counseling if the creditor does not have a policy of waiving interest and fees for debtors who enter a consolidated payment plan at a credit counseling agency.

Since it appears that Congress will require that consumers enter credit counseling before filing for bankruptcy, we must ensure that credit counseling is truly effective and a viable alternative to bankruptcy.

Credit card issuers, undermining the good intentions of consumers who enter into credit counseling, have sharply curtailed the concessions they offer to consumers in credit counseling, contributing to increased bankruptcy filings. According to a survey by VISA USA, 33 percent of consumers who failed to complete a debt management plan in credit counseling said they would have stayed on the plan if creditors had lowered interest rates or waived fees.

A large body of research, conducted by such entities as the Congressional Budget Office and the Federal Deposit Insurance Corporation, shows that aggressive lending practices by credit card issuers have contributed to the current high level of bankruptcies in this country. Credit card companies have an obligation to ensure that effective alternatives are readily available to the consumers they aggressively pursue.

As a show of support for the effectiveness of consumer credit counseling, especially as an alternative to bankruptcy, credit card issuers should waive the amount owed in interest and fees for consumers who enter a consolidated payment plan. Successful completion of a debt management plan benefits both creditors and consumers. For many consumers paying off their debt is not easy. My amendment will help people who are struggling to repay their obligations. I encourage all of my colleagues to support this amendment to help consumers enrolled in debt management plans to successfully repay their credits, free themselves from debt, and avoid bankruptcy.

My amendment has been endorsed by the Consumer Federation of America, U.S. Public Interest Research Group, Consumer Action, and the National Consumer Law Center.

I ask unanimous consent that a letter of support for my amendment be included in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONSUMERS UNION,
CONSUMER FEDERATION OF AMERICA,
March 7, 2005.

Re support for Akaka credit counseling and payday loan amendments to bankruptcy bill.

Hon. DANIEL K. AKAKA,
U.S. Senate, Washington, DC.

DEAR SENATOR AKAKA: The undersigned national consumer organizations strongly support your amendments to the bankruptcy bill (S. 256) that would encourage more responsible lending by payday loan companies and keep more consumers in credit counseling and out of bankruptcy.

MAKING CREDIT COUNSELING A MORE SUCCESSFUL ALTERNATIVE TO BANKRUPTCY

S. 256 *requires* consumers to seek credit counseling within six months of filing for bankruptcy. However, the credit card companies that created credit counseling have taken steps in recent years that undermine it as a viable alternative to bankruptcy for some consumers. By slashing funding for legitimate credit counseling agencies and charging consumers in credit counseling higher interest rates than in the past, credit card companies are leaving debt choked Americans with few options other than bankruptcy.

If Congress is going to require that consumers enter credit counseling before filing for bankruptcy, it must ensure that credit counseling is truly an effective and viable alternative to bankruptcy. This amendment would stop a credit card company from attempting to collect on debts in bankruptcy unless the creditor has a policy of waiving interest rates for consumers who enter credit counseling.

Consumers who enter a credit counseling "debt management plan" agree to discontinue credit card use and to make one consolidated payment to the credit counseling agency, which then forwards the funds to the appropriate credit card company. In exchange, creditors agree to offer two key "concessions" to help consumers pay off as much of their debts as possible: a reduced interest rate on the amount they owe and the elimination of fees that have accrued.

Unfortunately, credit card companies in recent years have become increasingly unwilling to reduce interest rates for consumers in credit counseling, which has led to more bankruptcy filings. According to a study by the National Consumer Law Center and Consumer Federation of America, five of 13 major credit card issuers increased the interest rates they offered to consumers in credit counseling between 1999 and 2003. Currently, only two major credit card issuers (Wells Fargo and American Express) completely waive all interest for consumers in credit counseling. The majority of other major credit card companies charge interest rates in credit counseling above 9 percent, with issuers like Capital One, General Electric and Discover charging rates of 15 percent or more.

The increasing refusal of creditors to offer low interest rates causes more consumers to drop out of credit counseling and to declare bankruptcy. According to a survey by VISA USA, one-third of consumers who failed to complete a debt management plan in credit counseling said they would have stayed on the plan if creditors had further lowered interest rates or waived fees. Moreover, almost half of those who dropped off the plan had or were going to declare bankruptcy.

It is ironic that the same creditors whose aggressive and reckless lending practices have contributed to the increase in bankruptcies in this country have weakened credit counseling in recent years. It is hypocritical for the credit card industry to demand that Congress give them bankruptcy relief while closing off credit counseling as an effective alternative for many consumers.

PROHIBITING THE RECOVERY OF PREDATORY PAYDAY LOANS

This amendment would prohibit payday lenders from having a claim on these loans in bankruptcy. Lenders who entice cash-strapped consumers to write checks without money in the bank to cover them as the basis for making "payday loans" should not be allowed to use the bankruptcy courts to collect. Payday loans trap borrowers in a cycle of debt when [illegible] keep their checks fr[illegible]

Last year, consumers paid $6 billion to borrow $40 billion in small cash advances from over 22,000 payday loan outlets. These loans of $100 up to $1,000 are secured by personal checks or electronic access to bank accounts and must be repaid in full on the borrower's next payday. Lenders charge annual interest rates on these loans that *begin* at 390 percent, with finance charges of $15 to $30 per $100 borrowed.

Payday lending condones check-kiting as a financial management tool and encourages the unsafe use of bank accounts. Loans phased on check/debit-holding get paid before other obligations, due to the severe adverse consequences of failing to make good on a check. Some lenders threaten criminal prosecution or court martial of military consumers for failure to make good on the check used to get a payday loan. If the consumer files bankruptcy to stop the cycle of debt, some lenders then try to convince the bankruptcy court that the payday loans should not be discharged.

Consumers need comprehensive small loan protections, reasonably-priced alternatives to payday loans, and sound financial education. In the meantime, Congress should prevent any lender that entices consumers to write checks without funds on deposit or to sign away electronic access to their bank accounts from also using the bankruptcy courts to collect on their usurious loans.

If this nation is truly going to reduce bankruptcies, lenders must first exercise more responsible lending decisions and be more responsive to consumers who show a genuine interest in resolving their debt problems. We applaud you for moving to make payday and credit card lenders more accountable in their treatment of consumers.

Sincerely,

JEAN ANN FOX,
Director of Consumer Protection, Consumer Federation of America.

TRAVIS B. PLUNKETT,
Legislative Director, Consumer Federation of America.

SUSANNA MONTEZEMOLO,
Policy Analyst, Consumers Union.

LINDA SHERRY
Editorial Director, Consumer Action.

EDMUND MIERZWINSKI,
Consumer Program Director, U.S. Public Interest Research Group.

JOHN RAO,
Staff Attorney, National Consumer Law Center.

Mr. AKAKA. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. DEMINT). Without objection, it is so ordered.

The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I would like to have the attention of the Senate to discuss my remaining amendments to the bankruptcy bill. I think my colleagues are aware that I strongly oppose this bill and that I am

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very disappointed in the process that has brought us to this point. I do not believe the sponsors of this bill and its supporters in the other body have dealt fairly with the proposed amendments.

I understand the Senator from Utah came to the floor earlier in the day and was complaining that I had a number of amendments and that I did not intend to vote for the bill.

I have been a legislator for 22 years. This is not an auction. Even if you are going to vote against a bill, if you have an amendment you believe will make it a better bill, it is still a worthy consideration. I was told in the committee, where I wanted to offer many of these amendments, that I should not offer them, that I should wait until the bill came to the floor to offer the amendments. So in most cases that is exactly what I did, being assured there would be a good faith response and consideration of the amendments. Well, of course, that is not what has happened to date. And I categorically reject the idea that simply because you do not think a bill is good, you do not have a proper role on the floor of the Senate in trying to improve it.

This has not been a legislative process worthy of the Senate. Members of the Judiciary Committee, as I just said, were implored to save their amendments for the floor. Then, when we got here, we were told no amendments could be accepted. It was a classic bait and switch. Negotiations have been minimal and pro forma. Extremely reasonable amendments were rejected supposedly because they were not drafted correctly, according to the sponsors, but there was no willingness to work on the language of the amendments so they could become acceptable.

One of the most disheartening examples of this way of dealing with good faith amendments was the treatment of the amendment offered by the Senator from Florida concerning identity theft. Senator NELSON simply wanted to give some special consideration to people who are forced into bankruptcy because other people—criminals, in fact—ran up debts in their names. It is awfully hard to argue with a straight face and pretty hard to claim that victims of identity theft should have to pay at least some of their debts if they have a higher than median income. The debts are not even theirs. Believe it or not, this bill might actually force someone to file for chapter 13 and make payments on debts for 5 years that were not even run up by the person filing for bankruptcy. I find this to be incredible. Unfortunately, the response from one of the bill's cosponsors was: "well, you have a good point here, but your amendment is just too broad."

In the Senate I have come to love in my 12 years here, the Senate I served in just a few years ago when we last considered the bankruptcy bill, Senators and their staffs would have sat down and they would have worked out language that was not too broad. There would have been some negotiation. In many cases an agreement would be reached. But in this debate that kind of legislating is apparently forbidden.

What is most disheartening is that so many Senators sent here to represent their constituents, to exercise their independent judgment for the good of their States and the country, have been willing to blindly follow instructions from the shadowy coalition of groups that are behind this bill—mainly the credit card industry—and vote down even the most reasonable of amendments. It is just sad when there is no debate on amendments, no discussion, no negotiation, just an edict from outside of the Senate, and the "no" votes follow every time.

Last night I offered a very important amendment concerning small businesses. I spoke for 10 or 15 minutes about the amendment and explained some new data on small business bankruptcies that I think shows these provisions are actually very wrongheaded. After what has gone on here, I, of course, didn't expect to win the amendment, but I did think we might have a debate of sorts. The sponsors of the bill didn't even bother to come down and debate. Not one Senator made a single response to my arguments. They sent an emissary to deliver the message right before the vote that the sponsors expected a "no" vote. Nonetheless, I have not given up hope that some real legislating can still take place in the waning moments of our consideration of this bill.

I have a number of amendments, 14 to be exact, pending before this body. They are entitled to receive votes before we vote on final passage. They are reasonable and modest amendments. They are not so-called message amendments. They are not intended to be poison pills or bring down the bill by causing a huge disagreement with the House. They are intended to improve the bill because this bill is now not an academic exercise, as we know. It is going to become law. It is going to be the first bankruptcy reform of any great substance since 1978. It is going to become law, probably in a matter of weeks, and it will have a real impact on real people all over this country.

Last night my staff was able to have some discussions about these amendments with staff for the sponsors. I am hopeful that some of these amendments can be accepted or negotiated. I am prepared to entertain any reasonable offer. If I feel the sponsors have made a legitimate effort to look closely at my amendments and consider them with an open mind, and if some number of those amendments are accepted, I will not seek votes on all the amendments. No one likes a vote-arama, as it has come to be known, when we vote on a bunch of amendments in a row and often people don't know what they are voting on. But we will have one if the attitude that has been on display for the last week and a half continues.

I know my bargaining position is not strong. But I hope my colleagues will look at these amendments and realize that they are modest and might actually improve the bill in a way that wouldn't offend anyone in this entire body from the point of view of their philosophy about what bankruptcy law should be. Writing laws that work is what the Senate is supposed to do. Here is an opportunity to do that.

Let me talk briefly about each of these amendments because I do not intend to call each one up individually for debate. Some of them are very simple. Let me reiterate that I am open to discussion on any of these amendments. If there is something about the drafting that could be improved, I urge the sponsors to work with me and help me perfect the amendments so they can become part of the bill in a managers' package or perhaps even by unanimous consent.

The first amendment I will discuss is amendment No. 92 which has to do with section 106 of the bill on credit counseling and education. The bill requires credit counseling and credit education for people who file for bankruptcy. Section 106 of the bill requires debtors to obtain a credit counseling briefing before filing a bankruptcy case and to take a credit education course as a condition of receiving a discharge. However, the provisions provide no recourse for debtors who have exigent circumstances that would make it actually impossible for them to take a credit education course after filing or to get credit counseling, even during the 30-day grace period the bill now allows.

Let me give a few examples. I know these cases may be rare, but they are real. There are people in this country who are homebound and do not have a telephone or Internet access. I wish there weren't, but there are. Are we going to decide in the Senate that these unfortunate citizens can never file for bankruptcy because they are in that situation? How about people who suffer from dementia caused by Alzheimer's or some other disease? They sometimes have to file for bankruptcy because of massive medical bills, and they can do so through someone who has power of attorney. Do we think anything is to be gained by requiring a debtor who is ill with a terrible, incurable disease, not even competent to sign legal papers anymore, to take a credit education course?

How about U.S. soldiers fighting in Iraq or Afghanistan or serving anywhere overseas? It is a tragedy that some of our young men and women serving their country have to file for bankruptcy, but that is actually happening right now every day. Yes, there is Internet access in Iraq, but do we want to require a soldier to sit down at a computer to take a credit counseling or credit education course while they are in Iraq in order to protect his or her family back home from financial ruin?

By the way, the Servicemembers Civil Relief Act does not address this problem. Nothing in that statute would excuse members of the military, even those on active duty serving overseas, from the credit counseling and education requirements. Our fighting men and women are already having to file for bankruptcy despite the protections of that law. My amendment creates simply a safety valve to address this problem by giving courts discretion—it just gives them discretion—to waive the credit counseling and education requirements based on a sworn statement filed by the debtor with the court.

The bill also fails to address the potentially prohibitive cost of credit education to some debtors. In contrast, section 111, which addresses credit counseling services, requires credit counseling organizations to provide counseling without regard to ability to pay the fee for such a service. My amendment borrows the same language, requiring credit education to be offered for a reasonable fee and offered to all persons without regard to ability to pay the fee.

These changes are essential to ensuring that the bankruptcy system is still an option available for those who truly need it. Let's not make these counseling and education requirements, which I think have a great deal of merit, into some kind of a trap for some unusually situated but still good-faith debtors whom the bankruptcy decision is actually designed to help. I know this issue is particularly important to Senator SESSIONS. I hope to be able to work with him to reach agreement. He and I have worked together well on this and a number of other issues in the past with the regard to the bankruptcy bill. I hope he will follow suit on this as well.

The amendment I have just discussed deals with the impact of this bill on a very few, unusual, and very hard-luck debtors. The same is true of the next amendment I want to discuss concerning current monthly income. There are actually two amendments I have filed on this topic, amendment No. 96 and amendment No. 97. I am suggesting two alternative approaches to deal with the same problem.

Section 318 requires debtors in chapter 13 whose current monthly income is over the median to file a 5-year plan rather than a 3-year plan. Requiring debtors to file a 5-year plan means it will take them longer to get back on their feet and they will end up paying more money to emerge from bankruptcy. Only those with a higher income should be subjected to this longer plan. But because of the way the income threshold is calculated in the bill, there is a great possibility of arbitrary and unfair results.

Whether this requirement applies depends on the income that debtors earn in the 6 months before bankruptcy rather than their actual income at the time of filing. In other words, the median income test is based on what you used to make, not what you make at the time of bankruptcy. To understand this problem, imagine person A has an income of $60,000 and that the State's median income is $45,000. A month before bankruptcy, she loses her job and is forced to take a job that pays only $30,000. Under the bill, her current monthly income works out to $5,000, even though she only makes $30,000 at the time of the bankruptcy and even if she never finds a higher paying job. So she would be forced into a 5-year plan, even though her real income is well below the threshold the bill's drafters apparently had in mind.

Imagine person B has an income of $40,000 before and after filing for bankruptcy. Because person B's income is below the median, she will be allowed to enter a 3-year plan even though she actually makes more than person A. So the definition of current monthly income as the average of the prior 6 months' income may not make sense in some cases.

My amendments provide two alternative ways to allow for a different and more accurate monthly income to be calculated. In addition, under my amendment, if a debtor's income decreases during the bankruptcy case to less than the median income, then a debtor who is at that time on a 5-year plan can seek to have the plan reduced to a 3-year plan.

Incidentally, the bill already provides a safety valve for calculating current monthly income in chapter 7. The court can reduce the income used for the means test if special circumstances are present. Special circumstances such as job loss or a sharp reduction in income from a home business would certainly qualify. I think it is an oversight that this was not done for chapter 13. So I hope the sponsors will simply fix this problem.

This change also needs to be made in another section of the bill where current monthly income plays a significant role; that is, in determining whether a debtor will have to use the restrictive IRS standards under the means test to figure out what living expenses will be permitted.

Again, it is unfair to someone filing in chapter 13 to make that determination based on past income rather than what the person actually makes.

This is a commonsense fix. We shouldn't import the means test to chapter 13 without allowing for special circumstances adjustments to income. Either of my amendments would bring chapter 13 in line with chapter 7 on this score.

The next amendment I want to discuss also has to do with chapter 13. There is a peculiar problem in this bill. I have often called it a bill that is at war with itself. What I mean by that is that the bill's overriding purpose—the argument that we have heard over and over on the floor in the past week 26 and a half—is to get more people to file for bankruptcy under chapter 13, which will require them to pay some of their debts over a 3- or 5-year period before getting a discharge of their remaining debts. This is what the means test is all about—getting debtors to pay some of their debts if they are able. That is chapter 13. You would think, then, that the bill's sponsors and supporters would want to make sure that chapter 13 remains a viable option for those debtors. But the bill also includes a number of provisions that make it less advantageous to file in chapter 13 and harder to complete repayment plans. That is a bill at war with itself, and I predict this bill will have very bad consequences if it is adopted as it stands. The chapter 13 bankruptcy trustees and judges have certainly told us that over and over again for the past 8 years. Apparently, no one wants to listen.

One amendment I have offered to try to undo one of the problems this bill creates for chapter 13 amendment No. 95, having to do with discharge of back taxes. Current bankruptcy law allows debtors who complete chapter 13 payment plans to discharge all taxes that were owed more than 3 years before the time of the petition. This allows debtors to look forward to someday improving their financial situation without facing a lifetime of debt repayment for old taxes. But the bill makes it less advantageous to file for bankruptcy under chapter 13 by disallowing the discharge of many of these older taxes.

Under section 707 of the bill, a standard now applicable only to chapter 7 would be applied to chapter 13. In chapter 7 cases, debtors may only discharge old taxes if they filed a tax return for those taxes at least 2 years before filing for bankruptcy. That limitation does not currently apply to chapter 13 cases. By the way, under chapter 13 today, as in chapter 7, taxes owed for the last 3 years must still be paid in full as priority debts, which enables the IRS to collect what is available from the debtor's disposable income with very low collection costs, and older taxes are paid pro rata with other creditors for duration of the plan. Society benefits at the completion of a debtor's chapter 13 payment plan when the debtor is able to rejoin the economic system as a tax-paying wage earner.

This is an important protection. Typical older tax cases involve debtors who have recently gotten back on their feet and found a job after years of economic or family displacement. The displacement is often the result of serious health or substance abuse problems, unstable employment or a marital collapse. These debtors may have drifted through many jobs over several years without keeping the W–2 or 1099 forms needed to file tax returns. Having finally found steady employment, debtors are often faced with a wage garnishment for these old taxes just at the time they are attempting to get back on level financial ground. The debtors may need to file for bankruptcy to stop the garnishment so that they will have enough money left from take-home pay to pay rent, child support, or other financial necessities.

But if old taxes cannot be discharged through a chapter 13 plan, as proposed in this bill, debtors will have no reason to try to pay what they can afford to pay through a chapter 13 plan, because they will know that at the end of the 3- to 5-year payment plan, they likely will again face an IRS garnishment for the older taxes.

My amendment addresses this problem. I should also point out that the amendment retains the bill's prohibition on the discharge of taxes for which a fraudulent return was filed. So we are talking about discharging of back taxes that are not the result of fraud, just the result of nonpayment.

The next amendment also deals with chapter 13. It is amendment No. 94, and would correct a serious drafting error in section 102(h) of the bill that threatens to unintentionally eviscerate chapter 13. Refusing to remedy this error would be disastrous for the very chapter of the code that the sponsors of this bill want to encourage people to use.

In chapter 13 cases, debtors must devote all they can afford—that is, their disposable income after living expenses—to payments under their plan. These payments go to administrative expenses, secured creditors and unsecured creditors. In fact, most chapter 13 cases filed under current law are filed in order to deal with secured debts, to prevent foreclosure on a home or repossession of a car.

As written, section 102(h) of this bill would instead require that for debtors who are below median income, all disposable income must go to unsecured creditors, and none could be used for secured debts or administrative expenses. This is an obvious drafting error, since the purpose of section 102(h), as I understand it, was simply to require debtors with income over the median income to use the IRS standards contained in the means test to determine their allowable living expenses but to leave the law unchanged for debtors below median income.

If this error is not corrected, the bill will make it impossible for debtors below median income to use chapter 13. Now some in this body may be under the mistaken impression that people who file for chapter 13 bankruptcy are well off and they will only choose that chapter if they are forced to by this bill. That is obviously not true since chapter 13 exists now and millions of people use it voluntarily. The large majority of chapter 13 filers are actually below median income. In fact, in the 1980s, one study found that about 15 percent of chapter 13 filers were actually below the poverty line. Very few people file in chapter 13 because they have large amounts they can afford to pay to unsecured creditors. They do it to protect their homes from foreclosure or their cars from repossession. While there certainly are exceptions, people who file for bankruptcy are generally poor, whether they choose chapter 7 or chapter 13.

Currently, with no means test in place, about 30 percent of bankruptcy debtors voluntarily file under chapter 13. Even the sponsors of this bill claim that only another 8–10 percent of those who now file under chapter 7 would be switched to chapter 13 if the means test were implemented. So even with the means test, the majority of chapter 13 debtors will almost certainly be below median income. That means the drafting error I have discussed is a big deal. We have to fix this problem before it becomes law.

A second problem created by this error has to do with administrative expenses in chapter 13 cases. Administrative expenses in bankruptcy include the fees of lawyers and trustees who are paid to process the case.

Section 102(h) of the bill would effectively impose a 10 percent cap on chapter 13 administrative expenses for debtors with income over the median. And it would prohibit any payments at all for administrative expenses for debtors below the median. What that means is that there will be no lawyers to handle chapter 13 cases at all. Chapter 13 will become a nullity.

This bill has contained a number of antilawyer provisions over the years, but I cannot imagine that the drafters of this bill intended to effectively prohibit attorney participation on behalf of debtors in chapter 13 cases.

My amendment will correct these drafting problems. It makes clear that the means test expense standards will be used for chapter 13 cases filed by debtors who make more than the median income. It makes sure that below median income debtors can pay their secured creditors. And it will allow administrative expenses, including attorneys' fees, to be included in the plan payments. I urge my colleagues to support this amendment if you don't want this bill to write chapter 13 out of existence.

Another of my amendments deals with a provision that bankruptcy lawyers are very concerned about. This is amendment No. 93 on debt relief agencies. The amendment is strongly supported by the American Bar Association. This amendment would exclude lawyers from the provisions dealing with "debt relief agencies" in sections 226 to 228 of the bill. As currently written, the bill would impose a number of unnecessary burdens on the attorney/client relationship in bankruptcy proceedings. Subjecting attorneys to the "debt relief agency" provisions will add little substantive protection for consumers, but require substantial amounts of extra paperwork and cost.

Requiring lawyers to call themselves "debt relief agencies" will do more to confuse the public than to protect it. I think members of the public generally understand what the word "lawyer" means, but the phrase "debt relief agency" is vague and unhelpful. It is also misleading, because there are significant differences between lawyers and nonlawyers, but both would be identifying themselves as debt relief agencies under this bill.

Only lawyers are permitted to give legal advice, to file pleadings, or to represent debtors in bankruptcy hearings. Perhaps most importantly, only lawyers are bound to confidentiality by the attorney-client privilege. These distinctions are important to consumers, but they would be obscured by the bill as written.

Furthermore, these provisions would apparently apply to any law firm that provides bankruptcy services, even if that law firm were primarily providing landlord-tenant advice—even to landlords—criminal defense services, or other unrelated services. Large firms with only one bankruptcy practitioner may be required to advertise themselves as "debt relief agencies."

I think this will be immensely confusing to consumers without any apparent benefit.

The substantive provisions on "debt relief agencies" would add little to the already existing laws and regulations governing attorney conduct. Attorneys currently have extensive duties relating to disclosures, fees, and ethical obligations. These provisions would micromanage that relationship without adding any meaningful substantive protection.

I think the intention of the bill's drafters was to prevent attorneys from tricking consumers into bankruptcy by not telling consumers from the beginning that they work on bankruptcy issues, and then sort of springing the idea of bankruptcy on the consumer. But rather than simply prohibiting this sort of unethical behavior, the bill tries to micromanage the attorney-client relationship by requiring large amounts of additional paperwork and disclosure. Extra paperwork substantially burdens the consumer and adds to the cost of bankruptcy. Given that attorney conduct is already regulated, I believe these provisions are unnecessary as applied to attorneys and provide no clear benefit.

As I mentioned, the American Bar Association strongly supports this amendment. The Federal Bar Association is also strongly in favor of it.

Mr. President, I ask unanimous consent that a letter from the Federal Bar Association be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FEDERAL BAR ASSOCIATION,
OFFICE OF THE PRESIDENT,
Cincinnati, OH, February 28, 2005.

Re Attorney Liability Provisions in S. 256, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Hon. PATRICK LEAHY,
Ranking Minority Member, Committee on the Judiciary U.S. Senate, Washington, DC.

DEAR CHAIRMAN SPECTER and SENATOR LEAHY: As the Senate prepares to consider the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (S. 256), I write to express the opposition of the Federal Bar Association to several provisions in the proposed legislation that would in our opinion inappropriately increase the potential liability and administrative burdens of bankruptcy attorneys under the Bankruptcy Code. Those provisions would require attorneys to: certify the accuracy of factual allegations in the debtor's bankruptcy petition and schedules under penalty of court sanctions (section 102); certify the ability of the debtor to make payments under a reaffirmation agreement (section 203(a)); identify and advertise themselves as "debt relief agencies" subject to a variety of regulations (sections 227–229).

The Federal Bar Association, with over 16,000 members throughout the country, is the only national association composed exclusively of attorneys in the private sector and government who practice within or before the federal courts and agencies. Our mission is to serve our nation's federal legal system. In our view, the above-referenced provisions of the proposed legislation pose a serious threat to the efficient operation of the bankruptcy laws and the bankruptcy courts. We are joined in this opinion by many state and national bar associations and bankruptcy practitioners.

The cumulative potential liability and additional administrative burden imposed upon debtor attorneys by the legislation may be expected to generate a substantial negative impact on the availability of quality legal counsel in the bankruptcy system. The above-referenced provisions will discourage many attorneys from agreeing to represent debtors and significantly increase the fees and expenses of clients. The requirement that a bankruptcy attorney certify the accuracy of factual allegations in the debtor's bankruptcy petition and schedules, for example, will essentially require the attorney to become a guarantor of the petitioner's statements. The effect of these draconian changes may be to drive many consumer bankruptcy practitioners out of this area of practice, depriving individuals of adequate legal representation and forcing them to seek less responsible alternatives such as unlicensed bankruptcy petition preparers or to file their petitions themselves. They may not even receive adequate advice regarding the necessity or advisability of filing for bankruptcy. Therefore, the attorney liability and "debt relief agency" provisions contained in the proposed bankruptcy legislation may have an adverse effect on debtors, creditors and the bankruptcy system itself. While these changes may not be intended by the advocates of the legislation, they are foreseeable.

The spirit of the above-referenced provisions can be better satisfied by the imposition of non-dischargeability sanctions upon debtors who falsify their bankruptcy schedules and tougher action by bankruptcy courts and the United States Trustee to enforce Bankruptcy Rule 9011 when misconduct by a party exists. These reforms would reduce bankruptcy fraud and abuse without unfairly harming honest debtors or the bankruptcy system.

We call upon you to support amendments that may be offered on the Senate floor that would remove the inappropriate and unnecessary sanctions and burdens described above from the proposed bankruptcy legislation.

Thank you for considering these views. If you would like more information on the PBA's views, your staff may contact our counsel for government relations, Bruce Moyer, at (301) 270–8115.

Very truly yours,

THOMAS R. SCHUCK,
National President.

Mr. FEINGOLD. Mr. President, another amendment I have pending is really concerned with making the bankruptcy system work better for both creditors and debtors. It is amendment No. 90, dealing with notice.

The bill contains three separate notice requirements which seem to create significantly differing procedures for notice.

The first provision requires debtors to send notice to the creditor at whatever preferred address the creditor has specified in correspondence with the debtor shortly before bankruptcy.

The second provision says that debtors and the court must send notice to the creditor at an address the creditor files in each individual case.

And the third provision says the court must send notice to an address the creditor files for all cases, with an exception if a different address is filed for an individual case.

The first requirement, that debtors send notice that bankruptcy has been filed to creditors at the creditors' preferred address, is actually unworkable and unfair and serves no apparent purpose. Debtors often do not receive correspondence within the last 90 days prior to filing for bankruptcy, and even when they do, they may not know that the correspondence is significant. Essentially, debtors might end up having their cars repossessed despite the fact that they filed for bankruptcy and repossession should be prevented by the automatic stay because they threw away what appeared to be junk mail from the creditor. And bankruptcy lawyers are forced to search through their clients' correspondence for an address or a change of address.

I think we can come up with a much more streamlined notice provision that will satisfy the interests of both creditors and debtors.

My amendment will eliminate the first notice provision of the bill and instead establish a central national registry for creditors' correspondence addresses. The registry would be available to debtor's counsel and the court on the Internet, as is already done for government creditors under the Federal Rules of Bankruptcy Procedure. The same address could be used for all notices, except when a creditor files and serves a different address for an individual case.

The bill generally provides for such a registry, and the courts are moving in that direction anyway, but the bill has two significant flaws. First, the bill is vague about whether a registry is to be maintained by each court or in a central national database, and it does not provide that the registry will be made available to the public.

Second, the bill's current language is unworkable because counsel will have to constantly check court records in every case to see if a new address was filed with the court. My amendment requires parties to use any address that has been filed more than 120 days previously with the registry. Within that 4-month period, the addresses should be updated in various software programs that bankruptcy attorneys use to find addresses, or they can recheck the registry to find if addresses have changed.

The exception to sanctions for a violation of an automatic-stay violation must also be amended so it does not include creditors who have clear actual notice of a stay. As it stands now, the bill creates a loophole that will encourage rampant abuse. For example, a debtor who filed for bankruptcy the previous week might return home from work to find her car being repossessed. The creditor might claim the debtor did not provide proper notice of the bankruptcy because notice was not sent to the correct address and therefore the creditor can proceed with the repossession, even if the debtor has her time-stamped bankruptcy petition in her hand and shows it to the repo man. It would not even work in that circumstance, which is an absurd result.

Finally, the language of the bill should be clarified so that actual notice reasonably calculated to come to the attention of a creditor or its agent is sufficient to allow sanctions for violation of the stay.

Correcting the notice provisions will protect the interest of debtors and creditors. Do we really want to leave in place a provision that is so obviously contradictory and unworkable and that could lead to a result as unjust as the example I just described? I hope not.

I also believe that creditor as well as debtor attorneys will appreciate the streamlined notice provision in my amendment and the establishment of a national registry available on the Internet.

It is my understanding the Administrative Office of the Courts does not favor the current language of the bill because it has essentially been overtaken by events. The courts are moving to electronic filing and notice registries. Keep in mind, this bill started about 8 years ago. An awful lot has happened in that time to make this much more feasible and, frankly, much more helpful to whoever is working on this, whether it be creditor representatives or debtor representatives.

My amendment is consistent with that movement. The bill is not.

One of my amendments is just a clarification of the effect of my bill and should not be controversial at all. It is amendment No. 100 on reaffirmation.

Section 524(1) allows creditors to accept payments made "before and after filing" of a reaffirmation agreement with the court. It also provides that a creditor may accept payments from a debtor under an agreement that the creditor believes in good faith to be effective.

I am concerned that these provisions could allow creditors to accept and retain payments where the reaffirmation agreement is ultimately held to be invalid.

In the late 1990s, in a celebrated case, the retailer Sears was required to disgorge literally hundreds of millions of dollars in payments made by debtors