Chapter 13, upon a finding of abuse by an individual debtor with primarily consumer debts. Abuse can be found in one of two ways: first, through an unrebutted presumption of abuse, arising under a new means test (§ 707(b)(2)); and second, on general grounds, including bad faith, determined under the totality of the circumstances (§ 707(b)(3)).

Standing. New § 707(b)(1) generally allows any party in interest, as well as the court on its own initiative, to bring a motion seeking dismissal of a Chapter 7 for abuse, but § 707(b)(6) provides that only the judge, U.S. trustee or bankruptcy administrator may bring the motion if the debtor's income does not exceed a defined state median. Moreover, under § 707(b)(7) the means-test presumption is completely inapplicable

to debtors whose income is below that median. (In addition, § 707(b)(2)(D) makes the means test inapplicable to certain disabled veterans.) The standing limitations can be summarized in a table:

	Debtor's income at or below the applicable median	*Debtor's income above the applicable median*
The means-test presumption	No one has standing.	All parties in interest have standing.
General grounds of abuse	Only judges, U.S. trustees, and bankruptcy administrators have standing.	

To apply the standing limitations, it is necessary to determine both "debtor's income" and the applicable state median.

(a) *Debtor's income.* Generally, the debtor's income, for purposes of standing to bring an abuse motion, is defined as the debtor's "current monthly income" multiplied by 12. As discussed below, "current monthly income" is the debtor's average monthly income over a six-month period. However, for purposes of limiting the standing of judges, U.S. trustees and bankruptcy administrators under § 707(b)(2)(B)(7), the debtor's current monthly income is augmented by that of the debtor's spouse, even in a non-joint case, unless the debtor submits a sworn statement reflecting that the spouses are separated.

(b) *Applicable median income.* The median income applicable for determining standing to bring a motion under § 707(b) is as follows: (a) for a debtor in a household of 1 person, the median family income of the applicable state for 1 earner; (b) for a debtor in a household of two, three, or four individuals, the highest median family income of the applicable state for a family of the same or fewer persons; and (c) for a debtor in a household of more than four individuals, the highest median family income of the applicable state for a family of four or fewer individuals, plus $525 per month for each individual in excess of four. According to a new definition of "median family income" added to the Code as § 101(39A), these figures would be as "both calculated and reported by the Bureau of the Census in the then most recent year," and if this calculation and reporting is not in the current year, then ad-

> justed to "reflect the percentage change in the Consumer Price Index . . . during the period of years occurring after such most recent year and before such current year." The $525 adjustment for larger families—with the other provisions of amended § 707(b)—is made subject to § 104 of the Code, and so would be increased (or decreased) in accordance with the cost of living on a triennial basis. With the current $525 monthly adjustment, the annual median income figure would be increased by $6300 for each family member above four.

The Bureau has recently released income data reflecting the median family income figures required for purposes of § 707(b)(6)-(7). One report, "Income—Median Family Income by Family Size," provides the data relevant for households of two or more individuals;[2] another, "Income—Median Family Income by Number of Earners in Family," provides the data for households of one person.[3] These reports use 2003 data, which the Bureau has apparently adjusted for inflation through 2005. As an example of the range of applicable medians, the following is the relevant information from the reports for the state of Illinois:

1-person household	$39,407
2-person families	49,855
3-person families	57,987
4-person families	69,141

Because the income figures reflected in the recent reports were "both calculated and reported" in 2005 and because § 101(39A) only directs inflation adjustment "annually" for the period after the year of the most recent Bureau report and before the year of the bankruptcy filing, the figures could be used without any inflation adjustment in bankruptcy cases filed in 2005 and 2006,. However, if the Bureau issued no new report from 2005 to 2007, cases filed in 2007 would use the 2005 fig-

[2] This report is available at <http://www.census.gov/hhes/www/income/medincsizeandstate.html> (last visited June 4, 2005). It can be anticipated that this data will also be available on the website of the United States Trustee Program.

[3] This report is available at <http://www.census.gov/hhes/www/income/medincearnersandstate.html> (last visited June 4, 2005). It can be anticipated that this data will also be available on the website of the United States Trustee Program.

ures adjusted by the percentage change in the Consumer Price Index for 2006 (a year after the current report but before the 2007 filing).[4]

Presumption of abuse under the means test. The presumption of abuse, set out in a new § 707(b)(2), is governed by a means test, designed to determine the extent of a debtor's ability to repay general unsecured claims. The means test has three elements: (a) a definition of "current monthly income," measuring the total income a debtor is presumed to have available; (b) a list of allowed deductions from current monthly income, for purposes of support and repayment of higher priority debt; and (c) defined "trigger points," at which the income remaining after the allowed deductions would result in the presumption of abuse.

(a) *Presumed income.* "Current monthly income" is defined in a new § 101(10A) as a monthly average of all the income received by the debtor (and the debtor's spouse in a joint case)—including regular contributions to household expenses made by other persons, but excluding Social Security benefits and certain victim payments—during a defined six-month period. Earlier versions of the reform legislation provided that this period would be the six-month period ending with the last day of the calendar month preceding the filing, but only if the debtor filed a statement of current monthly income at the time of the filing. However, S. 256 uses this six-month period in any case where the debtor files the statement of current income, without regard to when the filing is made. .Thus, for example, if a bankruptcy case were filed in March, as long as the debtor filed a statement of income, current monthly income would be the average monthly income received by the debtor during the preceding September through February. However, if the

[4] The Consumer Price Index for All Urban Consumers is maintained by the U.S. Department of Labor, Bureau of Labor Statistics, and is reported on the Bureau's website, currently available at <http://www.bls.gov/cpi/home.htm>(last visited June 4, 2005). It can be anticipated the United States Trustee Program will compute and report any necessary inflation adjustments to census data.

[6] Fed. R. Bankr. P. 4008 does provide that a motion by the debtor for approval of a reaffirmation agreement must be filed before or at the time of a hearing under § 524(d), but approval of reaffirmation agreements is not required for represented debtors and § 524(d) hearings are optional with the court. Section 524(c)(1) requires only the agreement be "made before the granting of the discharge."

debtor failed to file the required income statement, then the six-month period ends on the date that the court determines "current monthly income."

(b) *Presumed deductions.* The deductions from current monthly income allowed under the means test are set out in new § 707(b)(2)(A)(ii)-(iv) and can be categorized as follows:

(1) *Living expenses specified under standards of the Internal Revenue Service.* The IRS has developed living expense standards to provide guidance for its agents in negotiating consensual payment of overdue taxes. The IRS's website, <http://www.irs.gov/individuals/article/0,,id=96543,00.html>, explains the standards and links to tables of allowed expenses.

The specified expense allowances are of two types. First, "National Standards" establish allowances for food, clothing, personal care, and entertainment, depending on the taxpayer's family size, on a national basis (except for Alaska and Hawaii, which have higher allowances). Under the means test, debtors can deduct the National Standards amounts with an increase of up to 5% of the food and clothing allowance, if demonstrated to be reasonable and necessary.

Second, the IRS's "Local Standards" establish allowances for transportation (on a regional basis) and housing (on a county by county basis). It can be expected that the Executive Office for United States Trustees will issue tables of the IRS standards applicable in each relevant geographical area. However, it is unclear whether for purposes of the means test a debtor may claim the full amount specified in the Local Standards or only the amount actually expended by the debtor up to those amounts.

In any event, the means test requires that the amounts deducted by the debtor under the National and Local standards be reduced by whatever portion of the allowance reflects repayment of debt. Thus, repayment of a car loan would be deducted from the IRS Local Standard allowance for acquiring transportation. The legislation does not explain how mortgage payments are to be deducted from the IRS Local Standard for housing, which does not distinguish maintenance from acquisition costs.

(2) *The actual expenses of the debtor in categories recognized by the IRS but as to which no specific allowance has been specified.* The IRS recognizes a third category of expenses ("Other Necessary Expenses"), for which it does not specify an allowance. The means test provides that "reasonably necessary health insurance, disability insurance, and health savings account expenses" may be deducted by the debtor. The latter provision could result in actual expenses of the debtor for insurance not being deducted from current monthly income if the insurance is found not to be reasonably necessary.

(3) *Expenses for protection from family violence.*

(4) *Continued contributions to care of nondependent family members.* The family members to whom these contributions may be made include children, grandchildren, step-children, and step-grandchildren.

(5) *Actual expenses of administering a Chapter 13 plan*. These expenses are to be determined by the Executive Office for United States Trustees and applied to "projected plan payments."

(6) *Expenses for grade and high school (up to $1500 annually, per minor child)*. To claim this allowance the debtor is required both to document the reasonableness and necessity for the expenses and to show that the expenses are not covered by the applicable IRS standards.

(7) *Additional home energy costs*. Again, the debtor would have to document the expenses as reasonable and necessary and not covered by the IRS Local Standards.

(8) *1/60th of all secured debt that will become due in the five years after filing*. Past due debt may only be included in this amount if it is secured by property necessary for support of the debtor and the debtor's dependents.

(9) *1/60th of all priority debt*.

(10) *Continued contributions to tax-exempt charities*. This deduction is provided for under current § 707(b), and is newly codified as § 707(b)(1). No limit is placed on the amount of the contributions.

(c) *Trigger points.* Two distinct trigger points for the presumption of abuse are set out in § 707(b)(2(A)(i): (1) if the debtor has at least $166.67 in current monthly income available after the allowed deductions ($10,000 for five years), abuse is presumed regardless of the amount of the debtor's general unsecured debt, and (2) if the debtor has at least $100 of such income ($6000 for five years), abuse is presumed if the income is sufficient to pay at least 25% of the debtor's general unsecured debt over five years. The impact of these trigger points can again be shown in a table:

"Current monthly income" after defined deductions	*Presumption of abuse*
Less than $100	Does not arise
$100	Arises unless debt exceeds $24,000
$150	Arises unless debt exceeds $36,000
$166.66	Arises unless debt exceeds $39,998.40
More than $166.66	Always arises

(d) *Rebuttal.* To rebut the presumption, § 707(b)(2)(B) requires that a debtor swear to and document "special circumstances" that would decrease income or increase expenses so as to bring the debtor's income after expenses below the trigger points.

General grounds for abuse. The other basis for a finding of abuse, applicable under § 707(b)(3) where the presumption does not apply or has been rebutted, is that the debtor filed the petition in bad faith or that the totality of the debtor's financial circumstances indicates abuse. As noted above, the U.S. trustee, bankruptcy administrator or judge can assert this basis for finding abuse in any case; creditors and case trustees are limited to asserting it in cases where the debtor's income is above the defined state median.

Procedure. Section 707(b)(2)(C) requires debtors to file a statement of their calculations under the means test as part of the schedule of current income and expenditures under § 521. If the presumption arises, then, under § 342(d), the court is required to notify creditors within 10 days of the filing of the

petition. In addition, under § 704(b), (1) the U.S. trustee or bankruptcy administrator is required to review the debtor's materials and file with the court, within "10 days after the first meeting of creditors," a statement as to whether the presumption of abuse arises, a copy of which the court must "provide to all creditors," and (2) if the presumption arises, the U.S. trustee or bankruptcy administrator must file either a motion under § 707(b) or a statement explaining why the motion is not being filed.

2. Sanctions imposed on debtor's counsel

- **S. 256 § 102(a)(2)**

Section 707(b) is amended to add several new duties and liabilities of debtors' counsel:

- Subparagraph (4)(A) allows the court to award costs and fees to a trustee who successfully pursues a § 707(b) motion, payable by debtor's counsel, if it finds that the Chapter 7 filing violated Fed. R. Bankr. P. 9011.

- Subparagraph (4)(B) specifies that if the court finds any violation of Rule 9011 by the debtor's attorney, it may award a civil penalty against the attorney, payable to the trustee, U.S. trustee, or bankruptcy administrator. Pursuant to § 103(b) of the Code, this provision would apply only in Chapter 7 cases.

- Subparagraphs (4)(C) and (D) set out a statutory parallel to Fed. R. Civ. P. 11, providing that the signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that the signed documents is well grounded in fact, that any Chapter 7 petition is not an abuse under § 707(b), and that "the attorney has no knowledge after an inquiry that the information in the schedules filed with [the] petition is incorrect." This statutory restatement of Rule 11 includes no provision for sanctions in the event that its signature certification is incorrect.

- **S. 256 §§ 227-29**

Under new § 526, debtors' counsel are subject to loss of fees, damages, injunctive remedies, and imposition of costs for any failure to meet new disclosure and record-keeping requirements imposed on "debt relief agencies" in new §§ 527 and 528.

“Debt relief agency” is defined in new § 101(12A) as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration.” “Assisted person” is defined in new § 101(3) as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.” Accordingly, bankruptcy lawyers who represent only nonpaying debtors or owners of businesses and other relatively wealthy individuals would not be covered. Among the new provisions are an obligation to include specified statements in advertisements (§ 528) and an obligation to retain for two years a copy of each of several notices required to be given to any “assisted person” (§ 527).

- **S. 256 § 319**

A sense of Congress is set out, stating that Fed. R. Bankr. P. 9011 should be amended to include a requirement that all documents submitted by a debtor either to the court or a trustee, specifically including schedules, be subject to a reasonable inquiry by the debtor or the debtor's counsel to verify that the document is well grounded in fact and warranted by law. Such an amendment would increase the liability for debtor's attorneys under the terms of new § 707(b)(4)(A) and (B), described above, which are based on violations of Rule 9011.

3. Support priority; dischargeability of property settlements

- **S. 256 § 212**

Pursuant to an amendment to § 507(a), domestic support obligations of the debtor will have the first priority in distribution, subject to the expenses of a trustee in administering assets that might otherwise be used to pay the support obligations. Within this new first priority, support owed to or recoverable by a spouse former spouse or child is given priority over support obligations that have been assigned or owed directly to a governmental unit.

- **S. 256 § 215**

Section 523(a)(15) is amended to remove the affirmative defenses previously included. As a result, all property settlements arising from divorce or separation proceedings that are not covered by the support provisions of § 523(a)(5) are nondischargeable under (a)(15).

4. Reaffirmations

- **S. 256 § 203**

A new paragraph (2) is added to § 524(c), requiring as a condition for the effectiveness of a reaffirmation agreement that the debtor receive an extensive set of disclosures, set out in new § 524(k). Although these requirements for effectiveness are limited to the debtor's receipt of the disclosures, § 524(k)(6) requires the debtor to sign, prior to filing the reaffirmation agreement, a statement disclosing the debtor's income, the debtor's actual current monthly expenses, and the resulting balance available to pay the debt proposed to be reaffirmed.

A new § 524(m) provides that if the (k)(6) statement reflects insufficient income to make the payments scheduled in the proposed reaffirmation agreement, a presumption will arise that the agreement is an undue hardship on the debtor. The presumption lasts for 60 days after the filing of the reaffirmation agreement, but may be extended during that 60-day period, for cause, on court order after notice and a hearing. The court is directed to review the presumption—a review that is apparently intended to take place while the presumption is in effect— and if the debtor has not rebutted the presumption in writing to the court's satisfaction, the court may "disapprove" the agreement. This power to disapprove may be illusory, however, since § 524(m) also provides that disapproval can only take place "with notice and a hearing to the debtor and creditor" and that the hearing on disapproval must be concluded before the entry of the debtor's discharge. There is currently no deadline for filing reaffirmation agreements.[6] Thus, a reaffirmation agreement can be filed after the deadline for a judicial hearing on the presumption of undue hardship has passed. Section 524(m)(2) also entirely exempts credit union reaffirmations from disallowance based on a presumption arising from the debtor's (k)(6) statement.

Under new § 524(l), creditors are allowed to receive payments both prior to the filing of a reaffirmation agreement and under agreements "which the creditor believes in good faith to be effective." Moreover, creditors' disclosure requirements are satisfied if "given in good faith."

5. Redemption

- **S. 256 § 304**

Section 722 of the Code is amended to make clear, in accord with the case law, that redemption requires full payment of an allowed secured claim at the time of the redemption.

- **S. 256 § 327**

A new § 506(a)(2) to the Code reverses the majority interpretation that the value of collateral for purposes of redemption should be measured by what the creditor would receive upon repossession. The new provision requires that the value of personal property securing a claim in the case of an individual in Chapter 7 will always be based on the cost to the debtor of replacing the property—without deduction for costs of sale or mar-

keting—and that if the property was acquired for personal, family, or household purposes, this replacement cost will be the retail price for property of similar age and condition.
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6. Ride-through

Resolving a question that has split the circuits, S. 256 eliminates any option that a Chapter 7 debtor might have had to retain collateral without redemption or reaffirmation, simply by maintaining current payments on the secured debt. However, it does so in two different sections of the Code, with inconsistent provisions.

- **S. 256 § 304**

Section 521 of the Code is amended to add a new paragraph (a)(6), requiring that an individual debtor in a Chapter 7 case "not retain" any personal property that is subject to a purchase money security interest, unless the debtor, "not later than 45 days after the first meeting of creditors," either redeems the property or enters into a reaffirmation agreement with respect to the debt secured by the property. It is unclear whether this 45-day period should run from the first date set for the meeting of creditors, the date that the meeting actually commences, or the date that it concludes; there is no provision for judicial extension of the 45-day period. Section 521(a)(6) goes on to provide that a failure to exercise one of these two options results in termination of the automatic stay and removal of the property from the estate unless the court (1) determines on a motion filed by the trustee within the 45-day period, that the property is "of consequential value or benefit to the estate" (2) orders appropriate adequate protection, and (3) orders the debtor to deliver the collateral to the trustee.

- **S. 256 § 305**

Section 362(b) is amended to add a new subsection (h), applicable in individual bankruptcy cases, that terminates the automatic stay with respect to, and removes from the estate, personal property that is collateral for any secured claim (not just property subject to purchase money security interests) or that is subject to an unexpired lease, in the event that the debtor fails either to file the statement of intent required by § 521(a)(2) within 30 days of the case filing or fails "to take timely the action specified in such statement . . . unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refused to agree to the reaffirmation on such terms." Section 521(a)(2)(B) is amended to require performance of the debtor's intention within 30 days of the first date set for the meeting of creditors unless during this 30-day period the court extends the period for cause. Barring such an extension by the court, the 30-day period for debtor action in new § 362(h) would always end prior to the 45-day period specified for similar action in new § 521(a)(6). As under § 521(h), the automatic stay would remain in effect, and the property would remain in the estate, if the court (1) determined on a motion filed by the trustee within the applicable period, that the property is "of consequential value or benefit to the estate" (2) ordered appropriate adequate protection, and (3) ordered the debtor to deliver the collateral to the trustee.

7. Trustee compensation

- **S. 256 § 407**

Section 330(a)(3) is amended to exclude Chapter 7 trustees from the professionals whose compensation is to be based, among other things, on the time spent in providing their services. Rather, a new § 330(a)(7) is added, providing that the reasonable compensation of "a trustee" shall be treated "as a commission, based on § 326." Although new paragraph (a)(7) is not limited by its terms to Chapter 7 trustees, Chapter 11 trustees are expressly included in the list of professionals subject to § 330(a)(3), and so it is doubtful the new paragraph applies to Chapter 11 trustees.

- **S. 256 § 1224**

Section 1326 is amended to add a new paragraph (b)(3), providing for payment of compensation awarded to a Chapter 7 trus-

tee in connection with the conversion or dismissal of a debtor's case pursuant to § 707(b). Any such compensation remaining unpaid during the Chapter 13 case is to be paid during over the remaining term of the Chapter 13 plan, according to a limiting formula: no more than $25 per month or 5% of the average monthly payment made to general unsecured creditors under the plan, whichever is greater. Since most Chapter 13 plan do not provide for more than $500 per month in payments to general unsecured creditors, it is likely that trustees would be paid no more than $25 per month under this formula—a maximum of $1500 over a five-year plan.

8. Nonsubordination of property tax liens to family support claims

- **S. 256 § 701**

Section 724(b) is amended to limit the authorization of a Chapter 7 trustee to pay priority claims from funds that would otherwise be used to satisfy a property tax lien (and subordinate the tax lien to other liens on the affected property). Except for wage and employee benefit priority claims, this subordination is made inapplicable to perfected ad valorem property taxes, the situation in which it most commonly arises. Moreover, even for wage and benefit priorities, and even as to liens arising from a property tax assessed other than on the value of the property, subordination would be allowed under a new § 724(e) only after the trustee had exhausted the unencumbered assets of the estate—including § 506(c) recoveries from holders of secured claims. Thus, in contrast to the prior law, if a debtor owes both ad valorem property taxes secured by a lien on the debtor's property and support obligations, the proceeds of any sale of the property will now be used to pay the taxes before the support obligations.

The amendment contains a drafting error, referring to the administrative expense priority as § 507(a)(1). As noted above, § 212 of S. 256 makes support obligations the first priority, and has the effect of renumbering administrative expenses as paragraph (a)(2).

9. Treatment of collateral on conversion from Chapter 13.

- **S. 256 § 309(a)**

Section 348(f) is amended to provide that in a case converted to Chapter 7 from Chapter 13, (a) the property valuations in the Chapter 13 case will not apply; (b) the lien of a secured creditor will continue to secure whatever part of the debt was not paid in the Chapter 13 case (rather than securing only any unpaid portion of the bifurcated secured portion of the creditor's claim) and (c) the Chapter 13 case will have no effect on the treatment of prepetition defaults unless they were fully cured at the time of the conversion. Thus, if a debtor increases the non-exempt equity in a home by paying down a mortgage under a Chapter 13 plan, but then converts the case to Chapter7, the trustee in the Chapter 7 case will be allowed to sell the home and distribute the additional equity to creditors. Similarly, a debtor who fully pays the amount of an auto

lender's bifurcated secured claim in Chapter 13, but converts the case before the unsecured portion is paid, will thereafter hold the automobile subject to a lien in the amount of whatever portion of the lender's total claim remained unpaid, and any equity above that claim (subject to the debtor's exemptions) would be available for the estate.

Changes affecting consumer cases under Chapter 13

1. Secured claims

• S. 256 § 306(b); eliminating stripdown for certain secured loans

Section 1325(a) is amended to limit the power of Chapter 13 plans to strip down secured claims to the value of the collateral under § 506(a). Although the amendment is not clearly drafted, it appears to provide that no stripdown would be allowed for purchase money security interests in (1) motor vehicles purchased within 910 days of the bankruptcy filing (two days less than 2-1/2 years) or (2) in items other than motor vehicles purchased within one year of bankruptcy.

• S. 256 § 327; valuation of secured claims

New § 506(a)(2), discussed above in connection with redemption, applies in Chapter 13 as well as Chapter 7, and, in Chapter 13 has the effect of requiring that the stripped down value of a secured claim be based on the cost to the debtor of replacing the collateral—without deduction for costs of sale or marketing—and that if the collateral was acquired for personal, family, or household purposes, this replacement cost is the retail price for property of similar age and condition.

• S. 256 § 309(c); payments before and after confirmation

S. 256 makes two changes requiring adequate protection payments on secured claims in Chapter 13. First, § 1325(a)(5)(B) is amended by the addition of a new subparagraph (iii) requiring that Chapter 13 plans provide for payment of secured claims in equal installments, at least sufficient to provide adequate protection. Second, § 1326(a)(1) is amended by the addition of new subparagraphs (B) and (C), which require that, prior to plan confirmation, and unless otherwise ordered by the court, the debtor must make adequate protection payments directly to the

secured creditor, deduct the adequate protection payments from the preconfirmation plan payments made to the trustee, and give proof of the adequate protection payments to the trustee. The amount required to be paid for preconfirmation adequate protection is not clearly defined, but it appears that the debtor might have the choice of paying either the amount called for by the plan or the amount due under the loan. Preconfirmation payments on personal property leases (primarily auto leases) would have to be paid directly to the lessor, with proof given to the trustee.

- **S. 256 § 306(b); lien retention**

An amendment to § 1325(a)(5)(B)(i) precludes a Chapter 13 plan from providing for release of lien upon payment of a stripped-down secured claim. Rather, the creditor must be allowed to retain the lien until the full amount of the claim is paid or the plan is completed.

2. Disposable income

- **S. 256 §102(h)**

The best efforts test of § 1325(b) is amended to provide that Chapter 13 plans (if objected to by the trustee or an unsecured creditor) either pay unsecured claims in full with interest or else provide that all of the debtor's disposable income will be contributed to the plan for its minimum term. Disposable income is defined in § 1325(b)(2) as "current monthly income," other than child support income, not necessary to provide support for the debtor or a dependent of the debtor. For Chapter 13 debtors whose income is more than the applicable median, the debtor's support needs are to be determined under the means test for the presumption of abuse under § 707(b). As discussed above in connection with the means test, (a) "current monthly income" is a defined term averaging the debtor's income over a 6-month period, usually prior to the bankruptcy filing, and (b) the applicable median income is determined according to the debtor's state and household or family size.

3. Plan length

- **S. 256 § 318**

For debtors whose income is equal to or greater than the applicable median, the "best efforts" test of § 1325(b) is amended by the addition of a new paragraph (4) requiring that,

in the absence of earlier full payment of all claims, the plan must have a five-year term.

4. Discharge

• S. 256 §§ 314, 707; elimination of the superdischarge

The list of debts excepted from a Chapter 13 discharge under current § 1328(a) is expanded to include debts defined by § 523(a)(1)(B) and (C) [unfiled, late-filed, and fraudulent tax returns], (a)(2) [fraud, including credit card misuse], (a)(3) [failure to notify creditors of the bankruptcy in time to allow assertion of claims], (a)(4) [embezzlement, breach of fiduciary duty], and—insofar as personal injury or wrongful death is concerned—(a)(6). However, where § 523(a)(6) provides that "willful *and* malicious" injury gives rise to nondischargeable debts in Chapter 7 and 11 cases, revised § 1328(a)(4) excepts debts arising from "willful *or* malicious" injury, potentially creating a more limited discharge in Chapter 13 than in Chapter 7. On the other hand, the Chapter 13 exception in this respect applies only as to "restitution, or damages, awarded in a civil action against the debtor," and so if judgment on a personal injury or wrongful death action has not been entered prior to the bankruptcy filing, the exception may only be available if relief from the stay were granted to permit such a judgment to be obtained. The few debts still covered by the superdischarge include debts for willful and malicious injury to property under § 523(a)(6), debts incurred to pay nondischargeable tax obligations (§ 523(a)(14)), and debts arising from property settlements in divorce or separation proceedings (§ 523(a)(15)).

S. 256 § 213(9); interest on nondischargeable debt

A consequence of nondischargeability is that interest continues to accrue on the claims (a particular problem for the tax debts now excepted from discharge). A new § 1322(b)(10) partially addresses this issue by allowing a Chapter 13 plan to provide for payment of interest on nondischargeable claims, but only "to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims."

5. Timing of confirmation hearing

• S. 256 § 317

A new § 1324(b) requires (1) that confirmation hearings not take place earlier than 20 days "after the date of the meeting of creditors under section 341(a)," unless the court determines that it would be in the best interests of creditors and the estate to hold an earlier confirmation hearing and there is no objection, and (2) that the confirmation hearing not take place later than 45 days after 341 meeting date. This provision does not specify whether the new hearing requirements are to be measured by the first date set for the meeting of creditors, the first date that the meeting of creditors actually takes place, or the date on which the meeting of creditors concludes. That question may be determined by rule.

6. Filing requirements during the case

- **S. 256 § 315(b); annual financial statements**

New § 521(f)(4) provides that, on request of a party in interest or the judge, the debtor in a Chapter 13 case must file a financial statement annually, under penalty of perjury, showing "income and expenditures of the debtor during the tax year . . . most recently concluded . . . and monthly income of the debtor." The annual statement must also show "how income, expenditures, and monthly income are calculated." New § 521(g)(1) specifies that this annual statement must disclose the "amount and sources of the income," the "identity of any person responsible with the debtor for the support of any dependent of the debtor," and "the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides."

- **S. 256 § 716; tax returns**

In addition to the requirement of new § 521(f), discussed above, imposed on all individual debtors, to file with the court copies or transcripts of certain federal income tax returns, a new § 1308(a) requires Chapter 13 debtors to file with the appropriate taxing body, not later than the day before the 341 meeting, any "tax return under applicable nonbankruptcy law" that was required to be filed for a taxable period ending within four years of the filing of the bankruptcy case. If the debtor fails to comply with this requirement, new § 1308(b) provides that the trustee may continue the 341 meeting to allow the debtor to file the returns, but not for more than 120 days unless applicable nonbankruptcy law allows a longer time through automatic extensions that the debtor properly requests. Thereafter, an extension of the filing requirement may only be granted by the court upon a showing of circumstances beyond the

control of the debtor, and for a maximum of an additional 30 days. Section 1307(e) provides that if the debtor fails to file a tax return as required under § 1308, the court may convert or dismiss the case on the motion of a party in interest or the U.S. trustee.

7. Treatment of loans from pension and profit-sharing plans

- **S. 256 § 224**

A new § 362(b)(19) excepts from the automatic stay wage deductions for repayment of loans to a pension or profit-sharing plan, and a new § 1322(f) provides both that a Chapter 13 plan may not "materially alter" the terms of such loans and that the amounts paid on such loans are not "disposable income" under § 1325.

8. Treatment of support obligations

- **S. 256 § 213; payments required for confirmation and discharge**

Sections 1325(a) is amended to provide that a plan will not be confirmed unless the debtor is current in payments of any postpetition domestic support obligations and § 1328(a) is amended to provide that a discharge will not be granted until a debtor who owes such obligations certifies that they are current. Failure to make postpetition support payments is made grounds for dismissal or conversion in a new § 1307(c)(11). As for support obligations that became due before the bankruptcy filing, support obligations owing directly to a family member continue to require payment in full as priority claims, but a new §1322(a)(4) allows less than full payment of support obligations directly owed or assigned to a governmental unit if the plan provides for all of the debtor's projected disposable income to be applied to payments under the plan for a five-year period.

- **S. 256 § 214; exceptions to the automatic stay**

Section 362(b)(2) is amended to add several new exceptions to the automatic stay for purposes of enforcing a debtor's obligation to make support payments. Subparagraph (C) excepts income withholding for support obligations, and so would eliminate such withheld income as a source for funding a Chapter 13 plan. Subparagraph D excepts suspension of professional and driver's licenses on account of nonpayment of support, potentially threatening the debtor's ability to earn income necessary to

fund a Chapter 13 plan. And subparagraph F excepts the interception of tax refunds for payment of support obligations, again preventing other use of the refunds under a Chapter 13 plan.

Changes affecting consumer cases under Chapter 11

Individual Chapter 11 cases.

- **S. 256 § 321**

In several different respects, Chapter 11 is modified for cases brought by individuals so as to make the case much more like one under Chapter 13. A new § 1115 defines property of the estate for an individual Chapter 11 case as including property acquired by the debtor postpetition. A new § 1123(a)(8) provides for funding of the individual debtor's plan from the individual's future earnings. New § 1129(a)(15) imposes a best efforts test, requiring a 5-year minimum contribution of disposable income (as defined in § 1325(b)) upon the objection of any unsecured creditor. And new § 1141(d)(5) provides that individual Chapter 11 debtors will receive a discharge only after completion of their plans.